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Criminal Sentencing in Indonesia: Disparity, Disproportionality and Biases

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Abstract

This thesis assesses 1,100 Indonesian criminal justice decisions on theft and embezzlement-related offences as well as corruption in four first instance courts (2011-2015, but excluding 2013) to better understand sentencing practices in that country. Using a socio-legal methodology, it investigates the consistency and proportionality, as well as fairness (unbiased) of the sentencing practice, particular between offenders of different socio-economic backgrounds as well as the legal and extra-legal factors that contribute to sentencing outcomes.

This thesis finds unwarranted disparity and disproportionality in sentencing practices in Indonesia, particularly in cases involving medium and large losses. Further, while offenders charged with corruption received overall relatively longer imprisonment sentences than offenders charged with theft and embezzlement-related offences in the same categories of loss, when the differences in the offences' minimum and maximum penalties – as the expression of an offence's seriousness – are put into the equation, corruptors are indeed punished disproportionally more lenient compared to thieves and fraudsters. This is because the minimum and maximum imprisonment sentences for corruption are much longer then for theft and embezzlement-related offences.

I also find that many law enforcers and judges have suffer from class-bias or are involved in corruption, which leads them to be lenient in charging and sentencing corruption offenders from middle and upper socio-economic backgrounds. They did so, including, by deliberately misinterpreted provisions in the Anti-corruption Law and Supreme Court guidance. Judges' perspective of different offences seriousness between theft-related offences and corruption (with the first-mentioned offences are generally seen as more concerning to the public as the later one) also influence the disproportionality of sentences between the two types of offences.

This thesis also show that while judges do consider legal factors in sentencing, particularly the type of offence committed and the amount of loss caused, they tend to be overly influenced by a desire to avoid appeal by prosecutors (which would increase their workload and prolong the time that offenders have to spend behind bars due to the practice common of pretrial detention and, to a lesser extent, the long appeal process). This often leads judges to follow the prosecutor's sentencing recommendations, particularly in theft and embezzlement related offences. Worse, to avoid appeal, judges imposed more severe sentence than what is permissible on minor theft and embezzlement offenders simply because the prosecutor mischarged them by non-minor offences provisions (that demand longer prison terms). In other words, how the case is processed by the investigator and prosecutors significantly shapes sentencing outcomes. The Supreme Court's failure to provide sufficient sentencing guidelines and, more importantly, consistent decisions, including enforcing the existing guidelines, also contributes to these problems.

In summary, this thesis empirically confirms the public perception of class-bias and corruption in the Indonesian criminal justice and, further, illustrates how poor law enforcement, case management and weaknesses in the Supreme Court distort sentencing.

Declaration

This is to certify that:

1. this thesis contains only my original work towards the Ph.D. and no material which has been accepted for the award of any other university;
2. to the best of my knowledge, it contains no material previously published or written by any other person, except where due acknowledgment is made in the text;
3. it is less than 100,000 words, not included tables, appendices and bibliographies.

21 September, 2020,
Rifqi Sjarief

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'Finally, my family. They know that without their unstinting support, love, encouragement, and prayers, this thesis would never have materialised. My gratitude to them is beyond words'. (I copied this last paragraph from my wife's thesis acknowledgment to avoid disparity and disproportionality in ~~sentencing~~ expressing gratitude to her and the kids).

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CHAPTER 1
INTRODUCTION

> The Supreme Court Justices had no soul in deciding the case [involving a housekeeper who stole plates and soup ingredients from her employer and received a sentence of four months and ten days' imprisonment]…This has caused public perceptions that laws do not stand behind the poor, but belong to the rulers and the rich.
>
> Ahmad Yani, a member of the national legislature[1]

> The judgment is seriously unacceptable. We, as a society, are very disappointed with the judgment which imposed only a lenient punishment on Herliyan Saleh [a regent who participated in a corruption scandal involving losses of A$3.1 million]. We are suspicious about the judges and they should be investigated because their judgment is beyond logic and fishy [*penuh permainan*]. [How can they] impose only one and a half years of imprisonment when [the prosecutor] recommended eight years? I suspect there was money involved.
>
> Usman, Budget Transparency Activist[2]

A. Background

Generally, judges enjoy enormous power and discretion in sentencing. They can take an offender's life or mete out other sentences that might change his or her life. Sentencing affects not only the offenders (and their families) but many others as well, including law enforcement and correctional personnel and agencies, the judiciary, lawmakers, the victim and the public at large.[3] Despite its importance, sentencing is sometimes seen as a mysterious process. People find it hard to grasp why in some cases a murderer may receive a life sentence but in others receive only a few years prison time. In some cases, there are sound legal explanations for how judges come to particular decisions. Nevertheless, as argued in numerous studies, various extra-legal factors also influence judges in the sentencing process, such as an offender's background, the judge's background and perceptions, the court's socio-cultural context, and so forth.[4] Some scholars have even argued that sentencing is, to a certain extent, like a game of dice: luck plays an important role.[5]

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[1] 'Anggota DPR: MA Tidak Punya Hati Nurani', *Republika* (online), 2 February 2012 <https://nasional.republika.co.id/berita/lyppuw/anggota-dpr-hakim-ma-tak-punya-nurani>.

[2] 'Mantan Bupati Bengkalis Divonis 1,5 Tahun, Fitra Riau: Ada Dugaan Suap', Riauonline (online), 12 October 2016 <https://www.riauonline.co.id/riau/kota-pekanbaru/read/2016/10/12/mantan-bupati-bengkalis-divonis-15-tahun-fitra-riau-ada-dugaan-suap-hakim>.

[3] John Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971) 3.

[4] See the discussion on the role of legal and extra-legal factors in sentencing in Chapter 2. For a summary of approximately 40 studies of the legal and extra-legal factors influencing sentencing outcome, see Barbara Ann Sharp, *A Longitudinal Study of the US Sentencing Guidelines: A Decade of Balancing Judicial Discretion and Unwarranted Disparity (1993-2003)* (PhD Thesis, The University of Maryland, 2007) 87-96.

[5] See, e.g., Birte Englich, Thomas Mussweiler, and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32(2) *Personality and Social Psychology Bulletin* 188; Edward M. Kennedy, 'Criminal Sentencing: A Game of Chance' (1976) 60 *Judicature* 208.

While judges enjoy wide discretionary power when sentencing, that power is, in most countries, limited by legal factors, such as statutes, case law or sentencing guidelines.[6] Regulations or sentencing guidelines in some countries provide a range of maximum and/or minimum penalties that can, should, or must be imposed by the judges in deciding cases. They may also guide or instruct judges to consider punishment goals as well as various aggravating and mitigating factors that are connected to the commission of the offence, the offenders or the victim that may warrant a higher or lesser penalty.

Diverging from these common practices, Indonesia's legal system imposes very few limitations and almost no guidance on sentencing. For the majority of criminal offences, such as murder, assault or burglary, Law 1 of 1946 on the Criminal Code (*Kitab Undang-undang Hukum Pidana*, the 'KUHP') lists only the different types of penalties available[7] and the maximum penalty that can be applied by judges for specific offences. Judicial discretion to choose the type of penalty and the degree of severity is thus wide. The Criminal Code also does not state the punishment objectives that should be pursued by judges in sentencing. Furthermore, while judges are required to explain the mitigating and aggravating factors they have considered in arriving at a particular sentence,[8] the Criminal Code only lists several general factors that can mitigate or aggravate the degree or severity of a sentence: the role of the offender in the offence; the completion or otherwise of the offence; and whether the offence was committed by a public official.[9]

In addition to the Criminal Code, there are a number of specific statutes that impose criminal penalties for specific offences, such as the Corruption Law, the Narcotics Law, and the Forestry Law. Unlike the Criminal Code, most of these laws include not only maximum penalties but also minimum ones. The range of fixed maximum and minimum penalties for a general corruption offence, for example, is between four to 20 years, regardless of the severity of the offence.[10] Furthermore, the Supreme Court has provided very little meaningful guidance to judges on sentencing.

How, then, do Indonesian judges exercise this very broad discretion? What, for example, is the range in sentencing practises imposed by judges for particular offences? How do they determine what type of penalty to apply and the severity of that penalty? What factors influence judges in sentencing? Do judicial sentences (statistically) suffer from serious disproportionality and disparity?

It is difficult to answer even these basic questions in the Indonesian context because the amount of relevant data and research available is very limited. The courts do not publish

[6] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) 31-41.
[7] Article 10 lists four types of main penalties, which are capital punishment, imprisonment, custody, and fines (in limited cases). As this thesis demonstrated, by far the most common type of penalty used by judges is imprisonment.
[8] Article 197(1) f Law 8 of 1981 on Criminal Procedural Code.
[9] Article 52, 53(2) and 57(1). There are also other mitigating or aggravating factors that are specifically attached to particular offences, such as the criminal history of the offender. See further discussion on this issue in Chapter 3.
[10] Article 2(1) of Law 31 of 1999 on Corruption Eradication. The minimum penalties for other types of corruption vary from one to four years of imprisonment.

general information, such as the average sentence for particular offences. Most sentencing research concerns the formal legal aspects of decisions. Most of the available quantitative studies that seek to investigate sentencing disparity are shallow and assess only a handful of decisions relating to a single type of offence in a single location. Variables that are assessed in the existing literature are mainly the different severities of sentences imposed by judges for similar types of offences without considering other variables, such as the level of harm, the mitigating or aggravating considerations, and so forth.

There are, however, a few in-depth quantitative and qualitative studies on sentencing practices. In 2016 (when I conducted the field research for this thesis), there were, to my knowledge, three quantitative studies that assessed a larger sample size of decisions in corruption and narcotic cases, and some that evaluated the relationship between the penalties meted out by judges against several variables, such as the background of offenders, and some aspects of the nature of the offence (such as state loss in corruption cases, and type of narcotics in narcotic cases).[11] According to a 2014 Indonesian Corruption Watch study, for example, the range of sentences for corruption cases decided by all courts was between two months and 18 years, with an average of approximately two years.[12] Although noting disparity in sentences, the Indonesian Corruption Watch did not examine the type or severity of the offence.

Another study by Pradiptyo, also on corruption decisions, found that while offenders who committed "petty" and "small" corruption were generally punished more leniently than those committing "medium", "large" and "grand" corruption, the net penalty differences were not that significant.[13] According to Pradiptyo's study, the backgrounds of the offenders did not significantly influence sentencing.[14] As for research on narcotics cases, the main objective appears to be assessing how courts value the social cost of such offences. Studies have indicated that the Supreme Court generally slightly increases the severity of sentences imposed by lower courts on appeal.[15] These studies, however, are limited to Supreme Court decisions, focus exclusively on one type of offence, and, more importantly, do not pay any attention to the legal variables of the cases, such as details of the specific corruption offences that received lower or higher penalties (since there are different penalty structures for different types of offences); the role of the offenders in the offences; or other mitigating and aggravating factors considered in the decisions.

[11] Indonesian Corruption Watch, *Studi atas Disparitas Putusan Pemidanaan Perkara Tindak Pidana Korupsi* (ICW, 2014) 22; Rimawan Pradiptyo, 'A Certain Uncertainty; Assessment of Court Decisions in Tackling Corruption in Indonesia' (MPRA Paper No. 36382, Universitas Gadjah Mada, August 2011) 17 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480930; Sony Saputra and Rimawan Pradiptyo, 'On Assessment of the Supreme Court Decisions in Tackling Substance Misuse in Indonesia' (MPRA Paper No. 36381, Universitas Gadjah Mada, January 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981646 9>. In late 2017 and 2019, there were new, relatively in-depth, quantitative sentencing studies on terrorism and corruption cases: Center for Detention Studies, *Pola Pemidanaan Tindak Pidana Terorisme di Indonesia* (CDS, 2019).

[12] *Studi atas Disparitas Putusan Pemidanaan Perkara Tindak Pidana Korupsi* (n 11) 22.

[13] Pradiptyo, 'A Certain Uncertainty' (n 11) 17.

[14] Ibid.

[15] Saputra and Pradiptyo (n 11).

As for qualitative studies, most studies focus on the general *modus operandi* of corruption practices in law enforcement, as well as the sentencing process,[16] with one exception - an excellent ethnographic study by Asmara.[17] This study discusses in great detail various aspects of sentencing practices, among others: the interaction between judges and other actors (such as the chief judge of the court, prosecutors, lawyers, offenders and their families, court clerks and journalists) inside and outside the courtrooms, including how each actor influences the sentencing outcome; patterns of case distribution between panels of judges; different attitudes between judges in sentencing, and so forth.[18] The study argues that the main factor influencing decisions are the corrupt practices of a range of actors. Despite its thoroughness, this study seems to neglect the other possible legal and extra-legal factors (besides corruption) mentioned earlier that might also influence sentencing outcomes. Furthermore, due to its approach and method, it does not include a quantitative analysis of decisions.

Despite limited research in this area, there is a widespread belief in Indonesia that judicial sentences are generally disproportionate. Law enforcement – particularly judges – is said to be harsh only for offenders from lower-social backgrounds and soft on those of higher social status. In Indonesia, this injustice is often described with the idiom '*hukum hanya tajam ke bawah namun tumpul ke atas*', which literally means that the law is sharp only downwards and blunt upwards. This perception of the law is captured in the statements and cases quoted at the beginning of this chapter, for example, Rasminah,[19] the housekeeper who was convicted and received four months and ten days imprisonment for stealing a few plates and soup ingredients from her employer. By contrast, Herliyan Saleh, an ex-regent who participated in an approximately Rp31 billion (A$3.1 million[20]) corruption scandal, was only sentenced to one and a half years of imprisonment. In another notorious cases, in 2015, a farmhand who cut down three mangrove plants in a conservation area for firewood (for cooking) was sentenced to two years imprisonment and a fine of Rp2 billion (A$200.000)[21] – penalties that were overly harsh considering the very minor nature of the offence.

While there is no reliable data on sentencing disparity in Indonesia, these cases, and some of the aforementioned research findings, indicate grossly disproportionate punishments as well as inequality of treatment between offenders of different social statuses who commit offences of varying seriousness. When unpopular cases are discussed by the public or the legal community, blame is placed on the judges who decided those cases, and it is either assumed that the judges took a bribe or that they are out of touch with

[16] See, e.g., Indonesian Corruption Watch, *Menyingkap Tabir Mafia Peradilan* (ICW, 2002); Satuan Tugas Pemberantasan Mafia Hukum, *Mafia Hukum: Modus Operandi, Akar Permasalahan dan Strategi Penanggulangan* (Satgas PMH, 2010).
[17] Teddy Asmara, *Budaya Ekonomi Hukum Hakim* (Fasindo, 2011).
[18] Ibid.
[19] Many Indonesians use just one name.
[20] The currency amounts used in this chapter are based on the exchange rate of A$ 1.00 = Rp. 10,000, current in early 2020.
[21] 'Penebang Mangrove Didenda Rp 2 Miliar Jalani PK', *Tempo* (online) 12 March 2015 <http://nasional.tempo.co/read/news/2015/03/12/063649220/penebang-mangrove-didenda-rp-2-miliar-jalani-pk>.

community expectations (as also shown in the quotations above).[22] Few look for other explanations.[23] To some extent, this is understandable, particularly considering the many serious problems faced by the Indonesian judiciary, such as a lack of integrity and accountability,[24] and the low levels of public trust in judges and the judiciary in general.[25]

The reality is not always as simple. There might be justified and 'understandable' legal or extra-legal factors that influence judges to impose what are viewed as disproportionate and inconsistent sentences. For example, the severe penalty in the farmhand case mentioned above was mainly caused by the judges' strict implementation of a problematic law. The Law on Management of Coastal Zones and Small Islands provides a minimum penalty of two years and a A$200,000 fine for the offence in question irrespective of its nature or impact.[26] There are also indications that judges are generally reluctant to depart from the sentencing recommendations provided by prosecutors in order to avoid appeal, which can lengthen the process of the case to the detriment of the defendant (particularly when the offender is detained).[27] Furthermore, when an offender is detained before and during the trial, judges seem to feel 'obliged' to sentence him or her to imprisonment for at least the period already spent in custody, even for minor offences.[28] These are just some of the possible influences on sentencing practices that have nothing to do with corruption.

This thesis seeks to uncover how judges make sentencing decisions in Indonesia. This study has become even more urgent because the government and the legislature have long been discussing a Criminal Code Bill to replace the current Code, a Dutch colonial legacy that is now more than one hundred years old. The Bill, which has been drafted over a period that began in the 1970s and aims to modernise Indonesian criminal law, stipulates particular punishment philosophies and lists various mitigating and aggravating factors to be considered by judges in sentencing. It also introduces new types of penalties (such as social work), limits the use of minimum penalties, and codifies criminal offences that are now stipulated in a wide range of the statutes, among other things.[29] Without sufficient empirical data on sentencing practices, the 'sentencing guidelines' proposal in the Bill may not be able to address the real, underlying problems that this thesis uncovers.

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[22] See, e.g., Simon Butt and Tim Lindsey, 'Judicial Mafia: The Courts and State Illegality Indonesia' in Edward Aspinall and Gerry van Klinken (eds) *The State and Illegality in Indonesia* (KITLV Press, 2011) 193; Indonesian Corruption Watch, *Pengadilan Harus "Bersih-bersih" dari Korupsi* <http://www.antikorupsi.org/en/content/pengadilan-harus-bersih-bersih-dari-korupsi>.

[23] Butt and Lindsey, 'Judicial Mafia' (n 22) 193-194.

[24] See discussion on this issue in Chapter 7.

[25] A survey conducted by Transparency International in 2003, for example, shows that the public perception of the judiciary is very low, scoring only 4.4 out of 5 (where 1 is the highest positive view possible). Judges rank just below the police and political parties, which both scored 4.5. Deborah Hardoon and Finn Heinrich, *Global Corruption Barometer 2013* (Transparency International, 2013) 36.

[26] Article 73(1) b Law 27 of 2007.

[27] See, e.g., Itca Toys Alyamabra, 'Disparitas Putusan Hakim terhadap Tindak Pidana Perjudian: Studi di Pengadilan Negeri Malang (2014) 1(1) *Jurnal Mahasiswa Fakultas Hukum* 1, 15; Sonda Tallesang, 'Dasar Pertimbangan Hakim dalam Penjatuhan Putusan Pidana Bersyarat sebagai Alternatif Pidana Penjara (Studi di Pengadilan Negeri Malang) (2014) 1(1) *Jurnal Mahasiswa Fakultas Hukum* 1, 14.

[28] Tallesang (n 27) 14.

[29] Criminal Code Bill 2019.

B. Purpose, Research Questions and Framework

As mentioned, the main purpose of this thesis is to gain insight into criminal sentencing practices in Indonesia. To achieve this aim, the thesis asks the following questions:

1. To what extent are sentences imposed by judges in the studied courts consistent and proportionate, as well as fair (unbiased) to offenders from different socio-economic backgrounds?[30]
2. What are the legal and extra-legal factors that contribute to sentencing outcomes?
3. How do judges choose different types of penalties to impose?
4. How do judges justify mitigating and aggravating factors to be employed in deciding cases?

To answer these questions, this thesis conducts a case study of sentencing practices in relation to three types of offences: theft-related offences, embezzlement-related offences; and corruption offences. The reason for choosing these types of cases will be discussed in Chapter 5. Particular emphasis is given to assessing potential disproportionality in sentencing between theft-related offences, including minor theft offences, which are usually committed by offenders from lower socio-economic backgrounds, and corruption offences, which are usually committed by offenders from middle and higher socio-economic backgrounds. Further, in 2012, the Supreme Court issued guidance on how judges should decide minor property offence cases (which includes minor theft and minor embezzlement), as well as how to apply mandatory minimum penalties in the Corruption Eradication Law (Law 31 of 1999). Because, as discussed below, the decisions studied in this thesis were issued after 2012, the analysis will also assess the implementation of the new guidelines.

Sentencing can be studied within many different frameworks, including legal, sociological, anthropological and psychological perspectives, or a mixture of these.[31] This thesis approaches sentencing from a socio-legal perspective. I use empirical methods to study how judges make their sentencing decisions, including how they interact with legal texts, their colleagues and other court actors, in light of the influence of the courts as an institution and the surrounding environment, in particular communities values.[32] I therefore view law not as an autonomous force, but as shaping, and being shaped by, the social, political and economic context in which it operates.[33] I also explore some aspects of individual judges' behaviour and attitudes towards sentencing, such as personal

[30] 'Consistency' means that similar cases are treated alike. while 'proportionate' means that different cases are treated differently, according to their level of seriousness, that is, their level of harm and/or culpability. For a more detailed discussion of these definitions and how they operate in practice, see Chapter 5.

[31] See, e.g., Jeffery T. Ulmer, 'Recent Developments and New Directions in Sentencing Research' (2012) 29(1) *Justice Quarterly* 1, 4, 7-8; Hogarth (n 3) 6-7, 16; Donald C. Pennington and Sally Lloyd-Bostock, 'Introduction: Issues and Problems in the Psychology of Sentencing' in Donald C. Pennington and Sally Lloyd-Bostock (eds) *The Psychology of Sentencing: Approach to Consistency and Disparity* (Center for Socio-Legal Studies, 1987) 1-8.

[32] Reza Banakar and Max Travers, 'Introduction' in Reza Banakar and Max Travers (eds.), *Theory and Method in Socio-Legal Research* (Onati: Hart Publishing Oxford and Portland Oregon, 2005) x-xi.

[33] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane, Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016) 31.

preferences for particular punishment philosophies, their perceptions of the judicial role in the criminal justice system, and their attitudes towards particular offences.

C. Methodology

This research employs quantitative and qualitative methods. In this section I will explain the main qualitative methods used for this study and provide an overview of the quantitative methods used. A more detailed discussion of the quantitative methods can be found in Chapter 5, as well as a discussion of relevant sentencing theories and the Indonesian Criminal Code and Criminal Procedural Code.

Quantitative methods are used to answer research questions 1, 2 and 4, by statistically analysing relevant variables from 1,096 decisions in the first instance courts of four major cities (Central and South Jakarta, Bandung, and Tangerang) between 2011 and 2015 (excluding 2013), concerning theft-related offences, embezzlement-related offences and corruption that are online published in the Supreme Court website (www.putusan.mahkamahagung.go.id). Approximately twenty variables are assessed including, among others, the type and severity of penalty imposed (length of imprisonment or amount of fine imposed); offence seriousness (the level of loss, the offender's role in the offence, profit gained, or number of offences committed); the offender's socio-economic background (indicated by his/her occupation, education or attendance and type of legal representation); and key mitigating and aggravating factors surrounding the offence and offenders (returning the loss/compensating the victim, forgiveness by the victim, recidivism, offender's economic or physical needs).

Data for all these variables were collected directly from the court decisions by reading them. Details related to methodological issues, such as the reasons for choosing the courts and types of cases sampled, methods for comparing cases to answer the questions of consistency and proportionality, statistical techniques used and processes for collecting and analysing data, are explained in detail in Chapter 5.

Two data collection methods were used for the qualitative method: semi-structured interviews and reviews of judges' legal interpretations as they appeared in the decisions. The purpose of reviewing judicial interpretation was to assess the consistency of legal interpretation between judges (or between the same judge in different cases) in deciding similar cases, as well as to understand how judges justify extreme sentences. Semi-structured interviews were conducted, particularly with judges, to gain a fuller understanding of the findings in the statistical data, as well as to investigate extra-legal factors that may influence judges in sentencing that cannot be studied only by reviewing the decisions. Interviews were also conducted with prosecutors, lawyers and academics to provide additional comparative information.

The interviews were mainly conducted between 7 December 2016 and 24 January 2017 in Jakarta, Bandung and South Tangerang.[34] The total number of respondents interviewed was 26, as below.

Table 1.1. Composition of Respondents

Occupation	Total Number
Supreme Court justice	3 persons
First instance court judge	13 persons
Prosecutor	4 persons
Lawyer	3 persons
Academics /researcher	3 persons

The majority of respondents (20 of 26) were male, with relatively extensive experience (15 to 35 years' work experience) in dealing with all types of cases studied. Many of them (77 per cent) resided in Jakarta and the rest in Tangerang and Bandung equally. The duration of each interview was between one to two hours.

Two methods were used to select respondents: random and purposive sampling. For the first method, I formally asked the head of each relevant court to assign judges with experience in handling the type of cases studied to be interviewed. For the second method, I relied on personal connections with certain judges, prosecutors and other groups of respondents to get their agreement to be interviewed.

As mentioned, the interviews were conducted with a semi-structured approach. I developed and used interview guidelines, which consisted of lists of topics and questions. These included, for example, legal and extra-legal factors that the respondents used in determining sentences, discussion between members on judicial panels, how respondents felt about mandatory minimum sentences and judicial independence, goals of punishment, and how judges ensured consistency and proportionality in sentencing. Judges and prosecutors were also asked to respond to certain issues in sentencing practices that were identified in statistical and textual analysis of the decisions. Not every question was asked of all respondents. For example, judges were not asked to justify their own decisions and sensitive questions, such as regarding judicial corruption or other common criticisms of judicial decisions, were only put to the respondents who showed willingness to discuss such topics.

D. Significance of the Study

As discussed above, thorough empirical studies of judicial sentencing in Indonesia, are very limited. This study therefore seeks to narrow the knowledge gap in this area and provide a foundation for future study, both in its methodological approach as well as its findings. The use of quantitative methods with an adequate number of variables and a

[34] Two rounds of interviews were conducted, in August 2017 and one in February 2018.

relatively large sample size assists in providing a more 'objective' answer to the question of whether differences in sentencing practices are due to variation in cases coming before the court, as judges normally claim, or whether the disparities are caused by extra-legal factors.[35]

Furthermore, by providing a detailed study of the nuances and complexities of these issues, this study can inform policymakers of areas to be reformed in order to minimise inconsistency and disproportionality in sentencing, particularly for offenders from lower socio-economic backgrounds.

E. Limitations

There are a few limitations to this study. The main one concerns the representativeness of the sample. While there is no publicly available data about the case population of different types of offences decided by each court, it is expected that the sample of decisions being studied represents only a small fraction of the total number of relevant cases decided in each court. Further, due to practical limitations, including limited time, access and resources, this thesis only assessed a few district courts and Anti-Corruption courts in the urban area of the west part of Java. As a result, it cannot claim to represent sentencing practices throughout Indonesia. Nonetheless, it is expected that the results of the in-depth interviews can fill some gaps in understanding sentencing practices more broadly. This is partly because judges and prosecutors in Indonesia are rotated. All judges (and prosecutors) serving in big cities' courts have had experience working in smaller, rural courts. Other limitations relate to the consistency and reliability of data in the decisions as well as potential limitations of the statistical techniques used, discussed in Chapter 5.

F. Structure of the Thesis

This thesis is divided into three sections. The first section, Chapters 1-5, provides a background to the study, relevant theories and the context of Indonesian sentencing and procedural law, followed by an elaboration of the quantitative method used for the study. The second section, Chapters 6-9, describes and analyses the research findings. The last section, Chapter 10, summarises the previous chapters and then provides policy recommendations.

After Chapter 1 briefly outlines the background to this study, Chapter 2 discusses sentencing law and theory in general (not specific to the Indonesian context). Coverage includes legal and policy guidance concerning sentencing, theories on the goals of punishment and how they influence the law (particularly the level of sentencing discretion given to judges), and factors considered by judges in sentencing. It then examines the many empirical studies that try to explain what, how, and the extent to which, legal and extra-legal factors influence sentencing outcomes. This chapter will be used to inform the

[35] Butt and Lindsey (above n 22, 193-4) argue for the need for more adequate methods in assessing potential 'illegality' in court decisions.

variables to be assessed in the quantitative research part of this thesis,[36] as well as to guide interviews and analyses of the research findings.

Chapter 3 discusses Indonesia's sentencing law (the Criminal Code), criminal procedural law (the Criminal Procedure Code) and other relevant statutes. Various issues concerning sentencing law are covered, among others, the types of punishment available, mitigating and aggravating factors to be considered by judges, the minimum and maximum penalties under different laws, as well as punishment goals. The discussion of criminal procedural laws provides an overview of the institutions that enforce criminal law, mainly courts, the prosecutor's office and the police, as well as the relevant procedural laws that guide them in doing so, such as the different types of charges prosecutors can pursue, rights of offenders, how a panel of judges decides the type and severity of punishment to be imposed. Chapter 4 then expands on this, focusing on sentencing guidance and policies provided by the Supreme Court, in particular the guidance provided to lower court judges, though case law (*yurisprudensi tetap*), circular letters or regulations. These chapters argue that Indonesian laws and policies provide very wide sentencing discretion to judges.

Chapter 5 elaborates the details of the quantitative method. This includes, for example, the specific provisions of the types of offence analysed in the case study; all the variables (related to judicial discretion) to be assessed; the distribution of the case sample (by type of offence, year of decision, and court location) and distribution of offenders (by gender, age, occupation, educational background and legal representation); and the statistical analysis used and the limitations of the data.

Chapter 6 describes and discusses general findings concerning: the types of punishments commonly imposed by judges and the legal reasoning used; consistency of sentencing in similar cases (for example, same type of offence, similar harms and similar culpability); proportionality of sentencing in different cases (e.g., between theft and aggravated theft, or between theft and corruption, particularly when other variables, such as the level of harm or offender's culpability are relatively similar); and how judges use mitigating and aggravating considerations. The main findings of this chapter are that sentencing disparity, disproportionality and biases do indeed exist and are clearly evidenced in the data.

Chapter 7 further analyses the general findings, focusing on bivariate and path analysis of the sentencing outcomes to identify the legal and extra-legal factors that influence sentencing. It covers issues such as the influence on sentencing of: the nature of offences and level of loss from the offences; prosecutors' charges and sentence recommendations; judges' perceptions and beliefs; and judicial corruption and other structural problems. This chapter also discusses the relationship between these research findings and different

[36] Because this study is the first to assess sentencing practices in Indonesia using comprehensive quantitative methods, I purposely do not include any hypothesis – to be tested by the statistical analyses – but rather use theories, perspectives and findings from previous studies in other jurisdictions as a reference point for preparing variables to be assessed in the quantitative research of this thesis, as well as to guide interviews and analyses of the research findings.

theories and perspectives on sentencing. I conclude that, among other things, judges are more influenced by extra-legal factors than legal factors.

Chapter 8 and 9 further assess factors that influence judges in sentencing in specific cases: minor theft and corruption. These chapters assess judges' compliance with relevant statutes and Supreme Court guidelines, and provide a detailed assessment of inconsistency in legal interpretation by judges in sentencing these two types of offences. Judges' different perceptions and attitudes in sentencing these two types of offences – which are usually committed by offenders from different socio-economic backgrounds – are also discussed here. This chapter provides further proof of class bias in sentencing offenders from different socio-economic backgrounds.

The concluding chapter, Chapter 10, summarises the discussion in previous chapters, including the key findings, as well as highlighting the importance of the thesis and the prospects for future study, closing with general policy recommendations for improving sentencing practices in Indonesia.

CHAPTER 2
LAW AND THEORIES OF PUNISHMENT: WHAT GUIDES, LIMITS AND INFLUENCES JUDGES IN SENTENCING

While judges generally enjoy wide discretionary power when sentencing, they are usually guided, limited, or influenced to some degree by laws and policies, including sentencing guidelines (some of which might be mandatory), case law, and the aims of punishment. In practice, however, they are also influenced and constrained by extra-legal factors. This chapter discusses sentencing law and theory in general, not specifically in the Indonesian context. It discusses legal and policy guidance concerning sentencing, followed by theories of the goals of punishment and how they influence factors to be considered by judges in sentencing. This chapter then discusses various perspectives drawn from a number of empirical studies that try to explain what, how, and the extent to which, legal and extra-legal factors influence sentencing outcomes. The discussion in the first two sections of this chapter will later be used to analyse Indonesian sentencing laws and policies in Chapter 3 and 4. The last section will help to explain what, how, and the extent to which, legal and extra-legal factors influence sentencing outcomes in Indonesia, discussed in Chapters 6 and 7. It will also explain the selection of variables to be assessed in Chapter 5, on research methodology.

A. Law and Policy on Sentencing

The main sources of sentencing law and policy are legislation (statutes), case law, or other instruments, such as sentencing guidelines. Generally, legislation provides basic guidance and limitations on how judges decide sentences. These include, among others things, the types of punishments available for different offences (such as imprisonment, fines, community service, or suspended sentences), as well as the maximum and, sometimes, the minimum penalties allowed, depending on the offence's seriousness (the harms of the offence and the culpability of the offenders).[37] The extent of judicial sentencing discretion set in statutes varies, as shown in Figure 1 below.

Figure 1: The Spectrum of Approaches to Discretion in Sentencing[38]

Fixed Penalty	• Parliament specifies a set penalty for the offence. • The court has no discretion and is limited to a 'one size fits all' approach.
Mandatory Minimum	• Parliament specifies a range with maximum and minimum penalties. • The court has a narrow discretion regarding the factors that can be taken into account, and must impose a sentence that is within the statutory range.
Presumptive Minimum	• Similar to the mandatory minimum, the parliament specifies a range

[37] Ashworth, *Sentencing and Criminal Justice* (n 6) 31-41.
[38] Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (7 August 2008) Victoria Sentencing Advisory Council <https://www.sentencingcouncil.vic.gov.au/publications/mandatory-sentencing-research-paper>.

	but parliament allows the court to impose a sentence below that range in defined circumstances.
Structured Discretion	• Parliament specifies a maximum penalty and provides a set of general guidelines in the sentencing legislation. • The court can impose any sentence below the statutory maximum, subject to legislation, common law principles and appellate review. • The court can take a wide variety of factors into account.
Broad Discretion	• The court has a broad discretion to take any factors into account and to impose any sentence.

Apex courts with constitutional review papers in some jurisdictions can evaluate the constitutionality of laws relating to sentencing. Some of these courts have, for example, struck down mandatory sentences, arguing that they are unjustified forms of cruel and unusual punishment.[39]

Lawmakers, courts, or agencies established by them, sometimes also provide additional sentencing guidance to narrow the range between the maximum and minimum penalties (distinct from the fixed penalty or broad discretion approach mentioned above). This can be done by way of 'numerical sentencing' (numerical guidelines), as is the practice in some jurisdictions in the US or the UK, narrative guiding principles (narrative guidelines) as in, for example, Sweden, or an approach which is somewhere between the two.[40] In the first-mentioned approach, the ranges of punishments is prescribed in a definite manner as the normally-indicated sanction to be imposed by judges based on the offence's seriousness and the criminal history of the offender.[41] In the Minnesota Sentencing Guidelines, for example, an aggravated robbery perpetrated by offenders with a criminal record is classified as a 'level 8' offence, with an indicative sanction of between 50 to 69 months of imprisonment.[42] Meanwhile, a simple theft case committed by a first-time offender, where the amount of loss is less than US$ 5,000, is classified as a 'level 2' offence, and judges can impose up to one year of imprisonment or other less severe punishments, such as fines, or suspended sentences.[43] As for the second approach, narrative guidelines only specify the rationale of sentencing and, identify factors to be considered in determining different levels of the offence's seriousness and the offender's culpability, and provide an indication of when judges can impose imprisonment or other types of penalties.[44] No tariff or range of indicative length of imprisonment is provided in narrative guidelines. Some jurisdictions establish special bodies, such as sentencing councils, to assist judges in

[39] Kent Roach, 'Searching for Smith: The Constitutionality of Mandatory Sentences' (2001) 39(2) *Osgoode Hall Law Journal* 367.
[40] Andrew von Hirsch, 'Guidance by Numbers of Words: Numerical versus Narrative Guidelines for Sentencing' in Martin Wasik and Ken Pease (eds), *Sentencing Reforms: Guidance or Guidelines?* (Manchester University Press, 1986) 46.
[41] Ibid 46-8.
[42] Minnesota Sentencing Guidelines Commission<http://mn.gov/msgcstat/documents/Guidelines/2019/StandardGrid.pdf>.
[43] Ibid.
[44] Von Hirsch, 'Guidance by Numbers of Words' (n 40) 55-6.

achieving consistent sentences by, for example, providing statistical information on sentencing practices.[45]

Moreover, legislation normally specifies factors to be considered by judges in sentencing that are connected to the commission of the offence, the offenders or the victim, including conditions that can aggravate and mitigate the sentence.[46] An aggravating factor is a consideration that makes an offence worse or otherwise justifies a heavier penalty that is not contained within the elements of the offence.[47] A mitigating factor, meanwhile, is a consideration that justifies a more lenient penalty.[48] The most common aggravating considerations are the offender's criminal history and his or her leading role in an offence. Some jurisdictions provide very severe punishment for reoffenders, particularly habitual offenders, with what is called the three-strike law.[49] On the other hand, an offender's minor role in the offence, is usually considered as a mitigating consideration. Similarly, the circumstances of the offence, such as whether a defendant committed an offence under coercion or duress, are commonly considered mitigatory. Below are examples, provided by Bagaric, of aggravating and mitigating considerations recognised in legislation, case law or sentencing guidance in some jurisdictions.[50]

Table 2.1. Examples of Aggravating and Mitigating Considerations in Some Jurisdictions

Aggravating Factors	Mitigating Factors
Matters Personal to the Offender	**Matters Personal to the Offender**
• The offender has a criminal record (reoffending); or • The offender took a leading role in the offence.	• The role of the offender in the offence was minor; • The offender does not have a criminal history or significant previous convictions; • The offender has good character or good prospects of rehabilitation; • The offender is unlikely to reoffend.
The Manner in which the Offence was Committed	**Circumstances of the Offence**

[45] See Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Routledge, 2014).
[46] See, e.g., Ashworth, *Sentencing and Criminal Justice* (n 6).
[47] Mirko Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When It Comes to Punishing Criminals' (2014) 62(5) *Buffalo Law Review* 1159, 1160.
[48] Ibid.
[49] These laws allow severe mandatory minimum penalties, sometimes fixed penalties, for offenders who commit offences for a third time. In some cases, the first (or some of the earlier offences) must be considered serious, for example, must be a felony. The range of minimum penalties for these re-offenders is varied, between five to twenty years. Some even prescribe a lifetime sentence without parole. M. G. Turner, J. L. Stundt, B. K. Applegate, and Cullen F. T, 'Three Strikes and You're Out legislation: A National Assessment' (1995) 59 *Federal Probation* 16; Arie Freiberg, 'Three Strikes and You're Out—It's Not Cricket: Colonization and Resistance in Australian Sentencing' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 30.
[50] Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing' (n 47) 1165-89.

• Abuse of a position of trust or use of special skill; • Use of a minor to commit a crime; • Committed while on bail; • Involved extreme conduct (e.g., heinous, cruel) • Involved actual or threatened use of weapons and dangerous instruments; • Committed while the defendant wore an official, or counterfeit official, insignia or uniform; • Committed to conceal another crime. • Involved actual or threatened use of violence; • Motivated by prejudicial hate; • Involved multiple offences or victims; • Committed for financial gain; • Planned; or • Committed in company, or in the course of organised criminal activity.	• The offence was committed to avoid greater harm; • The offence was committed under coercion or duress; • The offender was provoked by the victim; • The offender was not fully aware of the consequences of his or her actions because of his or her age or any disability. **Offender's Response to Charges** • The offender pleaded guilty; • The offender demonstrates remorse; • The offender voluntarily disclosed the offence, which would otherwise be hard to discover; or • The offender has provided substantial assistance to authorities.
Impact of the Offence (Harms)	**Impact of the Offence (Harms)**
• Caused serious physical or psychological harm (death, extreme injury, etc); • Caused serious property damage or loss; • Disrupted governmental function; • Endangered national security, public health, or safety.	• The injury, emotional harm, loss, or damage caused by the offence was not substantial.
Factors Related to the Victim	**Impact of the Punishment to Offender**
• The victim is vulnerable; • The victim is an official; or • The offence involved restraint of the victim.	• Offender's age (young or old); • Particular issues with the offender's mental, emotional, or physical conditions.

Some countries also list factors that concern offenders that are *not* allowed to be considered in sentencing, including, among others: drug or alcohol dependence or abuse and gambling addiction; employment record; family ties and responsibilities; creed and religion; socio-economic status; and civic, charitable, public service, or employment-related contributions.[51]

The level of sentencing discretion given to judges and the factors to be considered (and not to be considered) in sentencing is usually influenced by the goals of punishment that lawmakers want judges to pursue, as discussed in the next section.

B. Punishment Goals and Their Influence on Sentencing Law and Practices

There are two major and contrasting penal philosophies that try to establish goals and justify the institution of punishment: retribution and utilitarianism. The difference between these theories is not only in relation to the question of "why punish", but also the question of "how much to punish" (distribution or allocation of punishment), including what factors are to be considered in punishing. Some theorists have developed a mixed or

[51] Ibid 1180.

"hybrid model" (or unified theory, in the Civil Law tradition) that combines some features of both philosophies, reconciling them or bridging gaps between them. Most of the "hybrid models" support the utilitarian answer to the question of "why punish" but endorse, at least partly, retributive philosophy when it comes to the issue of "how much to punish", or use retributive philosophy as a limit of utilitarianism's allocation of punishment principles.[52]

The adoption of particular punishment goals are influenced by a number of factors, including how lawmakers view the cause of crimes (for example, as regards biological, phycological, and social factors, influenced by philosophy, science, or politics),[53] the purpose of laws, the effectiveness of certain types of punishment goals, and sentencing practise.[54]

This section discusses the main differences between utilitarianism and retribution philosophies and how they may influence judges in sentencing outcomes, particularly the level of sentencing discretion given to judges and factors to be considered in sentencing. It does not discuss the hybrid models because of limitations of space and because many of their principles, in general, are already reflected in utilitarianism and retribution philosophies. Since there are many variants in both philosophies, I will only examine the mainstream ideas and make generalisations, as necessary.

1. Utilitarianism

Utilitarianism is a general ethical theory that holds that every action should be guided by moral principles to bring the greatest amount of utility to the greatest number of people. Utilitarian philosophy argues that punishment is justified since it can produce future good and social utility. This is why utilitarianism is labelled as a "forward-looking" or "consequentialist" approach. Jeremy Bentham, the main proponent of utilitarianism,

[52] See, e.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2th ed, 2008) Chapter 1 and 9; John Rawls, 'Two Concepts of Rules' (1955) 64(1) *Philosophical Review* 3, 4-13. For detailed elaboration of such differentiations in the "hybrid models", see Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 121-129. In Germany, for example, the main purpose of punishment is to prevent crime through its educational function ('positive general prevention'), as opposed to 'negative general prevention' (deterrence through threat or fear of punishment). Its punishment allocation logic (how to allocate or determine the right amount of punishment to offenders) is more similar to the retributivism's (desert) denunciation or censure theory (discussed later in this chapter) than utilitarianism in general. Thus, as Dubber asserts, '…at some point it becomes difficult to tell the difference between positive general prevention and retributivism' (Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 *The American Journal of Comparative Law* 679, 702). As the result, this theory is less vulnerable to the weaknesses of the utilitarian's allocation of punishment principles discussed in this chapter. For more discussion of the hybrid model in the Civil Law tradition, see, e.g., Clauss Roxin, 'Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment' in AP Simester, Antje Du Bois-Pedain and Ulfrid Nuewman (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart, 2014); Thomas Weigend, 'Sentencing in West Germany' (1983) 42 *Maryland Law Review* 37.

[53] See for example José M. Canals, 'Classicism, Positivism and Social Defense' (1960) 50(6) *Journal of Criminal Law, Criminology, and Police Science* 541, 542-3; Mauro Cappelletti, 'Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice' (1985) 35(1) *Catholic University Law Review* 1; Ilene H. Nagel, 'Structuring Sentencing Discretion: The New Federal Sentencing Guidelines', (1989) 80(4) *Criminal Law and Criminology* 883.

[54] Andrew von Hirsch and Lisa Maher, 'Should Penal Rehabilitation be Revived?' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 28; Donald A. Andrews, Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau, and Francis T. Cullen, 'Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis' (1990) 28(3) *Criminology* 369.

believed that punishment is justified since it can prevent crime through: deterring offenders or potential offenders from committing a future crime (deterrence); physically preventing them from committing another crime (incapacitation); or rehabilitating them to minimise the potential of reoffending (rehabilitation). Other scholars maintain that the goal of punishment should be to restore peace and justice (restorative justice). Below is an elaboration of each tenet of this theory.

1.1. Deterrence (General and Specific)

Bentham believes that the main goal of punishment is to deter people from committing crimes through threats and fear of punishment (deterrence).[55] There are two types of deterrence: specific deterrence, which focuses on preventing the offender from recommitting offence in the future; and general deterrence, which aims to deter others from following the conduct of the offender.[56] The underlying assumption is that humans, as rational beings, will calculate and adjust their behaviour according to the disincentive created by punishment.[57]

In terms of quantum, utilitarianism uses a cost/benefit calculation where punishment is calculated as being sufficient to prevent offenders or potential offenders from committing crimes in the future. Bentham also advocated for "rules of proportion" in determining sentences, asserting that '[t]he punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given', so that it is efficient.[58] More importantly, he argued that punishment for greater offences should be greater than minor offences and punishment of competing offences should be calculated in a way to induce offenders to commit the lesser offence.

While both general and specific deterrence share the same method (to deter offences through fear or threat of punishment), because of their different targets (offenders and potential offenders) they consider different, even conflicting, factors in sentencing. General deterrence, for example, is mainly concerned with the impacts or harms of the offence on society, including the degree of harm that is caused, the prevalence of the offence (crime rates in a particular place and time), or exposure (media coverage) of the case in society. As a consequence, general deterrence may acknowledge, or reject,

[55] Jeremy Bentham, *Principles of Penal Law* (The University of Adelaide, 2014) Part 2, Book 1, Ch 3.
[56] Ibid.
[57] Ashworth, *Sentencing and Criminal Justice* (n 6) 75. However, there are questions of the ability of punishment as deterrence to prevent crimes. For the debate on these issues, see, for example, Walker, *Why Punish?* (n 52) 14-15; Stanley Milgram, 'Behavioral Study of Obedience' (1963) 67(4) *The Journal of Abnormal and Social Psychology* 371; Stephen Brody, 'How Effective are Penal Treatment' (1978) 17 *Howard Journal of Criminal Justice* 133; Andrews et al (n 54); James Q. Wilson, 'Selective Incapacitation' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 114; George Antunes and A Lee Hunt, 'The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis' (1974) 64(4) *The Journal of Criminal Law and Criminology* 486; Steven Klepper and Daniel Nagin, 'The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited' (1989) 27 *Criminology* 721. Moreover, some scholars argue that the use of threats to deter offending treats without dignity humans with the capacity to reason, freedom and autonomy. See, e.g., John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 22-27, G.W.F. Hegel, 'Philosophy of Rights' as quoted in Igor Primoratz, *Justifying Legal Punishment* (Humanities Press International, 1989) 35; Roxin (n 52) 31.
[58] Bentham, *Principles of Penal Law* (n 55) 71.

mitigating and aggravating factors that are disconnected, or conflict, with offender's culpability or blameworthiness. In a well-known British High Court decision, *Regina v. Dudley and Stephens,*[59] for example, the court found the sailors who killed and drank the blood of a sick cabin boy to stay alive were guilty of wilful murder. [60] The court rejected a necessity defence argument, mainly to serve the function of reaffirming the prohibition against killing innocent victims.[61] Further, to create stronger deterrence, utilitarians are willing to mete out "exemplary sentences" – unusually severe punishment for minor offences that become a public concern[62] or that draw media attention, in order to create a wider deterrent effect.[63]

Specific deterrence, on the other hand, is more concerned with factors that relate to a specific offender's potential to reoffend, such as the offender's character, culpability, or the context that triggered or preceded the commission of the offence. Reoffenders, for example, deserve more severe punishment because it is assumed that previous sanctions have failed to deter them from offending.[64] Meanwhile, offenders who show remorse, or cooperate with authorities (as an indication of their repentance) are regarded as less likely to reoffend, hence are thought not to need harsh punishments.[65] An offender who commits an offence due to duress, for example, is less likely to reoffend.[66] Some utilitarian scholars even argue that the victim's forgiveness may also be considered in sentencing, in particular because it may coincide with the offender being remorseful or may make the offender feel remorseful.[67] Theoretically, the need to impose a harsh sentence is also lessened when the situation or context in which the offence was committed (such as financial need or mental illness) no longer exists.

Further, laws that are influenced by general or specific deterrence goals usually consider the potential benefit of committing a type of offence (either economic or other), as well as the risk of the perpetrators being caught.[68] If the potential benefit or profit from a particular offence is high, then the 'cost' of committing it, the punishment, should be higher, to prevent it. Also, if the rate of capture for an offence is lower than average, the severity of punishment threatened must be higher to maintain the overall deterrent.[69]

[59] *Regina v. Dudley and Stephens* (1884) 14 QBD 273.
[60] Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should be Punished How Much* (Oxford University Press, 2008) 14, 78.
[61] Ibid.
[62] Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976) 70; Barbara A Hudson, 'Doing Justice to Difference' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory* (Clarendon Press, 1998) 239.
[63] Robinson (n 60) 13.
[64] Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Sydney/London: Cavendish, 2001) 139.
[65] Bagaric (n 64) 139.
[66] Carissa Byrne Hessick and Douglas A. Berman, 'Towards a Theory of Mitigation' (2016) 96 *Boston University Law Review* 161, 184.
[67] Stephanos Bibas, 'Forgiveness in Criminal Procedure' (2007) 4 *Ohio State Journal of Criminal Law* 329, 334-5; Nigel Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (Black Stone, 1999) 210.
[68] Robinson (n 60) 7-8, 28.
[69] Robinson (n 60) 7-8, 26-8.

1.2. Incapacitation

The goal of crime prevention under the incapacitation strategy is straightforward: making offenders physically incapable of offending again, such as through capital punishment, imprisonment or castration. Incapacitation should not be confused with specific deterrence or rehabilitation. For example, while sending offenders to prison may result in special deterrence or provide an opportunity for rehabilitation, these are not its intrinsic goals.

The duration of incapacitation depends on an assessment of the likelihood or risk of reoffending. Offenders whose personalities and circumstances make them more liable to reoffend (risky or high-rate offenders) are punished more severely for an offence where it is believed or assumed they may commit another offence in the future (usually referred as "predictive sentence" or "punishment in advance").[70] In some jurisdictions, the prediction is made by assessing the offender's background, such as his or her criminal record, drug habit, or mental status.[71]

1.3. Rehabilitation

The idea of rehabilitation is to cure, reform or help offenders minimise their tendency towards criminal behaviour and to prepare them for reintegration into society.[72] Rehabilitation as a sentencing approach tries to treat and change the negative tendencies, outlooks or habits that lead offenders to commit crimes as well as to equip them with skills, through psychological assistance, counselling or vocational training conducted by therapists, correction officers or social workers.[73] In this sense, rehabilitation as a justification of punishment is different from rehabilitation as part of a post-conviction process to be followed by offenders in prisons.[74] While successful rehabilitation will surely benefit the offender, the main objective is to protect the general public, the members of which become less likely to suffer from the offender's commission of crimes in the future.[75]

In a system that employs rehabilitation as its primary justification for punishment, the sentence for each offender would be individualised, tailored to his or her needs for treatment. Factors relating to each offender's predicted future criminality or potential to be reformed, such as his or her character, criminal history or remorse, will influence the

[70] *A New Penal System: English Summary of a Report by the Working Group for Criminal Policy of the National Swedish Council for Crime Prevention* (1978) in Walker, *Why Punish?* (n 52) 59.
[71] See, e.g., Andrew von Hirsch, 'Selective Incapacitation: Some Doubts' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 121; Arnold H. Loewy, 'Culpability, Dangerousness and Harm: Balancing the Factors on which Our Criminal Law is Predicated' (1987-1988) 66 *North Caroline Law Review* 283, 286.
[72] Andrew von Hirsch, 'Rehabilitation' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 1-3.
[73] Ibid 1.
[74] McNeill Fergus, 'Punishment as Rehabilitation' in Gerben Bruinsma and David Weisburd, *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 4195-4206.
[75] Von Hirsch and Maher (n 54) 28.

sentence to be imposed.[76] As with special deterrence and incapacitation approaches, disproportionate punishment and sentencing disparity may also occur under a pure rehabilitative sentencing approach. This is because the gravity or seriousness of the offence, including the culpability of the offender or the harm caused by the offence, is not sufficiently weighted if rehabilitation goals are considered in isolation.[77]

1.4. Restorative Justice

The last theory developed on the basis of a predominately utilitarian philosophy is "restorative justice", although there is little academic agreement on the content of this sentencing goal. Unlike conventional goals of punishment, restorative justice broadly aims 'to repair the harm and injury caused by the crime, focusing on the victim, and the community, as well as the offender', in order 'to rebuild ruptured relationships in a process that allows three parties to participate'.[78] Some of the key features of restorative justice are:[79] 'disputes' can be processed outside courts, and more through a form of facilitation or mediation than trial;[80] victims have more voice or control over the process, including to forgive offenders; offenders are expected to understand the impact of the offence on the victim, which hopefully makes them feel remorse, and hence persuades them not to reoffend; the community is expected to be involved in the process, including to support the victims and to support and monitor offenders; and the process usually involves offenders compensating the victim. As this suggests, restorative justice is concerned more with the "process" for attaining certain goals than conventional criminal justice system and punishment. Some restorative justice scholars try to narrow the gap between the two by advocating that judges adopt and use some of restorative justice principles in court proceedings and sentencing, for example, by requesting judges to consider, at minimum, the response of the offenders (such as remorse and compensation offered to the victim) and any forgiveness by the victim when they determine types and severity of sentence to be imposed.[81]

2. Retributivism

2.1. Variants of Retributive Theory

In contrast to the utilitarian philosophy which justifies punishment for its future benefits (forward-looking), retributive philosophy (desert theory)[82] views punishment as a just

[76] Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing' (n 47) 1215.
[77] Von Hirsch and Maher (n 54) 29-30.
[78] Cassia C. Spohn, *How Judges Decide?: The Search for Fairness and Justice in Punishment* (Sage, 2002) 14-6.
[79] See, e.g., Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Routledge, 2011) 11-3, 113-4; Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57(2) *Modern Law Review* 228; Bibas (n 67) 334-5, 338.
[80] Assuming that the law allows it, there is not significant public interest in the case and the offender admits responsibility and the victim agrees to participate.
[81] Zedner (n 79) 233, 241.
[82] Contemporary retributivists like von Hirsch have debated the correctness of the term 'retribution', which literally means paying back or repayment, because this expression only explains a particular view (an older version of retributivism) and has negative and misleading connotations, such as punishment as revenge or vengeance. Therefore, he argues, that the best expression to capture the meaning of the new, revised version of retributive

response to an offence that has already been committed (backward-looking). When we punish, "we execute justice" as the offender deserves punishment because they committed an offence.[83] Desert (retribution) is seen as a necessary and sufficient moral justification for punishment.[84] Thus, unlike utilitarianism, retributivism sees punishment as an end in itself as, under this theory, it is considered intrinsically good.[85]

While agreeing on the premise that punishment is a just response for offending, retribution philosophers and theorists promote diverse reasons as to why offenders deserve to be punished for their wrongdoing. Different theories have been developed, including annulment theory, fair play (benefit and burden) theory, and denunciation or censure.[86] Most of these theories, besides denunciation or censure, have serious weaknesses[87] and emphasise the philosophical question of "why punish" as opposed to engaging with the issues of "how much punishment" and "what factors to consider when punishing", which are the focus of this thesis. For these reasons, this section will only discuss the justifications for punishment related to the denunciation or censure theory.

2.1. Denunciation or Censure Theory (Desert Theory)

Denunciation or censure theory argues that the nature of any institution of punishment, criminal or non-criminal, is condemnation. Von Hirsch, the main proponent of desert theory, states that we punish to convey censure or blame for those who commit wrongful acts and to hold them accountable for their actions.[88] Similarly, Primoratz maintains that because criminal law expresses very basic and fundamental rights of the people, those who violate them must be condemned through punishment because:

> By giving expression to it, punishment vindicates the law broken, reaffirms the right violated, and demonstrates that its violation was indeed an offence. If there are to be rights sanctioned by the criminal law, if some acts are to be offenses, if there is to be criminal law at all - there has to be punishment. If there is no punishment, there are no offenses, no criminal law, no rights determined and sanctioned by law.[89]

As a backward-looking approach to punishment, retributivism puts strong emphasis on proportionality between offence and punishment. As Duff put it, since 'punishment is to be for an offence, *its nature and exten*t must be justified by reference to that offence'.[90] The proportionality principle defines an offence's seriousness according to two aspects: the degree of the offender's culpability and the harm of an offence. Harm refers to the injury

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philosophy is "desert" (von Hirsch (n 62) 45-6). Despite my agreement with his view, this thesis will use both expressions interchangeably as both phrases remain in common usage in the literature.

[83] See, e.g., Primoratz (n 57) 12; Michael S. Moore, 'Justifying Retributivism' (1993) 27 *Israel Law Review* 15, 15.

[84] Moore (n 83) 15-16.

[85] Ibid.

[86] For further discussion of types of retribution theory, see, for examples, C. L. Ten, *Crime Guilt and Punishment* (Clarendon Press, 1987) 38-42, 52-53 Walker, *Why Punish?* (n 52) Chapter 9; John Cottingham, 'Varieties of Retribution' (1979) 29(116) *The Philosophical Quarterly* 238, 239-245.

[87] See, e.g., Walker, *Why Punish?* (n 52) Chapter 9; Cottingham (n 86); Ten (n 86) Chapter 3.

[88] Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993) 9-10.

[89] Primoratz (n 57) 152.

[90] R.A. Duff, *Trials and Punishments* (Cambridge University Press, 1986) 153 (emphasis added).

done or risked by the offence.[91] Culpability refers to issues such as: the offender's intention when committing the offence – purposeful, knowing, reckless or negligent; motives; and other circumstances that correlate to the degree of an offenders' responsibility for their conduct which are usually translated into mitigating or aggravating sentencing factors. These include duress, necessity, lack of capacity, and role of the offenders in the offence (if there are several offenders). [92]

In determining the penalty scale, von Hirsch argues that we should differentiate between ordinal and cardinal proportionality. Ordinal proportionality relates to the relative severity of punishments for offenders committing similar or different offences. Offenders who commit offences with similar seriousness deserve to be punished with comparable severity, unless there are mitigating or aggravating factors that need to be considered.[93] Other factors such as the offender's likelihood of recidivism or reform, or the expected deterrent effect of the punishment, should not be considered according to this theory.[94] Different offences should also be punished differently. For example, the sanction for armed robbery should, as a matter of principle, be different from burglary. As a consequence, there should be a rank-ordering to decide which offences need to be sanctioned more severely compared with others, depending on the seriousness of the respective offences (which also reflects the stringency of the condemnation or blame associated with the offences). Once the ordinal proportionality has been decided, cardinal proportionally must next be determined: 'how severe the severest penalty should be, how lenient the mildest'.[95]

3. Influence of Punishment Goals on Sentencing Law and Practice

3.1. Sentencing Factors, Aggravating and Mitigating Considerations

As shown above, the goals of punishment influence factors that should be considered by judges in imposing the "right" sentence. As a consequence, sentencing law and policies need to accommodate all relevant factors in accordance with each goal, including factors that aggravate or mitigate sentences. In other words, the shape of sentencing law and policies is influenced by the goals of punishment.

An issue arises because retributive and utilitarian goals have different, and sometimes conflicting, factors to consider in sentencing. In fact, differences and conflicts exist between theories *within* utilitarian philosophy. If the goal of punishment is to deter the public from committing the same offence (general deterrence), for example, factors such as the probability of apprehension or the rate of a particular crime would be relevant considerations, regardless of the offence's seriousness or the offender's culpability. This is in conflict with incapacitation, rehabilitation, and, to some extent, special deterrence

[91] Andrew von Hirsch, *Past or Future Crime: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 64.
[92] Von Hirsch, *Past or Future Crime* (n 91) 80.
[93] Von Hirsch, *Censure and Sanctions* (n 88) 18.
[94] Von Hirsch, *Past or Future Crime* (n 91) 40.
[95] Andrew von Hirsch, 'Desert and White-collar Criminality: A Response to DR. Braithwaite' (1982) 1 *Journal of Criminal Law and Criminology* 1164, 1165.

rationales, which rely more on the likelihood of reoffending, and offender's background or personal characteristics.[96] Between the latter goals, there is also a slight variation in the primary factors considered in sentencing. Consequently, where no specific theory is endorsed in sentencing law or policies, the punishment of offenders committing similar crimes can be widely inconsistent, and thus unjust.[97] Further, a judge can easily pick and choose different goals inconsistently, depending on the outcome he or she prefers.

3.2. Judicial Discretion, Mandatory and Minimum Penalties

Sentencing law based on utilitarianism and retributivism provides different levels of sentencing discretion to judges. Since utilitarian philosophy is concerned with the consequences of punishment, the rationale gives broad discretion to judges to take into account different variables in imposing sentences (such as the crime or case context or the offender's characteristics) to achieve punishment goals. As an illustration, the crime rate for theft may differ from one place to another, and some offenders have greater potential to reform than others. These different contexts need to be responded to differently by utilitarian judges. As a consequence, a law that is based on utilitarian justification cannot, in principle, endorse a statutory minimum penalty, and should allow a wide range between the maximum and minimum penalties. In fact, some jurisdictions have introduced indeterminate sentences where role of the sentencing judge is merely to decide the minimum and maximum penalties, while a parole board determines the exact date when offenders are to be released.[98] With this broad discretion sentencing disparity is inevitable. In practice, however, jurisdictions that opt for deterrence-based systems or incapacitation strategies apply severe mandatory penalties and/or minimum statutory penalties, or limit offender's opportunities for parole, at least for some crimes.[99] This stems from a heavy reliance on a utilitarian philosophy by policymakers to support a tough law-and-order approach to crime prevention by using threats of severe punishment.[100]

On the other hand, because desert proportionality requires like cases to be treated the same and different cases to be treated differently, under this approach there needs to be some degree of standardisation of punishment to limit sentencing discretion.[101] There are two ways this can be achieved:[102] first, by using numerical guidance; and, second, by creating statutory sentencing principles that set desert proportionality as the guiding

[96] Robinson (n 60) 12-14.
[97] Ashworth, *Sentencing and Criminal Justice* (n 6) 73.
[98] Marvin Zalman, 'The Rise and Fall of the Indeterminate Sentence' (1977) 24(1) *Wayne Law Review* 45; Susan R. Klein, 'The Return of Federal Judicial Discretion in Criminal Sentencing' (2004) 39(3) *Valparaiso University Law Review* 693.
[99] See, e.g., Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2004) 78-88; Michael Tonry, 'Can Twenty-first Century Punishment Policies Be Justified in Principle?' in Michael Tonry (ed) *Retributivism Has a Past, Has It a Future?* (Oxford University Press, 2011) 6-14; Gabriel Hallevy, *The Right to be Punished: Modern Doctrinal Sentencing* (Springer, 2013) 27.
[100] See, e.g., von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 78-88; Tonry, 'Can Twenty-first Century Punishment Policies Be Justified in Principle?' (n 99) 6-14.
[101] Von Hirsch, *Censure and Sanctions* (n 88) 77.
[102] Ibid 78; Andrew Ashworth, 'Four Techniques for Reducing Sentence Disparity' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 231-234.

principle and specify aspects to be considered in determining sentences. Each model has its own strengths and weaknesses. On the one hand, numeric guideline models are simpler to use and more promising to assure consistency in sentencing but may be too rigid, or can be used by the legislature to set harsh minimum penalties.[103] On the other hand, the effectiveness of statutory sentencing principles model depends on courts' willingness to consistently implement it.[104]

Some utilitarian proponents argue that since the revival of retributivism in the 1970s, there is an increasing trend towards punitive punishment, particularly in the US and the UK. This is demonstrated by the growth in prison populations and harsher penalty structures in desert-base laws or sentencing guidelines.[105] However, desert theorists argue that this has more to do with excessive use of deterrence and incapacitation strategies by policymakers, as discussed above.[106]

3.3. Sentencing Disparity, Disproportionality and Bias

As discussed, according to the utilitarian goals of punishment, the severity of a sentence should accord with what is believed to be effective or needed to achieve these goals, as opposed to being what offenders deserve according to their individual conduct (based on the harms the offence causes and the culpability of the offender). This approach tends, overall, to result in disproportionate punishments and sentencing disparity. For example, to create stronger deterrence, utilitarians are ready to mete out "exemplary sentences" for minor offences that become a public concern or draw media attention. Similarly, in the name of preventing crimes or protecting the public, a punishment that is based on an incapacitative strategy legitimately, even desirably, employs "punishment in advance" or "predictive sentencing" for risky or high-rate offenders, whose personalities and circumstances make them more likely to reoffend. However, the factors used to predict whether someone is a high-risk or low-risk offender in some jurisdictions are controversial, including, among others, an offender's educational background, work experience and residential and income stability.[107] As a result, offenders from lower socio-economic backgrounds are most likely to be considered high-risk offenders and receive more severe sentences than people with higher socio-economic status', even if they

[103] See, e.g., von Hirsch, *Censure and Sanctions* (n 88) 78-79; von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 78-88.
[104] See, e.g., von Hirsch, *Censure and Sanctions* (n 88) 78-79; von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 78-88.
[105] See, e.g., Edward Rubin, 'Just Say No to Retribution' (2003) 7(1) *Buffalo Criminal Law Review* 17, 56, 58; Theodore Caplow and Jonathan Simon, 'Understanding Prison Policy and Population Trends' (1999) *Crime and Justice* 63, 65-68; von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 84-85; Tonry, 'Can Twenty-first Century Punishment Policies Be Justified in Principle?' (n 99) 11-13.
[106] Furthermore, the implementation of desert-based proportionality in Finland and Sweden, or the adoption of numeric sentencing guidelines in some US states, namely Minnesota and Washington, has yielded relatively positive results. See, e.g., von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 76-8; Tapio Lappi-Seppälä, 'The Fall of the Finnish Prison Population' (2000) 1(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 27; Richard S Frase, 'Sentencing Guidelines in Minnesota and Other American States: A Progress Report', in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon, 1995) 169, 182.
[107] Michael Tonry, 'Selective Incapacitation: The Debate over Its Ethics' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 135.

commit a comparable offence.[108] Moreover, people of minority race or ethnicity, or of a particular sex, age or intellect, have a higher chance of being labelled high-risk offenders and may be treated differently (or even risk being discriminated against), as will be discussed in the next section. Such risks are worsened where utilitarian proponents support the "individual sensibility" argument, which demands that judges consider the effect of punishment based on factors including the offender's health, strength, sex, age, habitual occupation, peculiar circumstances, social rank, education, or lineage.[109] While it is valid to consider some individual sensitivities, such as health or age (old or young), other factors, like social rank, or lineage are class biased and should not be considered.

Disproportionate punishment and disparity in sentencing may also occur in special deterrence or rehabilitative types of punishment because they are mainly concerned with aspects concerning the offenders, not the offence.[110] Restorative justice is also criticised. For example, reducing sentences based on compensation is biased against offenders with limited financial resources.[111] Further, giving too much weight to the victim's voice in determining a sentencing outcome, may weaken broader society's interests *vis a vis* the victim,[112] and potentially put the equality of treatment and proportionality principles at risk because some victims may be forgiving and others may be vindictive.[113]

Meanwhile, some utilitarian scholars argue that retributivism can also lead to unjust and disproportionate punishments, at least for some types of offenders. This is because it ignores offenders' different sensitivities to punishment as well as their characters and pre- and post- offence conduct, including whether they are remorseful, or can be easily rehabilitated.[114] Retributive punishment also potentially disregards the issue of inequality between offenders with different social-economy conditions in its punishment philosophy.[115]

Desert theorists have different responses to the above criticisms. Some argue that retributive punishment recognises an offender's sensibility to punishment, particularly in the context of fines. Ashworth and Player, for example, maintain that judges may impose different levels of fines according to offenders' financial ability to ensure the equal impact

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[108] Ibid.

[109] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1823) 51-62 and 182. For a revival of Bentham's argument, see, Adam J. Kolber, 'The Comparative Nature of Punishment' (2009) 89(5) *Buffalo University Law Review* 1565, who argues that the different economic statuses of offenders should also be taken into account in sentencing.

[110] For a utilitarianist response, see, for examples, Bagaric (n 64) 136, 185; Roxin, *Strafrecht Allgemeiner Teil I* in Ulfrid Neumann, 'The Deserved Punishment' in AP Simester, Antje Du Bois-Pedain and Ulfrid Nuewman (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart, 2014) 76; and Johannes Andenaes, *Punishment and Deterrence* (The University of Michigan, 1974) 137.

[111] Ashworth, *Sentencing and Criminal Justice* (n 6) 173-4.

[112] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42(3) *British Journal of Criminology* 578, 585. Ashworth believes that the main legitimate interest of the victim in a criminal proceeding is compensation or reparation, not to have say on the form or quantum of the punishment to be imposed on the offender.

[113] Ibid 586.

[114] Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 11; Bagaric (n 64) 244-245

[115] Nigel Walker, 'Desert: Some Doubts' in Andrew von Hirsch and Andrew Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 2nd ed, 1998) 157.

principle, so that all offenders committing an offence will receive (feel) equal deprivation from this monetary penalty.[116] It is also argued that desert theory considers certain aspects of the offenders' post-offence conduct such as if they seriously repent or voluntarily mend their acts by, for example, providing compensation or other assistance to the victim before conviction. Such an action could be considered to reduce the harm of the offence as well as indicating that they have already 'taken a message of punishment to heart and… have started to mend [their] ways'.[117] Further, von Hirsch maintains that an offender's criminal history matters because it indicates his or her degree of culpability and commitment to the offence. Unlike utilitarian philosophers, however, he states that the desert approach views criminal history as "loss of mitigation". This is not to say that offenders with criminal history should receive more severe punishment, but rather that the *first-time offender deserves a sentencing discount,* which will gradually diminish if he or she recommits the offence.[118] This is because, he argues, when an offender commits an offence for the first time, we may "tolerate" his or her wrongdoing as we understand human fallibility for temptations or pressures.[119] However, when reoffending, his or her degree of culpability increases by persisting with such behaviour after being punished.[120] Lastly, some retributive scholars also argue that it may be justified for socially deprived offenders to receive more lenient sanctions because their conditions (which may make it much harder to resist the temptation or pressure to commit an offence) make them less culpable than others.[121]

C. Theoretical Perspectives in Explaining Sentencing Outcomes: What and How Legal and Extra-legal Factors Influence Sentencing

The previous sections of this chapter illustrate how "legal factors" set by laws and sentencing guides, such as factors to be considered and the level of discretion allocated, limit and influence judges in sentencing. As indicated earlier, other extra-legal factors play a role in the sentencing process and cause sentencing disparity, disproportionality and bias. This is because judges are not robots and the sentencing process does not happen in a vacuum. As discussed in this section, scholars have highlighted the importance of extra-legal factors internal and external to judges in influencing sentencing, such as a judge's values, beliefs and attitudes, the practices of other court actors, and the political, social, environmental and organisational context of the court.

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[116] Andrew Ashworth and Elaine Player, 'Sentencing, Equal Treatment, and the Impact of Sanction' in Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory*' (Clarendon, 1998) 255. I would also argue that giving similar fines to offenders with different resources potentially sends the wrong message to the offenders (and to the general public) since they will feel the degree of censure of their conduct either too harshly or too weakly.

[117] Von Hirsch and Ashworth, *Proportionate Sentencing* (n 99) 3. For an elaborated argument for the role of remorse in punishment see Duff (n 90) 246-262.

[118] Von Hirsch, *Past or Future Crime* (n 91) 84-91. For a different view from other retributive theorists, see Ashworth, *Sentencing and Criminal Justice* (n 6) 184-5.

[119] Von Hirsch, *Past or Future Crime* (n 91) 84-85.

[120] Ibid 78.

[121] See, e.g., Michael Tonry, 'Can Deserts Be Just in an Unjust World?' in AP Simester, Antje Du Bois-Pedain and Ulfrid Nuewman (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart, 2014) 163; Barbara A. Hudson, 'Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act' (1994) 22(1) *Crime, Law and Social Change* 59, 70.

There is, however, disagreement on which factors, among a range of legal and extra-legal factors, are more influential in shaping sentencing outcomes, and how that is so. Scholars have developed several theoretical perspectives to resolve this debate, from the substantive political perspective to the focal concerns perspective. Some are conflicting, while others are complementary. These differences are caused by a number of factors, among others: differences in methods, statistical techniques, or theories/perspectives in approaching the question; the level of analysis, differences in the number of variables, or case samples (including types of offence) that were assessed; and the dissimilar dates and locations of courts/cases in the studies.[122] Further, some studies focus on the role of individual judges in sentencing, while others focus on the contribution of different courts or countries' characteristics, or a combination of these factors.[123] As a consequence, not every finding and argument is equally valid or conclusive.

I now briefly examine the most common sentencing perspectives.[124] Since there are a number of variables in each perspective and a divergence in research results, simplification and generalisation are unavoidable.

1. Substantive Political Perspective

The substantive political perspective, based on class or conflict theory, views sentencing outcomes as directly influenced by the socio-economic status or class of the offenders. According to this perspective, offenders from lower socio-economic classes or status, that is, those who have less power and resources or belong to minority groups, generally tend to receive more severe punishment than others. Some scholars argue that this is because judges usually come from middle and upper classes and work in the bureaucratic framework to serve the interests of people in their same class,[125] or that they view the behaviour of offenders from lower socio-economic classes or status as threatening the economic and moral interests of more powerful groups.[126] Other scholars blame such sentencing disparity on the neoclassic conception of the rule of law that views law and the implementing agencies (including court/judges) as autonomous institutions that work in a formal-rationalistic manner to ensure legal certainty and crime prevention, regardless of socio-economic inequalities in society.[127] As a result, judges are not encouraged to consider social, economic or psychological pressures that trigger offenders from lower socio-economic backgrounds to commit crimes, or the relative social and economic consequences of punishment for offenders and their families. [128]

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[122] See, e.g., Ulmer (n 31).
[123] Brian D Johnson, 'The Multilevel Context of Criminal Sentencing: Integrating Judge-and County-Level Influences' (2006) 44(2) *Criminology* 259.
[124] Most of the sentencing perspectives included here are those that assess sentencing outcomes (particularly the length of imprisonment imposed and other variables surrounding the cases) using a quantitative method.
[125] William J. Chambliss and Robert B. Seidman, *Law, Order, and Power* (Addison-Wesley, 1971) 462-3, 457.
[126] John Lofland, *Deviance and Identity* (Prentice-Hall, 1969) in Darrell Steffensmeier and Stephen Demuth, 'Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?' (2000) 64 *American Sociological Review* 705, 706.
[127] Joachim J. Savelsberg, 'Law that Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law' (1992) 97(5) *American Journal of Sociology* 1346, 1348-51.
[128] Ibid.

Numbers from some of the earliest sentencing studies employing this perspective analysed the harsher punishments received by black offenders, who were usually in the lowest socio-economic class, as compared to white offenders who committed similar crimes.[129] However, many of these studies were criticised for only comparing two variables, race and sentencing outcomes, without assessing other variables.[130] As will be discussed below, a number of later studies that use regression models indicated that sharp sentencing differences between offenders based on race were more likely caused by a variety of factors rather than being attributable solely to racial discrimination.[131] This perspective (or a similar one) has also been used to explain disproportionality between punishments imposed on offenders of different socio-economic status' who committed street crimes, or between offenders who committed street crimes and white-collar crimes, although, again, there are mixed results.[132]

Despite results not being conclusive, socio-economic class or status (including race) remains a relevant factor to be considered when analysing sentencing. These factors could influence processes before trial and sentencing, such as in plea-negotiation or charge considerations, as well as via different quality of legal representation.[133] More importantly, many studies that used complex statistical analysis also found evidence that factors of race or socio-economic status had an at least indirect influence in sentencing. In particular, as argued by attribution theorists (discussed next), these factors influenced how judges assessed an offence's seriousness, an offenders' blameworthiness, and the impact of punishment.

2. Formal Legal Perspective

In contrast to the substantive political perspective, legal decision making is a technical-rational process according to the formal legal perspective. Formal legal rules 'govern the sentencing decisions via the application of these rules to specific cases'.[134] Thus, proponents of this perspective argue that legal factors would be the main determinant factors in sentencing, including offenders' of different classes or races.[135]

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[129] See the discussion of this issue in Cassia C Spohn, 'Thirty Years of Sentencing Reform: the Quest for a Racially Neutral Sentencing' in Julie Horney (ed) C*riminal Justice 2000: Policies, Processes, and Decisions of the Criminal Justice System* 3 (National Institute of Justice, 2000) 458; John Hagan, 'Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint' (1973) 8 *Law and Society Review* 357, 379-80; Jo Dixon, 'The Organizational Context of Criminal Sentencing' (1995) 100(5) A*merican Journal of Sociology* 1157, 1161

[130] Ibid.

[131] See, e.g., Hagan (n 129) 379-80; Ulmer (n 31); Spohn, 'Thirty Years of Sentencing Reform' (n 129).

[132] See, e.g., Shanna van Slyke and William D. Bales, 'A Contemporary Study of the Decision to Incarcerate White-Collar and Street Property Offenders' (2012) 14(2) *Punishment and Society* 217; Sean Maddan, R.D. Hartley, J.T. Walker, and J.M. Miller, 'Sympathy for the Devil: An Exploration of Federal Judicial Discretion in the Processing of White-Collar Offenders' (2012) 37(1) *American Journal of Criminal Justice* 4; Stewart J. D' msio and Lisa Stolzenberg, 'Socioeconomic Status and the Sentencing of the Traditional Offender' (1993) 21(1) *Journal of Criminal Justice* 61, 62-7. For further discussion of this issue, see next section concerning attribution theory.

[133] Hagan (n 129) 379-80; Samuel W. Buell, 'Is the White Collar Offender Privileged?' (2014) 63(4) *Duke Law Journal* 823, 878-88; Malcolm D Holmes, Harmon Hosch, Howard C Daudistel, Dolores A Perez and Joseph B Graves, 'Ethnicity, legal resources, and felony dispositions in two Southwestern jurisdictions' (1996) 13 *Justice Quarterly* 11.

[134] Dixon (n 129) 1161.

[135] Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press, 1972) in Dixon (n 129) 1161.

This perspective is supported by a number of studies that, using multivariate analysis (regression), reassess earlier findings on the role of, for instance, race, in sentencing. The authors of these studies argue that the fact that, for example, black offenders tended to receive more severe sentences was mainly as a result of their criminal history or the offence's severity, as opposed to their race.[136] Several similar studies came to similar conclusions,[137] although the findings are not conclusive.

3. Attribution Theory

Attribution theory aims to explain 'how individuals assess the behavior of others and attribute causes for observed behavior'.[138] In the area of judicial sentencing, attribution theory is commonly used to argue that how judges perceive an offence and attribute blame or responsibility to the actor depend on how they perceive the cause of the offence (causal attribution).[139] On the one hand, judge is more likely to support punitive approaches (including severe punishment) if he or she believes that crime is caused by "internal attributions", negative personal traits or personal choices of the offender, thus perceiving them to be more responsible or more likely to reoffend.[140] On the other hand, a judge may think that a crime is caused by "external attribution", forces or environmental factors beyond the control of an individual offender, and therefore endorse rehabilitation or social crime prevention programs, or at least impose a more lenient punishment.[141] According to scholars, the attribution process is influenced by, among others, cognitive and motivational biases of the perceiver; the perceiver's characteristics, values and beliefs; the perceiver's perception of the actor's intentions; as well as the perceiver's assumed similarity with the actor.[142]

Albonetti applies attribution theory to explain biases in sentencing practice. He argues that judges are required to make sentencing decisions without sufficient information, particularly concerning the offender's dangerousness, recidivism risks, or likelihood of rehabilitation, thus producing uncertainty.[143] As a consequence, judges would make attributions about the offender's future behaviour and risks that are linked to race, gender, and other socio-economic status' stereotypes and prejudices, which result in

[136] Spohn, 'Thirty Years of Sentencing Reform' (n 129); Hagan (n 129); Dixon (n 129) 1161.
[137] Hagan (n 129).
[138] Daniel McGillis, 'Attribution and the Law' (1978) 2(4) *Law and Human Behavior* 289, 289.
[139] Darnell F. Hawkins, 'Causal Attribution and Punishment for Crime' (1981) 2(3) *Deviant Behavior* 207, 207-8.
[140] See, e.g., Kelly G. Shaver, *An Introduction to Attribution Process* (Cambridge Mass, 1975) in Hawkins (n 139) 208; Laura J. Templeton and Timothy F. Hartnagel, 'Causal Attributions of Crime and the Public's Sentencing Goals' (2012) 54 *Canadian Journal of Criminology and Criminal Justice* 45; George S. Bridges and Sara Steen, 'Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms' (1998) 63(4) *American Sociological Review* 554, 561.
[141] Shaver in Hawkins (n 139) 208; Templeton and Hartnagel (n 140); Bridges and Steen (n 140) 561.
[142] Harold H. Kelley and John L. Michela, 'Attribution Theory and Research' (1980) 31(1) *Annual Review of Psychology* 457; E. E. Jones and Davis, K, 'From Acts to Dispositions: The Attribution Process in Person Perception' in Berkowitz (ed.) *Advances in Experimental Social Psychology* (New York: Academic Press, 1965) in McGillis, 'Attribution and the Law' (n 138) 295; Hawkins (n 139) 208.
[143] Celesta A. Albonetti, 'An Integration of Theories to Explain Judicial Discretion' (1991) 38(2) *Social Problems* 247; 248-50; Celesta A. Albonetti, 'Sentencing Under the Federal Sentencing Guidelines: An Analysis of the Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentencing Outcomes for Drug Offenses' (1997) 31(4) *Law and Society Review* 789, 797.

sentencing bias towards certain groups of offenders.[144] Offenders from minority races (for example black or Hispanic offenders), for example, are generally 'perceived' to be more aggressive, dangerous, or more prone to reoffending (internal attribution), so that it is 'justified' to incarcerate them, while white offenders are perceived to be influenced by external or environmental factors when committing offences, so rehabilitation sentences are reasoned to be sufficient.[145]

Stereotyping and prejudice in the attribution process also occurs with respect to other social categories, based on factors such as age, gender, employment, or socio-economic status.[146] Some studies, for example, found that female offenders were more likely to receive lighter sentences, including fines or suspended sentences, compared to their male counterparts, because judges generally believe that female offenders are less dangerous (thus more easily reformed), less likely to reoffend, or that they usually commit offences due to external environmental or other reasons. Further, some judges believe that severe punishments, particularly imprisonment, could have negative impacts on female offenders' families (a paternalistic and stereotyped view of female roles in the family).[147] However, young offenders, particularly if they are black and male, are generally seen as more of a threat to the community or as having less potential to be rehabilitated, so that severe sentences are 'deserved'.[148]

In the case of socio-economic status, a number of studies concerning sentencing of white-collar crimes show that the higher socio-economic status of most offenders of this type of offence provides a "shield", protecting from them receiving harsh punishment. Judges, who usually identify themselves as having similar backgrounds to this type of offender, tend to perceive the offenders as 'good people' because they usually have clean criminal records, stable work and families, and are active in their communities, so judges are more reluctant to place blame on them, or send them to the same prisons as 'other felons' who commit street crimes.[149] There are also other factors, besides the "status shield", that lead to offenders from high socio-economic backgrounds who commit white-collar crimes being perceived as not fully responsible for their actions (a lack of internal attribution). These include that the distance between the offence and its effect is usually more remote

[144] Albonetti, 'An Integration of Theories to Explain Judicial Discretion' (n 143) 250.
[145] See, e.g., Kelly G. Shaver, *An Introduction to Attribution Process* (Cambridge Mass, 1975) in Hawkins (n 139) 208; Bridges and Steen (n 140) 561.
[146] See, e.g., Spohn, 'Thirty Years of Sentencing Reform' (n 129) 433; Gary Fontaine and Catherine Emily, 'Causal Attribution and Judicial Discretion: A Look at the Verbal Behavior of Municipal Court Judges' (1978) 3(4) *Law and Human Behavior* 323, Carol Hedderman and Loraine Gelsthorpe (eds), *Understanding the Sentencing of Women* (London: Home Office, 1997); Matthew Zingraff and Randall Thomson, 'Differential Sentencing of Women and Men in the U.S.A' (1984) 12(4) *International Journal of the Sociology of Law* 401; Stephanie Bontrager, Kelle Barrick, and Elizabeth Stupi, 'Gender and Sentencing: A Meta-Analysis of Contemporary Research' (2013) 16 *Journal of Gender, Race and Justice* 349.
[147] See, e.g., Hedderman and Gelsthorpe (n 146); Zingraff and Thomson (n 146); Bontrager et al (n 146); Darrell Steffensmeier, Jeffery Ulmer, and John Kramer, 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male' (1998) 36(4) *Criminology* 763, 786-8.
[148] Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 786-8.
[149] Slyke and Bales (n 132) 220-1; Stanton Wheeler, Kenneth Mann, and Austin Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminal* (Yale University, 1988).

(so that the offender is seen to have less intention to cause harm from the offence),[150] or that the offender - if in the higher levels of an organisational hierarchy - can diffuse responsibility for their action to others, or claim that the act was done for the benefit of the organisation, not them personally.[151] Nonetheless, there are counter-arguments, which are also supported by numerous studies, that judges may attribute more blame to such offenders because of their high status (status liability).[152]

Victims' conduct, or their characters, may also affect how judges attribute blame to offenders. If judges believe that offenders committed a crime partly due to a victim's conduct or appearances (external attribution), or if judges have low perceptions of a victim's character or reputation (victim's internal attribution), less causality is attributed to offenders.[153]

There are also links between the nature of an offence and the level of harm caused and causal attribution. When an offence involves relatively common behaviour, judges may attribute an offender's actions to external attribution, such as social pressure or habit.[154] Further, if an offence is seen as less desirable, or as having had a severe impact on a victim, judges may attribute more responsibility to the offender's personal attribution.[155] Some studies also found that an offender who commits offences individually is perceived as having greater criminal intent (*mens rea*), and thus is seen as more responsible for his or her actions, than those who committed joint offences.[156]

4. The Organisational Efficiency Perspective

According to the organisational efficiency perspective, the criminal justice system operates with limited resources. As a consequence, most of the actors, including judges, share the same interest in processing cases efficiently and expeditiously, including to avoid long trials and case backlogs.[157] In practice, this leads judges to encourage, and reward offenders who are willing to plead guilty (so that they avoid the long trial process) by imposing more lenient punishments, particularly in courts with large caseloads.[158]

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[150] This is also related to the common perspective that some types of white-collar crimes, such as corruption, are victimless crimes.

[151] Peggy C. Giordano, 'Sanctioning the High-Status Deviant: An Attributional Analysis' (1983) 43(4) *Social Psychology Quarterly* 329, 334-5.

[152] See, e.g., David Weisburd, Elin Waring and Stanton Wheeler, 'Class, Status, and the Punishment of White-Collar Criminals' (1990) 15(2) *Law and Social Inquiry* 223; Stanton Wheeler, David Weisburd, and Nancy Bode, 'Sentencing the White-collar Offender: Rhetoric and Reality' (1982) 47(5) *American Sociological Review* 641.

[153] Eric P. Baumer, Steven F. Messner and Richard B. Felson, 'The Role of Victim Characteristics in The Disposition of Murder Cases' (2000) 17(2) *Justice Quarterly* 281; Mark A Whatley, 'Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-analysis' (1996) 1(2) *Aggression and Violent Behavior* 81.

[154] McGillis, 'Attribution and the Law' (n 138) 294.

[155] E. E. Jones and K Davis, 'From Acts to Dispositions: The Attribution Process in Person Perception' in Berkowitz (ed.) *Advances in Experimental Social Psychology* (New York: Academic Press, 1965) cited in McGillis, 'Attribution and the Law' (n 138) 294; B. Rosen and T. H. Jerdee, 'Factors Influencing Disciplinary Judgments' (1974) 59 *Journal of Applied Psychology* 327 cited in Martha A Myers, 'Social Contexts and Attributions of Criminal Responsibility' (1980) 43(4) *Social Psychology Quarterly* 405, 407.

[156] R. Feldman and F. Rosen, 'Diffusion of Responsibility in Crime, Punishment and Other Adversity' (1979) 2(4) *Law and Human Behavior* cited in McGillis, 'Attribution and the Law' (n 138) 294.

[157] Dixon (n 129) 1162-3.

[158] Dixon (n 129) 1162-3; Ulmer (n 31) 12.

5. The Focal Concerns Perspective

One of the most common perspectives for explaining sentencing outcomes is the focal concerns perspective. According to this perspective, a sentencing outcome is a result of a judge's subjective definition of offenders and offences based on three concerns: blameworthiness; protection of the community; and the practical constraints and consequences of judicial decisions.[159] This perspective expects legal factors to influence sentencing decisions to a greater extent than extra-legal factors. [160]

Blameworthiness (offence seriousness)[161] links to an assessment of the offender's culpability and the level of harm caused to the victim (which is usually outlined in law in different penalties for different types of offences). This concern is a retribution punishment goal, that is, for the punishment to "fit the crime".[162] Assessment of culpability includes, among other things, the offender's role in the offence (whether he or she is a leader, or a follower), and the offender's criminal history.[163] Further, incorporating attribution theory, the focal concerns perspective argues that judges' interpretations of blameworthiness are influenced by the attributions discussed before. Judges, for example, may interpret a guilty plea as evidence of remorse and rehabilitative potential, which can mitigate the perception of blameworthiness and improve the perception of rehabilitative potential.[164]

Protection of the community is translated into considering the need to incapacitate dangerous offenders (incapacitation goals), or to deter reoffending of would-be offenders (deterrence goals).[165] Like blameworthiness, judges' predictions about the offender's dangerousness, or the risk of future violence, will be influenced by the attribution process, including concerning the nature of the offence (for example, whether it was violent or not), case information, an offender's criminal history and other characteristics, such as gender, age, race, employment, or socio-economic status.[166]

The practical constraints and consequences of judicial decisions encompassing concerns for organisational efficiency and resources, include prison capacity, the need to process

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[159] For a more in-depth discussion of this perspective, see, e.g., Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766-8; Jeffery T. Ulmer and Brian Johnson, 'Sentencing in Context: A Multilevel Analysis' (2004) 42(1) *Criminology* 137, 140-6; Richard D. Hartley, Sean Maddan, and Cassia C Spohn, 'Concerning Conceptualization and Operationalization: Sentencing Data and the Focal Concerns Perspective-A Research Note' (2007) 4(1) *Southwest Journal of Criminal Justice* 58, 59-63.

[160] Ulmer (n 31) 10-11; Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766; John H. Kramer and Jeffery T. Ulmer, 'Downward Departures for Serious Violent Offenders: Local Court Corrections to Pennsylvania's Sentencing Guidelines' (2002) 40(4) *Criminology* 897, 921.

[161] The focal concern perspective defines 'blameworthiness' in a broader sense, which includes both the offender's culpability *and* the harms of the offence. This broad definition is similar to the term "offence seriousness" used by most criminal law scholars, as discussed earlier.

[162] Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 767.

[163] Ibid.

[164] Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 906.

[165] Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766-8; Ulmer and Johnson, 'Sentencing in Context' (n 159) 140-6.

[166] Johnson, 'The Multilevel Context of Criminal Sentencing' (n 123) 267; Ulmer (n 31) 10-1; Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766-9.

cases efficiently and to avoid case backlogs (as in the organisational maintenance perspective), and the impact of punishment on the individual offender (and his or her family) or victim/s.[167] In sentencing white-collar crimes, concerns about the impact of punishment on an offender (who is usually from a high socio-economic background) are commonly interpreted widely to include, among other things: the offender's suffering experienced as the result of apprehension, public indictment and conviction; the collateral disabilities incident to conviction - loss of job or professional licenses; and the offenders' susceptibility to imprisonment.[168]

The focal concerns proponents maintain that the use and reliance on these three concerns are universal. Nevertheless, they argue, borrowing the concept of the court community perspective (discussed below), 'the meaning, relative emphasis and priority, and situational interpretation of them is embedded in local court community culture, organizational contexts, and politics'.[169] More importantly, because individual judges have unique attitudes, beliefs, and characteristics, their situational interpretations of the relative importance of different focal concerns are likely to be different, as also argued by attribution theorists.[170] In short, the focal concerns perspective incorporates, at least partially, most other sentencing perspectives.

6. Court Community Perspective

The court community perspective adopts a similar approach to the focal concerns perspective on many points. The main difference is that it views courts as 'communities of action and communication based on participants' shared workplace, interdependent working relations between key sponsoring agencies (prosecutor's office, bench, defence bar), and local legal and organizational culture'.[171] Accordingly, its emphasis is more on the importance of the interactions between court actors (familiarity and stability of court community membership) and the contours of local courts (structure, resources, caseload, size, location, visibility of case processing activities), as well as the relevant legal culture and socio-political environment (for example, composition of race and the crime rate in the community, how judges and prosecutors are appointed, and jail capacity).[172] Understanding this, the court community perspective expects that factors influencing sentencing will vary between courts.[173]

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[167] Ibid.

[168] Kenneth Mann, Stanton Wheeler and Austin Sarat, 'Sentencing the White-Collar Offender' (1979) 17 *American Criminal Law Review* 479; Walter E. Craig, 'Sentencing in Federal Tax Fraud Cases' (1970) 24 *Tax Law* 49, 58; Arie Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at the Conference on Fraud Prevention and Control, Queensland, 2000); Mirko Bagaric and Theo Alexander, 'A Rational Approach to Sentencing White-collar Offenders in Australia' (2013) 34 *Adelaide Law Review* 317, 327-33.

[169] Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 905.

[170] Johnson, 'The Multilevel Context of Criminal Sentencing (n 123) 267; Ulmer (n 31) 10-1; Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766-9.

[171] Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 902.

[172] Ulmer (n 31) 11; Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 902; Brian D. Johnson, 'Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing (2005) 43(3) *Criminology* 761, 783.

[173] Johnson, 'The Multilevel Context of Criminal Sentencing (n 123); Ulmer (n 31) 11-2.

Some studies found, for example, that smaller courts, usually in rural areas, tended to impose more severe sentences than larger courts because their work is more visible to the public and they need to satisfy demand or pressure for a 'tough on crime' policy (particularly if the prosecutors and judges are elected), and they tend to have smaller caseloads.[174] Racial minority offenders (black or Hispanic) may receive harsher sentences in areas where the percentage of population of that race are larger, partly because that is perceived as increasing the threat in the community[175] and because judges see crimes committed by those race categories as 'typical' cases (so that the judges rely heavily on a biased attribution process).[176] Further, the role of other actors, particularly the prosecutor, can also influence sentencing. Some studies suggest that judges may alter their sentencing practices according to how the prosecutor exercises his or her prosecutorial discretion.[177]

7. Cross-Cutting Factors: Judges' Beliefs, Attitudes and Characteristics

As shown above, almost all theories or perspectives, besides formal rational and organisation efficiency perspectives, highlight to different degrees the role of individual judges, their socio-economic background and status, or their bias perception in determining the cause of crimes, and in influencing sentencing behaviours and outcomes. Hogarth, who conducted an in-depth study of sentencing behaviour of Canadian magistrates, goes further by arguing that 'one can explain more about sentencing by knowing a few things about a judge than by knowing a great deal about the facts of the case'.[178] His study found a significant correlation between sentencing behaviour and outcomes and judges' values, beliefs and, particularly their 'judicial attitudes'.[179] He also argued that judges have a tendency to interpret what is demanded by laws in a way that is in line with their personal values and beliefs. Punitive judges, for instance, interpreted the law as demanding punitive behaviour, and non-punitive judges, the opposite.[180]

Judges may also adopt different sentencing goals, or prefer different types of punishment in sentencing different types of offences. Studies show that a number of judges viewed the

[174] The opposite is true for larger, urban courts. See, e.g., Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 904-5; Johnson, 'Contextual Disparities in Guidelines Departures' (n 172) 783.

[175] Stephanie Bontrager, William Bales and Ted Chiricos, 'Race, Ethnicity, Threat and the Labeling of Convicted Felons' (2005) 43(3) *Criminology* 589, 591-2.

[176] Ulmer and Johnson, 'Sentencing in Context' (n 159) 141-2. This relates to the concept of "representativeness heuristic strategy", that is, where there is more representation of a certain race in a community, which most likely increases the probability of individuals of that race committing offences, judges tend to overlook substantive differences between cases and ascribe similarities based on extra-legal characteristics. Paula Kautt, 'Heuristic Influences Over Offense Seriousness Calculations: A Multilevel Investigation of Racial Disparity Under Sentencing Guidelines' (2009) 11(2) *Punishment and Society* 191.

[177] Byungbae Kim, Cassia C Spohn, and E. C. Hedberg, 'Federal Sentencing as a Complex Collaborative Process: Judges, Prosecutors, Judge Prosecutor Dyads, and Disparity in Sentencing' (2015) 53(4) *Criminology* 597; Jeffery T. Ulmer, Megan C. Kurlychek and John H. Kramer, 'Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences' (2007) 44(4) *Journal of Research in Crime and Delinquency* 427.

[178] Hogarth (n 3) 350.

[179] Judicial attitudes are a set of evaluation categories relevant to the judicial role that the individual judge has adopted or learned during his or her past experience with persons, problems or ideas in his or her social world, which include beliefs about, perceptions of, and feelings towards a particular offence, type of offender, or idea of a problem commonly associated with cases. Ibid 24.

[180] Ibid 366.

purpose of sentencing white-collar crimes as being to prevent others from committing similar crimes (general deterrence), and that fines, probation, restitution, or brief periods of imprisonment are sufficient to achieve that goal without unnecessarily having an impact on offenders, their families, employees, clients, or community relations.[181] Further, sending offenders to prison will lessen their willingness, or ability to compensate or pay restitution to victims.[182] Yet, some judges are more flexible in adopting other punishment goals, including special deterrence and incapacitation, and impose different types of punishment depending on the case contexts in sentencing other types of offences.[183]

Hogarth and other scholars also found a correlation between judicial attitudes and sentencing outcomes, as well as with judges' backgrounds or characteristics, such as age, educational and occupational backgrounds, socio-economic status, gender, religion, race, or family background although, again, this was not always conclusive.[184] It is argued that judges from professional family backgrounds, for example, were more partial towards treatment-oriented, or rehabilitation, approaches, while those from working-class backgrounds appeared to be more punitive.[185] In some studies female judges were more inclined to impose harsher punishments, particularly on black offenders or in sexual assault cases, than male judges.[186] Some studies also found that black judges and older judges tended to be harsher than white judges and younger judges.[187]

D. Conclusion

This chapter has argued that in exercising sentencing discretion, judges are guided, limited, and influenced by laws and policies, including punishment goals, case law, and sentencing guidelines (legal factors). There are maximum, and sometimes minimum, penalties for judges to follow, or lists of mitigating and aggravating factors to consider. Law and policies may also guide judges regarding the goals of punishment to be achieved, particularly between retributivism and utilitarianism, which influence the different levels of sentencing discretion and the factors to consider in sentencing. In practice the underlying philosophies and policies that guide sentencing result in sentencing disparity and issues with proportionality.

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[181] Mann et al (n 168); Craig (n 168) 54-9.
[182] Mann et al (n 168) 491-5.
[183] Mann et al (n 168); Craig (n 168) 54-9.
[184] For literature reviews of different findings on the role of judges' backgrounds or characteristics in sentencing, see Carol T. Kulik, Elissa L. Perry and Molly B. Pepper, 'Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes' (2003) 27(1) *Law and Human Behavior* 69, 72-4; Darrell Steffensmeier and Chris Hebert, 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?' (1999) 77(3) *Social Forces* 1163, 1166-9; Rhys Hester, '*Criminal Sentencing in the Court Communities of South Carolina: An Examination of Offender, Judge, and County Characteristics*' (PhD Thesis, University of South Carolina, 2012); William Hauser III, *Do Judges' Experiences and Indelible Traits Influence Sentencing Decisions?: New Evidence from Florida* (PhD Thesis, Florida State University, 2012) 13-9.
[185] Hogarth (n 3) 368.
[186] Steffensmeier and Hebert (n 184); Cassia Spohn, 'Decision Making in Sexual Assault Cases: Do Black and Female Judges Make a Difference?' (1991) 2(1) *Women and Criminal Justice* 83.
[187] Darrell Steffensmeier and Chester L. Britt, 'Judges': Do Black Judges Sentence Differently?' (2001) 82(4) *Social Science Quarterly* 749, 761; David B. Mustard, 'Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts' (2001) 44(1) *Journal on Law and Economics* 285. For different result, see, e.g., Cassia C. Spohn, 'The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities' (1990) 1 *Law and Society Review* 1197; Hauser III (n 184) 53-4.

This chapter has also illustrated how in many jurisdictions, theories, perspectives and the experiences of judges influenced, or constrained, their decision-making (with both legal and extra-legal factors playing a role). Relevant factors include those external to judges, such as the practices of other court actors, as well as the political, social, environmental and organisational context of courts, or those internal to judges, such as their values, beliefs and judicial attitudes, which are also influenced by their characteristics and social environments. Building on this chapter, the next two chapters, Chapters 3 and 4, analyse how Indonesian sentencing laws and policies limit and guide judges in sentencing.

CHAPTER 3
SENTENCING LAW AND CRIMINAL PROCEDURAL LAW IN INDONESIA

As discussed in the previous chapter, judges' discretion in determining sentences is generally limited and guided by laws and policies (legal factors). These may include, among others, the types and minimum and maximum penalties that are allowed to be imposed (including numerical sentencing guidelines),[188] mitigating and aggravating factors to be considered, sentencing aims, and so forth. In Indonesia, sentencing limitations and guidance are provided by statutes (mainly the Criminal Code) and Supreme Court policies. Until very recently, there were no numerical sentencing guidelines in Indonesia.[189]

This chapter highlights key features of Indonesian sentencing law prescribed by statutes, as well as relevant procedural laws. Supreme Court policies concerning sentencing will be discussed in the next chapter. The purpose of this chapter is to give background for the discussion of sentencing practices in Chapters 6 to 9. The topics covered in this chapter include: the types of punishment available; aggravating and mitigating factors to be considered in sentencing; mandatory sentencing; sentencing for multiple offences; and sentencing aims and philosophy according to these laws. The last part of this chapter provides an overview of institutions that enforce criminal law, mainly courts, the prosecutor's office and the police, as well as the procedural laws that guide them in doing so.

I argue that, in principle, sentencing laws do not provide sufficient guidance about how judges should go about sentencing. Instead, they are drafted in a way that gives wide sentencing discretion and interpretative powers to the judiciary. Further, some features of the laws, particularly mandatory minimum penalties, can create disproportionality in sentencing.

A. Sentencing in the Criminal Code (the KUHP) and Special Statutes

As a former Dutch colony, Indonesia has a European-style civil law system, where statute plays a vital role as a source of law. The legacy of Dutch colonial law is still present today, including the late 19th century *Wetboek van Strafrecht* (Criminal Code). After Indonesia became independent in 1945, this Code was adopted as the Indonesian Criminal Code by Law 1 of 1946, and is commonly referred as the *Kitab Undang-Undang Hukum Pidana* (KUHP). Law 1 of 1946 basically states that the *Wetboek van Strafrecht* is declared binding in some parts of Indonesia,[190] with minor revisions,[191] until the new government issues its

[188] As discussed in Chapter 2, numerical sentencing guidelines are sentencing model where a range of punishments are prescribed in a definite manner as the normally-indicated sanction to be imposed by judges for various criminal acts. See von Hirsch, 'Guidance by Numbers of Words' (n 40).

[189] In late July 2020, the Supreme Court issued limited sentencing guidelines for certain types of corruption offences.

[190] Article 17 stated that the code only applied to Java and Madura. Few months later, the government issued Government Regulation 8 of 1946 that ratify the application of the KUHP for Sumatera. Only with the passing of Law 73 of 1958 was the code applied to the whole of Indonesia.

own criminal code. Despite government efforts to draft a new criminal code since 1980[192] the KUHP is still in place. There have, however, been some changes to the Code, including, among others, adding new criminal offences, adjusting the sanctions for some offences, adjusting the value of minor offences and fines, and adding new types of punishment.[193]

The *Wetboek van Strafrecht* developed by the Dutch as an amendment to the Napoleonic penal code applied at that time, provided a great deal of discretion to the judiciary in deciding punishments and interpreting the law,[194] as is evident from its minimal guidance on sentences. Writing about this early Code, Tak argues:

> Compared to the French Penal Code, the Dutch Criminal Code is characterized by its simplicity, practicality, its faith in the judiciary, adherence to egalitarian principles ... illustrated by ... its sanctions system containing only four principal sentences: imprisonment, detention, task penalty and fine. Its faith in the judiciary is evident from the absence of lay judges or mandatory sentences for serious offences, and the wide discretionary power in sentencing … The Criminal Code is a very practical one, leaving the development of criminal law doctrine in general to the courts and to the Supreme Court in particular. [195]

The KUHP consists of: description of criminal offences; general principles of criminal law (such as the scope of application of the code and the principle of legality); sentencing issues (for example scope of criminal liability; defences; aggravating and mitigating factors; and sentencing multiple offenders/offences); some principles in relation to procedural law (for examples procedures for filing and withdrawing criminal complaints and the prohibition against double jeopardy); and definitions. These provisions are generally presented in a simple manner, leaving judges very wide discretion for legal interpretation and sentencing.

The KUHP establishes two groups of offences: crimes (*kejahatan),* which are serious offences that are closely connected with the concept of *mala in se,* such as murder, assault or burglary; and violations (*pelanggaran*), which are similar to *mala prohibita,* such as traffic violations and public drunkenness. The major implication of this categorisation, as discussed below, is the difference in the types of sanctions and sentencing rules that apply to each.

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[191] These changes included, among others, translating Dutch terms into Bahasa Indonesia and deleting or adding new offences.

[192] For a short history of the process of drafting the KUHP, see Mardjono Reksodiputro, 'Sejarah Singkat Konsep KUHP Nasional' in Bidang Studi Hukum Pidana FHUI, *Position Paper: RKUHP Kodifikasi atau Kompilasi* (UI, 2014) 44.

[193] See examples of laws that amended the KUHP in S.R. Sianturi, *Asas-asas Hukum Pidana Indonesia dan Penerapannya* (Alumni Ahaem-Petehaem, 1996) 51-4. There are also a handful provisions of the KUHP that were annulled by the Constitutional Court. See, for example, Kejaksaan Agung, *Himpunan Perubahan Undang-undang berdasarkan Putusan Mahkamah Konstitusi* (Kejaksaan Agung, 2014) 33-5.

[194] The Napoleonic penal code vastly limited judicial discretion in sentencing and legal interpretation as it was a response to the corrupt, arbitrary, feudal and inhuman practices of the judicial system prior to the French Revolution. See, e.g., Canals (n 53) 542-3; Cappelletti (n 53) 11-6.

[195] P.J.P. Tak, *The Dutch Criminal Justice System* (Wolf, 2008) 27.

In addition to the KUHP, there are hundreds of 'special statutes' (*Undang-Undang Tindak Pidana Khusus*)[196] that impose criminal penalties for certain groups of offences, such as corruption, drugs, or banking.[197] These statutes usually only lay down a description of the offence and maximum and/or minimum penalties without providing general principles on sentencing.[198]

1. Types of Punishment

The KUHP creates two categories of punishment as follows (Article 10):

a. Principal punishments:
1. capital punishment;
2. imprisonment;
3. custody;
4. fine; and
5. confinement.[199]

b. Additional punishments:
1. deprivation of certain rights;
2. forfeiture of specific property; and
3. publication of judicial verdicts.

As suggested by their name, 'principal punishments' (*pidana pokok*) are a category of punishments that must be imposed by a judge if the offender is found guilty. On the other hand, 'additional punishments' (*pidana tambahan*) are, in principle, optional[200] and cannot be imposed as a stand-alone punishment.[201] While new types of additional punishments have been introduced by special statutes – as discussed later in this chapter – none of them create new types of principal punishments.

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[196] The term 'special statute' refers to an Act that criminalises particular actions that have not been dealt with, or not sufficiently dealt with, by the general criminal provisions in the Criminal Code, and which applies to all persons, times and places (not only to particular members or a class of persons, or in particular places and times). This type of statute may provide specific provisions that differ from the general principles stipulated in the Criminal Code and the Criminal Procedural Code. Between 1998-2014 alone, there were approximately 154 statutes that imposed such criminal sanctions. Anugerah Rizki Akbari, *Potret Kriminalisasi Pasca Reformasi dan Urgensi Reklasifikasi Tindak Pidana di Indonesia* (Institute for Criminal Justice Reform, 2015) 10-2.

[197] Some of these special laws are "pure" criminal laws (concern with *mala in se*), while others mostly administrative laws that contain criminal sanctions (concern with *mala in prohibita*).

[198] Local governments can also pass regulations that impose criminal punishment, but only for minor offences (*pelanggaran*) that are punishable by a maximum of six months of custodial punishment or fines up to 50,000,000 rupiahs (approximately A$5,000). They cannot provide any principles of punishment or direction/guidance on how judges should sentence (see Article 15 of Law 12 of 2011 on the Law-Making Process and Article 238(2) of Law 32 of 2014 on Local Government). Therefore, this chapter will focus on sentencing principles in the Criminal Code (the KUHP) and special criminal statutes.

[199] Added later to the KUHP by Law 20 of 1946 on Confinement Punishment.

[200] For certain types of offences, imposing 'additional punishments' is obligatory. See, for example, Article 250, 261 and 275.

[201] With the exception of forfeiture or confiscation of the assets of a minor offender who receives a non-punitive order to be returned to his or her parents (Article 40 of the KUHP). Under some special statutes, the court can impose asset forfeiture without imposing a principal punishment, such as when an offender dies before the verdict is given (Article 38(5) of Law 31 of 1999 on Corruption Eradication).

For almost all offences, the KUHP offers two or more options for the types of punishment that judges can impose - usually some form of confinement and a fine. Judges must choose and impose the one they deem appropriate in a particular case. Each type of punishment has its own maximum limit. For example, the sanction for stealing is five years of imprisonment *or* an A$90 fine at maximum (Art 362). Further, unlike some special criminal statutes, the KUHP does not impose mandatory minimum penalties.

Imprisonment is the most common type of penalty available under the KUHP and other special-purpose criminal statutes. Of 1004 sanctions stipulated in the KUHP, 13 are the death penalty (1.29%), 683 are imprisonment (63.54%), 118 are custody (*kurungan*, a less restrictive form of imprisonment that is explained in more detail below) (11.75%) and 253 are fines (23.40%).[202] The domination of imprisonment in the special statutes is staggering. Of 154 special statutes that were passed between 1998-2014, almost all (91.34%) incorporated imprisonment as a type of punishment.[203] Furthermore, unlike the KUHP, most special statutes impose an accumulation of sanctions for a single offence (usually imprisonment *and* fines) or give the option to judges to impose more than one type of principal punishment.[204]

Beside punishment, KUHP also allows judges to impose 'measures' (*tindakan*), such as sending convicts with mental illnesses to health care facilities for a period of time (Article 44(2)). Unlike punishment, these measures relate to offenders' conditions, not their blameworthiness. This type of 'non-punitive sanction' aims to simultaneously help the individual offender and protect the public.[205] Other measures are stipulated in special criminal statutes, such as ordering a drug addict into treatment or returning under-age offenders to their parents/guardians, or placing them in government/charitable institutions.[206]

1.1. Principal Punishments

Death Penalty

The most severe type of punishment that exists in the Indonesian criminal system, despite continuous criticism of it, is capital punishment or the death penalty (*hukuman mati*). According to the KUHP, capital punishment can be applied only for limited crimes that are considered very serious, such as crimes against the state (for example, Article 104) or premeditated murder (Article 340), and is not to be imposed on juveniles.[207] Every offence punishable by capital punishment always includes alternative sanctions, such as a life sentence or imprisonment for up to 20 years.

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[202] Wahyudi, *Kebijakan Legislatif dalam Rangka Mengefektifkan Pelaksanaan Sanksi Pidana Denda* (LLM Thesis University of Diponegoro, 2004) 88.
[203] Akbari (n 196) 20-2.
[204] Usually the law will state that the sanction for a certain offence is "imprisonment *and/or,* fines". See Ibid.
[205] P.A.F. Lamintang and Theo Lamintang, *Hukum Penitensier Indonesia* (Sinar Grafika 2nd ed, 2010) 194-5.
[206] See, for example, Article 103(1)(b) of Law 35 of 2009 on Narcotics and Article 82(1) of Law 11 of 2012 on the Juvenile Criminal Justice System.
[207] Article 3(f) and Article 81(6) of Law 11 of 2012 on Juvenile Criminal Justice System.

Imprisonment

The most common type of sanction in the KUHP is imprisonment (*penjara*), which can be imposed for almost all crimes but not for mere violations (*pelanggaran*). There are two types of imprisonment, lifetime or temporary. In some special statutes, imprisonment is also used as a substitute for fines or restoration when the convict fails to pay. The length of temporary imprisonment in the KUHP is organised in a way to reflect the nature of the offences. In principle, the length of temporary imprisonment for offences stipulated in the KUHP is at least one day and the maximum is 15 years (Article 12(2)). Nevertheless, judges may, as an alternative punishment, impose a maximum of 20 years of imprisonment for crimes punishable by capital punishment or lifetime imprisonment, or for offenders who commit multiple or aggravated offences (Article 12(3)). Thus, lifetime imprisonment aside, no convict may be imprisoned beyond 20 years.[208]

There is a tendency in many recent special statutes to threaten offenders with more severe penalties, even for offences that are not relatively serious, and also to define the offences in a broad and vague manner, so they can be applied for offences already proscribed in the KUHP, such as minor offences.[209] Some statutes raise the level of maximum temporary imprisonment to 20 or even 25 years[210] and introduce mandatory minimum sentences. These developments have raised serious concerns about proportionality of sanctions as between crimes in the KUHP and in the special statutes.[211]

Custody

While the idea of custodial punishment (*kurungan*) and imprisonment both involve limiting the convict's liberty, the first is considered more lenient because those sentenced to custody enjoy more rights and better conditions than those who are imprisoned.[212] Custodial punishment can be imposed on offenders committing less serious crimes, such as negligent acts,[213] or violations (*pelanggaran*),[214] or as a substitute for a fine not paid by the convict (Article 30(2)). It is usually an alternative to imprisonment or fines, although a few offences punishable only by custodial punishment.[215] In some cases, a custodial penalty can also be applied to an offender who commits repeated violations punishable by a fine.[216] The maximum length of a custodial sentence is one year, but it can be extended for up to one year and four months if there are aggravating circumstances (Article 18).

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[208] Article 12(4) also states that '(i)n no case may the term of twenty years be exceeded'. The only possibility for someone to receive imprisonment for more than 20 years is when a convict commits another crime while serving his or her sentence – an *argumentum a contrario* of Article 71. Nevertheless, there are scholars who argue that the limitation in Article 12(4) can also be exempted in cases where an offender commits a crime punishable by imprisonment up to 20 years and there is an aggravating factor. See, for example, Sianturi (n 192) 460.

[209] See further discussion on this issue in Chapter 8.

[210] See, for example, Article 4 of Law 8 of 2010 on Money Laundering and Article 36 of Law 26 of 2000 on Human Right Court.

[211] See, for example, Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (Citra Aditya Bakti, 3rd ed, 2013) Ch 2, 10, 11 and 14.

[212] For instance, custodial punishment is conducted in the domicile of the convict or, with government permission, in another place that he or she requests (Article 21). In practice, however, this differentiation does not really occur.

[213] See, for example, Articles 191, 193, 195, 197 and 199-201 of the KUHP.

[214] See Book III of the KUHP.

[215] See, for example, Articles 334(3), 392(2), 504, 505 and 520 of the KUHP.

[216] See, for example, Articles 489(2), 492(2) and 495(2) of the KUHP.

Fines

Fines (*denda*) are, as mentioned, only applicable to less than a quarter of offences, and are generally used as alternative sanctions to imprisonment or custody for crimes and violations. Nevertheless, there are less serious offences (violations) that are only punishable by fines, for example, organising a party without a permit (Article 510(1)). For such offences, offenders can make an out-of-court settlement by paying the maximum fine and costs incurred by the prosecutor (if the prosecutor has already processed the case).[217]

Before 2012, the minimum and maximum fines under the KUHP were very low. Aside from gambling, the minimum fine was just Rp3.75 or approximately A$0.004 (Article 30(1)) and the maximum was Rp150,000 (approximately A$15). The average fine for most offences was Rp4,500 (approximately A$0.45). These amounts were so low because the last time the value of fines was adjusted was in 1960[218] (except for gambling, which was adjusted in 1974).[219] This made fines in the KUHP practically ineffective and they were therefore almost never imposed.[220] In 2012, the Supreme Court readjusted the value of all fines in the KUHP (again, except for gambling) by increasing them a thousand fold (Article 3 of Supreme Court Regulation 2 of 2012 on Adjustment of Standards for Minor Offences and Value of Fines in the KUHP). This regulation, as its title suggests, also adjusted the amount of loss necessary for a property offence to be considered a minor offence, as is discussed in Chapter 8.

The minimum and maximum fines in the KUHP apply to every offender committing the same offence. It does not recognise different schemes for different offenders' financial capabilities, such as the 'Day Fine' system, used in some counties.[221] Thus, poor offenders may be burdened unfairly and disproportionately compared to wealthy offenders.

According to Law 8 of 1981 on Criminal Procedural Code, fines should be paid within 30 days of the verdict and, in particular cases, this can be extended for another month (Article 273(1) and (2)). Should the convict fail to pay, the fine is altered to custodial punishment for a maximum of six months, which can be extended to eight months where there is an aggravating factor (Article 30(3) and (5) of the KUHP).

According to the KUHP, the term of custodial punishment where a fine is not paid should be calculated as follows (after readjustment by the Supreme Court Regulation):

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[217] Article 82(1) of the KUHP.

[218] The last adjustment was made by Government Regulation in Lieu of Law 18 of 1960 on Revision of the Value of Fines in the Criminal Code and Other Statutes that were Enacted Before 1945. This regulation was validated by Law 1 of 1961. According to Article 1 of this law, all fines in the KUHP and other statutes which were enacted before 1945, except Law on Economic Crime, should be read as increased fifteen-fold.

[219] Law 7 of 1974 on Policing on Gambling revises the maximum imprisonment and fine for gambling-related offences in the KUHP.

[220] See, for example, Suhariyono, AR, *Pembaruan Pidana Denda di Indonesia* (Papas Sinar Sinanti, 2012) 225; Niniek Suparni, *Eksistensi Pidana Denda dalam Sistem Pidana dan Pemidanaan* (Sinar Grafika, 2nd ed, 2007) 65.

[221] For concept of one-day fine, see Elena Kantorowicz-Reznichenko and Maximilian Kerk, *Day Fines: Asymmetric Information and the Secondary Enforcement System* (Discussion Paper, Rotterdam Institute of Law and Economics: Rotterdam, 2015).

> For an imposed fine of seven thousand five hundred Rupiah or less, shall be substituted one day, an imposed fine in a larger amount shall be substituted with not more than one day for each seven thousand five hundred of the imposed fine and for the remaining part thereof.[222]

Many special statutes also stipulate fines as a type of punishment. Some statutes specify it as an alternative to imprisonment as in the KUHP, while others provide it as an option or mandatory penalty to be accumulated with imprisonment or custody[223] to increase the penalty severity. Further, the maximum fines in special statutes are usually very high and some even impose mandatory minimum fines.[224] All of these conditions mean that many convicts are unable to pay fines, and thus spend longer in custody.[225]

The majority of special statutes do not contain any special provisions to deal with unpaid fines. Thus, the provisions in the KUHP apply despite the vast difference in fine values between many special laws and KUHP.

Confinement

Law 20 of 1946 created a new type of principal punishment, confinement (*pidana tutupan*). This is designed for a convict who commits an offence for motives that ought to be respected (Article 2), including for political, religious or moral motives.[226] Unlike imprisonment or custody, confinement is conducted in a special place – the 'house of confinement' (*rumah tutupan*),[227] where convicts enjoy more freedom and better facilities.[228] However, this type of punishment has very seldom been imposed and is no longer applied.[229]

1.2. Additional Punishments

Additional Punishment in the KUHP

As mentioned above, as well as the principal punishments, judges may also impose additional punishments on convicted offenders, such as deprivation of some of their rights (*pencabutan hak-hak tertentu*), forfeiture of their property (*perampasan barang-barang*

[222] Article 30 (4) of the KUHP.
[223] See examples in Table 3.1 discussed next.
[224] See examples in Table 3.1 discussed next. The highest maximum fine acknowledged in Indonesian law for an individual offender (not company) is in the Outer Space Law, which is Rp5 trillion (A$500,000,000) (Article 99 of Law 21 of 2013).
[225] Interview with Prosecutor #16 (Bandung, 20 January 2017). The interviewee gave the example of narcotics cases where most offenders are charged with Articles 111 and 112 of Narcotics Law, with Rp800 million (A$80,000) as their minimum fine.
[226] A. Van Maanen, *Een Nieuwe Hoofdstraf I de Republic* (1947) in Han Bing Siong, *An Outline of the Recent History of Indonesian Criminal Law* (Martinus Nijhoff, 1961) 25.
[227] Article 1 of Government Regulation 8 of 1948 on Confinement Houses.
[228] See Government Regulation 8 of 1948 on Confinement House. These include, among other things, better food (Article 33) and facilities (e.g., Articles 33(3) and 47(1)). Convicts also have more freedom, such as to bring their own books (Article 47(1)) or decorate their rooms (Article 44(2)).
[229] Some suggest that it was only used once for national heroes or politicians who attempted a coup against the Prime Minister Syahrir on 3 July 1947. See Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana di Indonesia* in Adami Chazawi, *Pelajaran Hukum Pidana 2* (Rajawali Press, 2009) 43.

tertentu), or publication of a judicial verdict (*pengumuman putusan hakim*). These are explained in more detail below.

Deprivation of Rights. According to Article 35(1), rights that can be suspended are, among others, the right to hold office or be involved in certain professions, to work in certain fields, to vote and be voted for in elections, to become a legal counselor, trustee or curator, and to be a parent or guardian. These additional punishments can only be imposed on offenders committing certain crimes[230] and their length depends on the type of principal punishment imposed on the offenders (Article 38(1)).

Forfeiture. The court can order the forfeiture of assets of a convict that are the result of the crime or an instrument of the crime (Article 39(1)).[231] Usually investigators would confiscate such assets prior to the trial. If not, or if confiscated but the value is less than the result of the crime, the court can order a convict to surrender his or her assets to repay the balance. If the convict fails to do so, he or she should suffer, as a substitute, custodial punishment of between one day and six months, depending on the amount of the obligation (Article 41(1) and (2)). The conversion uses the same calculation as custodial punishment being substituted for a fine, as discussed earlier (Article 41(3)).

Publication of Verdict. This can be imposed on offenders committing particular crimes, such as fraud, embezzlement and other dangerous conduct.[232] The objective of this additional punishment is to prevent crime by warning society about the potential of a convict to harm them.[233]

Additional Punishment in Special Statutes

A number of special statutes introduce new types of additional punishments. Law 31 of 1999 on Corruption, for example, empowers the court to: order offenders to pay restitution (*uang pengganti*) to the government equivalent to the amount of the stolen assets; revoke a business license; temporarily halt the operation of a company; or withdraw rights and benefits received by the convict (Article 18(1)). The Law also acknowledges imprisonment as a substitute for restitution, that is, where a convict cannot pay the restitution and has no assets to be forfeited (Article 18(2) and (3)). However, unlike the similar concept in the KUHP, the length of this substitute imprisonment can be much longer, 'provided [that it] does not exceed the maximum penalty of the offence in the law' (Article 18(3)). Thus, it may be up to 20 years, depending on the judges' discretion.

1.3. Suspended Sentence, Compensation and Special Order

The KUHP recognises the concept of a suspended sentence (*pidana bersyarat*) or probation, that is a conditional suspension of the execution of a sentence. Judges may only impose a suspended sentence on a convict who is sentenced to one year of imprisonment

[230] Such as theft, fraud and embezzlement.

[231] The Criminal Procedural Law details further types of property that can be seized and forfeited as including property being used to prepare for the crime, or which has a direct relation to it, as well as property that is used to obstruct an investigation (Article 39(1)).

[232] See Article 43 in conjunction with Articles 128(3), 206(2), 361, 377, 395 and 405(2) of the KUHP.

[233] See, for example, Adami Chazawi, *Pelajaran Hukum Pidana 1: Stelsel Pidana, Tindak Pidana, Teori-teori Pemidanaan dan Batas Berlakunya Hukum Pidana* (Radja Grafindo Perkasa, 2002) 54; Sianturi (n 192) 472.

or less,[234] custody (*kurungan*), or a fine if they are reasonably convinced that the convict will not commit any crimes during probation (Article 14a(1) and (4)) or, in the case of fines or forfeiture, if they believe such punishments will create severe difficulties for the convict (Article 14a(2)).[235] The maximum probation period is between two and three years, depending on the offences (Article 14b). If the Court imposes a suspended sentence, it may also attach special conditions (*kondisi khusus*) to be met by the convict during the probation period. It can, for example, order the convict to pay damages to the victim (Article 14c(1)).

2. Mandatory Minimum Punishments in Special Statutes

Since 1997, a number of special statutes have stipulated mandatory minimum penalties, both for imprisonment and fines,[236] which are basically not recognised in the KUHP.[237] The reasons for this are to create stronger deterrents[238] and minimise disparity in sentencing,[239] although, as in other jurisdictions, mandatory minimum sentences are sometimes motivated by politics[240] or even as a response to what lawmakers understand to be the demands of international law.[241]

As shown in Table 3.1 below, the severity of minimum penalties in special statutes varies: from just one month to 10 years' imprisonment, and from merely Rp2 million (A$200) to Rp10 billion (A$1 million) in fines. Similarly, the distance or range between the minimum and the maximum penalties can be as short as just two months, or as long as 19 years. Furthermore, there seems to be no consistency in the ratio between the duration of prison sentences penalties *vis a vis* the amount of fines in various statutes.[242]

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[234] According to the *memorie van toelichting* (explanatory memorandum) of the KUHP, the reason for prohibiting parole for an offender who is sentenced to more than a year of imprisonment or custody is to avoid feelings of injustice in society. See G.A. Hamel, *Inleiding tot de Studie van het Nederlandsche Strafrecht* (1927) 551 in Sampurno Djojodihardjo, 'Putusan Pidana Bersyarat Bukanlah Merupakan Suatu Pengampunan (*Mercy*)' (1970) *8 Majalah Lembaga Pembinaan Hukum Nasional, Hukum Nasional* 1, 68.

[235] However, judges cannot impose a suspended sentence on a convict sentenced to a fine or forfeiture when he or she is sentenced for certain crimes that include drug offences (Article 14a(2)).

[236] The first statute that imposed minimum sentences was Law 5 of 1997 on Psychotropic Substances (Article 59(1)(e)).

[237] The minimum period for imprisonment is only one day and the minimum fine is less than A$0.50.

[238] See, for example, the general elucidations to the Law 18 of 2013 on Prevention and Eradication of Forest Destruction, Law 23 of 2004 on Elimination of Domestic Violence, and Law 9 of 2013 on Prevention and Eradication of Terrorist Financing.

[239] See, for example, government responses to constitutional review of the minimum penalties provisions in the Corruption Eradication Law in Constitutional Court Decision 39/PUU-X/2012 (17-18). See also 'Sanksi Berat Disiapkan untuk Pembalak Liar', *Hukumonline* (online), 17 June 2011 <http://www.hukumonline.com/berita/baca/lt4dfa9a802053a/sanksi-berat-disiapkan-untuk-pembalak-liar->.

[240] Institute for Criminal Justice Reform, 'Legalkan Hukum Kebiri (Chemical Castration), Upaya "Balas Dendam" Pemerintah Atas Nama Kepentingan Korban' (Press Statement, 15 January 2016).

[241] See government responses in the constitutional review of the minimum penalties in the Corruption Eradication Law in Constitutional Court Decision 39/PUU-X/2012 (17-18).

[242] For further assessment of these issues, see Barda Nawawi Arief, 'Tinjauan terhadap Pengenaan Sanksi Pidana Minimal Khusus' (unknown, 27 November 2007).

Table 3.1: Examples of the Minimum and Maximum Sentences in Some Special Statutes

Statutes & Crimes/Offences	Sanctions/Penalties			
	Imprisonment		Fines (thousand Rp.)	
	Min	Max	Min	Max
Central Bank (Law 23 of 1999) Unlawfully use foreign money for financial transactions or payments against the law (art. 65 in conjunction with Art. 2 (3))	1 month	3 months	2,000	6,000[b]
Labour (Law 13 of 2003) Employer fails to pay salary to the employee who does not come to work due to lawful reasons, such as sickness, leave, etc. (art. 186(1) in conjunction with art. 93(2))	1 month	4 years	10,000	400,000 [a]
Corruption Eradication (Law 31 of 1999 as amended) Abuse of power to benefit him/herself or another (art. 3)	1 year	Life or 20 years	100,000	1,000,000 [a]
Narcotics (Law 35 of 2009) Own, keep, provide a non-plant narcotic in group I (e.g., opium) which is against the law (art. 112(1))	4 years	12 years	80,000	8,000,000 [b]
Banking (Law 7 of 1992 as amended) A shareholder who instructs a bank's commissioner, director or employee to do/not do things resulting in the Bank not taking the necessary measures to assure the Bank's adherence to the applicable law (art. 50A)	7 years	15 years	10,000,000	200,000,000 [b]
Disasters (Law 24 of 2007) By omission, conducts a high-risk activity (such as oil drilling, develop nuclear weapon, mining exploration) without conducting a risk-assessment and causes disaster and property loss (art. 75(2) in conjunction with art. 40(3)).	6 years	8 years	600,000	3,000,000
Human Rights Court (Law 26 of 2000) Genocide (art. 36)	10 years	Death, life or 25 years	N/A	N/A

(a) the imposition of the fine is optional
(b) the imposition of the fine is compulsory in addition to imprisonment

The low minimum penalties and the wide margin between the minimum and the maximum penalties presented in Table 3.1 raises questions about the standards used to formulate them, and how they can bring about deterrence or minimise sentencing disproportionality and disparity. Apart from these issues, the most troubling matter is the ambiguity of some statutes in describing the elements of the offences, which can be misused by judges and, in particular, police and prosecutors, to deal with offenders who

caused only small harm or whose culpability is low, thus causing injustice. This happens, for example, in narcotics, illegal logging, or people smuggling cases.[243] Due to criticism of this, lawmakers recently removed minimum penalties from some statutes or provided different levels of minimum penalties for different types of offenders in new statutes.[244]

In 2012, the Constitutional Court, a special court that has a jurisdiction that includes the exclusive right to review the constitutionality of a statute, ruled on the constitutionality of minimum penalties when reviewing a challenge to the Corruption Eradication Law. It maintained that the adoption of statutory minimum penalties is a matter of legal policy within the constitutional power of lawmakers because corruption is an extraordinary crime and the Law aims to deter its commission by the general public.[245]

3. Aggravating and Mitigating Factors

The Criminal Procedural Code requires judges to explain the aggravating and mitigating circumstances that influence them to arrive at a particular sentence (Article 197(1)(f)). However, the KUHP only lists a few 'general' factors that can aggravate or mitigate the degree of a sentence's severity. The aggravating factors are: the status of the offender; the use of particular state symbols during offences; and the criminal record of the offender. The young age of the offender, criminal attempt, and the minor role of offender in an offence are mitigating factors. What it means by 'general' factors is aggravating and mitigating factors that apply to all offences/offenders or groups of offence/offender. This is in contrast to 'specific' aggravating and mitigating factors, where the factors are integrated in the definition of the offences, such as higher penalty for a premeditated murder compared to a spontaneous one.

There are also a number of general and specific aggravating and mitigating factors in the special statutes. Nevertheless, the general aggravating and mitigating factors in the KUHP apply to criminal penalties stipulated in special statutes unless otherwise stated (Article 103).

3.1. General Aggravating Factors in the KUHP

Offence by a Public Official

[243] For the problems in the application and interpretation of mandatory minimum penalties in Immigration Law, see, e.g., Antje Missbach, 'Sentencing People-Smuggling Offenders in Indonesia', CILIS Policy Paper 12, Centre for Indonesian Law, Islam and Society (University of Melbourne, 2016); Wayne Palmer and Antje Missbach, 'Judicial Discretion and the Minimum Statutory Sentence for Migrant Smuggling through Indonesia' (2018) 5(2) *Asian Journal of Law and Society* 413; For the problems in the application and interpretation of mandatory minimum penalties in Narcotics Law, see Institute for Criminal Justice System, *Kertas Kerja: Memperkuat Revisi Undang-undang Narkotika Indonesia Usulan Masyarakat Sipil* (ICJR, 2017); Rifqi S. Assegaf, 'Manoeuvring the Mandatory Minimum Sentences: Judicial Decisions on Corruption' in Tim Lindsey and Helen Pausacker (eds), *Crime and Punishment in Indonesia* (forthcoming).

[244] For example, the minimum and maximum penalties for certain illegal logging offences by member of local communities (those who live near or in the forest and whose livelihood depends on it) in the 2013 Prevention and Eradication of Forest Destruction Law are significantly lower than other types of offenders – between three months to two years for the former, and one year to five years for the late.

[245] Constitutional Court Decision No. 39/PUU-X/2012 [33-4].

Article 52 of the KUHP states that the sentence for public officials who abuse their power to commit an offence can be increased by up to one-third of the maximum penalty of the offence. The term 'abuse of power' in that article includes abusing specific duties, authority (in a general sense) and using opportunities or means conferred upon him/her by their office. This aggravation does not apply in some specific offences designed to criminalise public officials (for examples, see the offences under Articles 421 and 436).[246]

Use of National Flags During an Offence

A similar one-third sentence increase can be imposed on offenders who, during the commission of their offences, use the national flag (Article 52a).[247] The reasons for adding an additional penalty for such conduct is not because it dishonours the flag, but because the offender is seen as using the flag to manipulate the victim by attempting to pass off illegal conduct as the performance of a public duty. [248]

Recidivism

Theoretically speaking there are three ways laws formulate punishments for recidivists: first, by threatening them with a higher penalty; second, by giving a sentencing discount to a first-time offender; or third, by treating recidivists the same way as first-time offenders.[249] The KUHP takes the first approach, with some modifications.

According to the KUHP, offenders with previous convictions may receive a heavier sentence for a new offence. The penalty may be increased by up to one-third of the maximum penalty of the offence.[250] This only applies to offenders who commit offences listed in Articles 486, 487 and 489, such as offences: related to property (for example, theft, embezzlement, forgery or counterfeiting); against life and causing physical harm (for instance, murder and assault); and against the state and other related offences (such as defamation, insulting the president or desecration of the flag). Furthermore, this heavier sentence can, in principle, only be imposed on offenders who commit exactly the same offence (or another offence in the same group) within less than five years of his or her previous conviction.[251]

Law 31 of 1999 on Corruption stipulates different aggravating factors for corruption reoffenders. According to this Law, the maximum penalty for repeat offenders of particular corruption offence may be increased to death (Article 2(2)).

[246] See e.g., H.J. Schavendijk, *Buku Pelajaran tentang Hukum Pidana Indonesia* (1955) in Chazawi, *Pelajaran Hukum Pidana 2* (n 228) 74; Roeslan Saleh, *Stelsel Pidana Indonesia* (Gadjah Mada, 1960) 13.
[247] This penalty was added to the KUHP by Law 73 of 1958.
[248] Elucidation of Law 73 of 1958 (Article III (1)).
[249] Ashworth, *Sentencing and Criminal Justice* (n 6) 184-191.
[250] See Articles 486, 487 and 488 of the KUHP. The additional sentence for some offences is less than one-third of the maximum penalty of the offence.
[251] For some offences, the time period is shorter than five years. See, for examples, Articles 216(3), 489(2), 495(2), 501(2) and 512(1) and (2) of the KUHP.

3.2. General Mitigating Factors in the KUHP

Young Offenders

According to Article 47(1) of the KUHP, the sentence for a minor (aged 16 years or less) should be reduced by one-third of the maximum penalty. This provision was later changed by Law 11 of 2012 on the Juvenile Criminal Justice System, which adjusts the age limit between 14 and under 18 years old and increases the penalty reduction to half the maximum penalty (Articles 1(3), 69(2), 79(2) and 81(2)).[252] Furthermore, the death penalty, life sentence and the mandatory minimum penalties in specific statutes cannot be applied to juveniles (Articles 81(6) and 79(3)).[253]

Criminal Attempts and Assisting an Offence

A sentencing reduction is also given to offenders committing incomplete offences (an attempt or *percobaan*) or those who only help or assist the main offender (*pembantu*). In principle, the KUHP considers an attempt to commit a crime to be an offence[254] but the sentence is reduced by onethird from the maximum penalty for the complete offence (Article 53(2)). Similar sentencing discounts apply to offenders who only help or assist the main perpetrator of an offence (Article 57(1)). Someone is considered as a 'helper' if they, prior to or during an offence, deliberately provide opportunity, means or information to the main perpetrator (Article 56).[255]

3.3. Aggravating and Mitigating Factors in Special Statutes

Outside KUHP, there are several special statutes that also recognise aggravating and mitigating factors in sentencing. As mentioned earlier, Law 11 of 2012 on the Juvenile Criminal Justice System provides general provisions for penalty discount for children who commit offences. Law 13 of 2006 on Witness Protection (as amended) also acknowledges a sentencing discount for justice collaborators. These are offenders who assist a law enforcer to reveal the main perpetrator or to recover the proceeds of the crime, particularly in serious crimes. According to this law, a justice collaborator may receive a sentence reduction, the amount of which is at the discretion of the judges (Article 10A).[256]

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[252] Law 11 of 2012 on the Juvenile Criminal Justice System also limits offences that may warrant imprisonment for a juvenile to serious crimes, violence and other offences that endanger society (Articles 79(1) and 81(1)). A child between 12 and under 14 years old can only receive 'measures', not imprisonment (Articles 1(3) and 69(1)).

[253] The maximum penalty for a young offender committing offences punishable by death or a life sentence is reduced to ten years (Article 82(6)).

[254] See Articles 53(1) and 54. However, attempts to commit some crimes (*kejahatan*), such as light assault of humans or animals (Articles 351(5), 302(4), and 184(5)), are not considered an offence. Further, an attempted violation (*pelanggaran*) is not considered an offence.

[255] One of the key differences between a helper and a main perpetrator is their intention. While the intention of a main perpetrator is to commit the offence, a helper only intends to help with the offence. See also, for examples, Sianturi (n 192) 322.

[256] This reduction may include being sentenced by probation or receiving the lowest penalty among other offenders. See the Elucidation to Law 13 of 2006 as amended by Law 31 of 2014 on Witness and Victim Protection, as well as Article 4(4) (a) of the Minister of Law and Human Rights, Attorney General, Chief of the Police, Head of

Yet, most aggravating and mitigating circumstances in special statutes are only designed for specific conditions. For example, In the Corruption Eradication Law, there is no sentencing reduction for attempting or assisting corruption offences.[257] Furthermore, fines for offences committed by corporations are generally higher than for natural persons.

4. Sentencing Multiple Offences

Another important concept in Indonesian criminal law which is closely related to sentencing is that of multiple offending (*perbarengan* or, in Dutch, *samenloop/concursus*), a condition where an offender violates more than one law in a single incident, or a number of them, for which he or she has not previously been held accountable. The KUHP distinguishes different sentencing structures for different types of multiple offending, which aim to reduce the total penalty imposed on the offender; none can exceed a maximum of 20 years of imprisonment. For example, when an offender, in a single incident, commits an offence that gives rise to a number of charges (*concursus idealist or perbarengan peraturan)*, he or she should only be sentenced for the single offence that warrants the heaviest penalty (Article 63(1)). If an offender commits more than one crime such that each should be seen as a separate offence, and each is punishable by the same type of principal punishment (*concursus realist (perbarengan perbuatan*)), he or she should only be punished for one of the offences but the punishment may be increased by a maximum of one-third of the most severe maximum penalty for the offence (Article 65(1) and (2)).

5. Aims of Punishment

There is no law which specifically and explicitly mandates particular aims of punishment to be adhered to by judges in sentencing. Nevertheless, there are some special laws that indicate strong preferences towards deterrence and rehabilitation over other types of punishment objectives. What is emphasised in most laws is that punishment must be proportional – that is it should be weighted according to the nature of the offence and the offender's context and characteristics, and punishment should not be imposed as revenge.

5.1. Aims and Proportionality of Punishment in the KUHP and Law on Judicial Power

Although the KUHP is silent on aims for punishment to be pursued by judges in sentencing, the historical context of the KUHP's enactment shows its endorsement of mixed aims or justifications for punishment. As argued by scholars, the KUHP (*Wetboek van Strafrecht)* adopted a neo-classical school of thought.[258] One of the main ideas of this school is that while humans, as rational beings, have free will, they are also constrained by

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Corruption Eradication Commission and Witness and Victim Protection Agency Agreement on Whistleblowers and Justice Collaborators of 2011.

[257] Article 15 of Law 31 of 1999 on Corruption Eradication.

[258] See, e.g., Tak (n 195) 27; H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht: Deel I* (1891) 386-7 as quoted in Sudarto, *Hukum dan Hukum Pidana* (Alumni, 5th ed, 2007) 47; Constantijn Klek, 'Consents in 'Dutch Criminal Law'' in P. Alldridge and C.H. Brants (eds), *Personal Autonomy, the Private Sphere and the Criminal Law - A Comparative Study* (Hart, 2001) 205, 205-6.

biological, psychological and social circumstances.[259] Furthermore, there is a strong focus on the proportionality principle.[260] These ideas can be seen in the explanatory memorandum (*memorie van toelichting*) of the Code which states:

> In determining the severity and leniency of a sentence, a judge should take into account the objective and subjective conditions of each offence that is committed as well as the offence and the offender. What kinds of rights are violated due to the offence? What harm does it cause? What was the offender's previous behaviour? Is it the first charge that indicates his tendency toward a wicked path or a repetition of evil character which is already observed? The minimum and maximum penalty of each offence should be put in a wide manner so that even if the answer to all of the above questions does not benefit the offender, the maximum penalty in place is already sufficient.[261]

There are two important ideas that can be extracted from this statement. First, by arguing that judges are obliged to evaluate the overall aspects of the offence and the offender, the lawmakers are trying to accommodate both the characteristics of retributivism and utilitarianism in what is commonly referred to as mixed justifications for punishment, as discussed in Chapter 2. The drafters want to ensure that the criminal sanction and punishment are proportional, reflecting on the (past) offence, but, at the same time, also have future purposes, particularly to prevent crime through special deterrence and rehabilitation.[262] Second, the wide span between the minimum and the maximum penalty was designed to give room for judges to determine the most appropriate and proportionate punishment for the case at hand as well as to indicate to judges that the maximum penalty is to be reserved for worst-case scenarios.[263]

The preference for mixed justifications for punishment and the proportionality principle in the KUHP can also be explained, at least in part, by its punishments for recidivists and multiple offences cases. As discussed, while the KUHP acknowledges a higher maximum penalty for re-offenders, it limits its application to only a few offences. Furthermore, it does not recognise pure accumulation of punishment for offenders committing multiple crimes.

Similar ideas are adopted in the laws on the judiciary. Article 20(1) of Law 19 of 1964 on

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[259] See, e.g., Roger Hopkins Burke, *An Introduction to Criminological Theory* (Willan 3rd, 2009) 31-33; Topo Santoso and Eva Achjani Zulfa, *Kriminologi* (Rajawali Press, 2001); Margaret Gwynne Lloyd and Michel Bénézech, 'Criminal Responsibility in the French Judicial System' (1991) 2 (3) *Journal of Forensic Psychiatry* 281, 282.

[260] C.M. Pelser, 'Criminal Legislation in the Nineteenth Century: The Historic Roots of Criminal Law and Non-Intervention in the Netherlands' in P. Alldridge and C.H. Brants (eds), *Personal Autonomy, the Private Sphere and the Criminal Law - A Comparative Study* (Hart, 2001) 181, 187-8.

[261] Sudarto (n 257) 47-8.

[262] See for example, Jan W de Keijser, 'Never Mind the Pain, It's a Measure! Justifying Measures as Part of the Dutch Bifurcated System of Sanctions' in Michael Tonry (ed), *Retributivism Has a Past, Has It a Future?* (Oxford University Press, 2011) 188, 189-90; Jan W de Keijser, *Punishment and Purpose: From Moral Theory to Punishment in Action* (17 June 2017) Rozenberg Quarterly <http://rozenbergquarterly.com/punishment-and-purpose-2-the-theoretical-debate/>; Annemarieke Beijer, 'The Debate on Capital Punishment in the Netherlands and Germany' (2000) 10(1) *International Criminal Justice Review* 98, 101-3.

[263] While it may be thought that the upper limit of the penalty is meant to be the limit of the use of utilitarian aims in punishment (the negative retributivism concept), the Dutch system more closely follows a mixed theory where (positive) retributivism is the general justification of punishment but allows utilitarian considerations to be used in deciding the most appropriate sentence for offenders within the lower and upper limits of penalties provided in the law. See Keijser, *Punishment and Purpose* (n 261) 2.6.

Judicial Power, which was the earliest law enacted in independent Indonesia to govern the judicial branch, reads 'in deciding the severity of punishment, judges should consider the good and evil of the offender'. Its Elucidation states that '[i]nformation on the offender's character can be obtained from his or her colleagues, local community leader, psychiatrist, and so forth'. Identical provisions appear in later version of the laws, such as Law 14 of 1970, and, the latest, Law 48 of 2009.[264]

5.2. More Explicit Deterrence and Rehabilitation Goals in Some Statutes

Several statutes also specify punishment objectives, usually for particular offences. The Corruption Eradication Law, for example, implicitly endorses general deterrence. The Elucidation of the Law states that 'to effectively achieve the aims to *prevent and eradicate* corruption, this law incorporates…mandatory minimum penalties, higher fines… (emphasis added)'.[265] Here, it seems clear that the more severe penalties are designed to prevent (deter) potential offenders from committing corruption. Other laws are more explicit, but are still targeted towards certain types of offences or offenders. For example, Law 18 of 2013 on Prevention and Eradication of Forest Destruction provides that the goal of the law is 'to have a deterrent effect on offenders'.[266] The Narcotics Law and Juvenile Criminal Justice System Law promote rehabilitation and restorative justice consecutively, but only for offenders who are drug users[267] or under-age offenders.[268] The only law that promotes rehabilitation (including social reintegration) as a goal of punishment for general offences and all offenders is the Correctional Institutions Law.

Law 12 of 1995 on Correctional Institutions basically sets standards and principles for correctional institutions to rehabilitate inmates and to prepare for their reintegration into society. In principle, this law extends earlier concepts of correctional systems to replace the old prison system, in place since 1964, but it also touches upon issues of punishment philosophy in its Elucidation. The first paragraph of the Elucidation states that the law promotes new goals of punishment, not merely to deter crimes, but also to rehabilitate offenders and reintegrate them into society. The Elucidation continues by criticising the old prison system that relied on the use of imprisonment rather than other types of punishment such as suspended sentences, and asserts that 'prison systems, that heavily stress revenge and deterrence … have gradually been perceived as incompatible with rehabilitation and social reintegration concepts' (paragraph 2).

Further, the drafters also believed that correctional systems cannot be separated from the overall criminal justice system. Paragraph 5 of the Elucidation of the law states that:

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[264] Compare Article 20(1) of Law 19 of 1964 with Article 27(1) of Law 14 of 1970 and Article 8(2) of Law 48 of 2009. The only minor change is that the Elucidation to Article 8(2) of Law 48 of 2009 simply states that the reason to assess the offender's character is in order for the judge to arrive at a just and proportionate punishment according to the offender's culpability.

[265] Paragraph 8 of the Elucidation of the Law 31 of 1999 on Corruption Eradication.

[266] Paragraph 6 of the Elucidation of the Law 18 of 2013 on Prevention and Eradication of Forest Destruction.

[267] Articles 4(d), 103 and 127 of Law 35 of 2009 on Narcotics endorse rehabilitation for drug user offenders, although this is rarely ordered.

[268] The Law 11 of 2012 on Juvenile Criminal Justice System sees punishment as the last resort and encourages restorative justice (see, e.g. Articles 2(i) and 5(1)).

> The correctional system is an integral part of law enforcement, thus its implementation cannot be separated from the general conception of punishment ... Punishment is an effort to bring the inmates to repent for their mistake and rehabilitate them as good citizens.

It is obvious that Law 12 of 1995 on Correctional Institutions has a strong preference for rehabilitation (including social reintegration) over other purposes of punishment. It does not merely endorse the application of this idea by correctional staff while 'curing' the inmates in correction institutions, but also by law enforcement agencies and judges when enforcing the law and crafting sentences.[269]

B. Criminal Procedural Law

The process of enforcing criminal law, which involves various actors, is governed by the Criminal Procedural Code (the KUHAP, *Kitab Undang-undang Hukum Acara Pidana*), as well as other statutes, and regulations. This part of the chapter provides only an overview of the process, mainly what is stipulated in the KUHAP and Corruption Eradication Law (which will be used as the case study in Chapters 6 to 9), covering investigation to post-sentencing, as well as the key actors: the police and other investigator agencies, prosecutors, defendants, and judges. Indonesia does not have a jury system.

1. The Police and Investigation Process

The police have exclusive jurisdiction to investigate all offences under the KUHP as well as most offences in special statutes. However, other agencies also have authority to investigate particular offences stipulated in several special statutes. For example, the Environmental Law, Tax Law, and Immigration Law grant power to civil servant investigators (*Penyidik Pegawai Negeri Sipil*) to investigate cases related to these statutes, usually in coordination with the police (Articles 6(1)(b) and 7(2) of the KUHAP). Three institutions have express jurisdiction to investigate corruption: the Police; the Prosecutors Office; and the Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* (KPK). The latter two agencies also have power to prosecute corruption cases. Unlike civil servant investigators, they do not need to coordinate with the police in conducting investigations.

The KUHAP is the main reference point for how agencies should conduct investigations, including: procedures to arrest and detain suspects, search and confiscate instruments, manage proceeds of crime, and challenge the legality of the use of these powers (Articles 16-39 and 77-83); regulate the types and minimum evidence needed to name, detain, and charge a suspect (Articles 21(1) and 182); and determine the conditions that allow investigators to stop an investigation (Article 109(2)). In addition, some special statutes provide slightly different procedures as exceptions to KUHAP procedure.

[269] The execution of this ideal, however, is very far from what is expected. See, for example, Direktorat Jenderal Pemasyarakatan, *Cetak Biru Pembaruan Pelaksanaan Sistem Pemasyarakatan* (Departemen Hukum dan Hak Asasi Manusia, 2008); Topo Santoso and Hasril Hertanto, *Menunggu Perubahan dari Balik Jeruji* (Kemitraan, 2007).

In principle, investigations are undertaken by investigators without involving prosecutors. Investigators only need to inform prosecutors when starting an investigation (Article 109(1)). After investigatory processes are completed, investigators will hand an investigation report or dossier to the prosecution, and the case will be further processed by the prosecutor (Article 101(1)). If the prosecutor believes that the investigations are inadequate or incomplete, he or she can return the dossier to the investigators, along with instructions about what further information is required (Article 110(2)). This process can continue without limit until either the prosecutors are satisfied and bring the case to the courts or the investigators stop the investigation.

Indonesia does not have a formal plea-bargaining system. However, the police or investigators usually give incentives for suspects to cooperate, particularly those with minor culpability by, for example, only charging them with one of multiple potential crimes,[270] or even by not bringing charges. Further, they can request that the prosecutor charges cooperative suspects with lighter charges or make lenient sentence recommendations.[271]

2. The Prosecutor and Prosecution Process

2.1 Overview of Process

The power to prosecute all criminal cases is in the hands of prosecutors, under the Prosecutor's Office. The only other agency that has prosecutorial power is the KPK, but it is limited to corruption cases and money laundering cases connected to corruption. Prosecutors are also responsible for executing court judgments, including supervising convicts receiving probation or suspended sentences (Article 270 and 276 of the KUHAP).[272]

Prosecutors prepare their cases solely based on information gathered by the police during the investigation and presented in the investigation report or *Berita Acara Pemeriksaan*. They are not involved in the investigation process, let alone the interviewing of suspects or witnesses. Law of 2004 on Public Prosecution Law, however, gives prosecutors power to conduct a 'pre-charge' (*prapenuntutan*) process, in addition to 'investigations' (*pemeriksaan tambahan*), which, in practice, may include interviewing witnesses but not the suspect. However, this can only be exercised in complex cases, or cases involving serious public and state concerns (see Elucidation to Article 30(1)(e) of Public Prosecution Law).

Prosecution processes involve three key activities: providing facts that prove the crime has been committed by the accused or the defendant; charging the defendant with specific provision(s) in the law; and proposing a sentence to be imposed (sentence

[270] Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford, 2018) 211.
[271] Article 4(4) (a) of the Minister of Law and Human Rights, Attorney General, Chief of the Police, Head of Corruption Eradication Commission, and Witness and Victim Protection Agency Agreement on Whistleblowers and Justice Collaborators of 2011.
[272] See also Article 30(1) of Public Prosecution Law.

recommendation), including conditions that aggravate and mitigate that sentence. Judges are not bound by the sentence recommendation, although it significantly influences the actual sentence, as shown in Chapter 7. The Prosecutor's Office has provided guidelines on how to prosecute cases, including: how to construct indictment letters and charges; how to calculate and determine recommended sentences; when to appeal sentences imposed by courts; and what should be considered as aggravating and mitigating considerations. These guidelines are briefly discussed below.

2.2. Constructing Charges

According to Attorney General Circular Letter No. SE-004/JA/11/1993 and general practice, prosecutors can construct their charges in five ways. The first is the 'single charge', that is, where a prosecutor only accuses the defendant of a solitary or single offence, with one charge. Where a defendant commits a single offence but prosecutors are not yet sure about the most appropriate charge to use, they will use either an 'alternative' or a 'subsidiary charge'. In both approaches, the prosecutor would include two (or more) offences in their initial indictment letter (*surat dakwaan*). This is submitted to the Court and, as mentioned, read out at the first hearing. At the end of the hearing, the prosecutor will recommend what he or she believes is the proven offence (and also the recommended sentence) in the closing argument, the formal charge (*surat tuntutan*).

This approach lets the judges decide the most fitting charge, with freedom to choose between offences in the indictment letter or the formal charge. The only difference between the two approaches is that in the subsidiary model, the offences are set out in priority order (primary, subsidiary and so forth) and the judges should consider them in that order. If judges sentence for the subsidiary offence (usually the lesser offence), they have to give reasons why the first offence is not proven. As for the alternative model, judges can choose the most appropriate offence without having to consider the other(s). The fourth type, 'cumulative charges', is used where a defendant has committed multiple offences. There is also a combination of these four types of charges. Judges can only sentence an accused under the specific provisions used to charge him or her in the indictment letter (Article 182(3) and (4) of the KUHAP).[273]

2.3. Sentence Recommendation Guidelines

The Attorney General also provides specific guidelines on how prosecutors are to go about recommending sentences to court. Attorney General Circular Letter No. SE-013/A/JA/12/2011 on guidelines for prosecuting general crimes (*pidana umum*), such as theft, embezzlement or assault, elaborates factors to be considered in recommending sentences (narrative guidelines), as well as indicative ranges for sentences for different offences (numerical guidelines). The narrative guidelines state that in proposing sentences, prosecutors should consider the nature of the offence, including the effects that it has caused, as well as the personal circumstances of the offenders. It then further lists conditions that could aggravate and mitigate the sentence. The aggravating considerations

[273] See also Article 197(1) (d-f) of the KUHAP.

are, among others, if the offence:[274] disrupts the stability and security of the state; widely disturbs the public or becomes a public concern; causes harm to the state and the public; concerns ethnicity, religious, or race issues; causes serious and long-term hardship (including job loss) to the victim, or his or her family; or is done in a sadistic manner. Other aggravating factors include the offender's: criminal record (recidivism); motives; role in the offence; occupation; education; physical and mental health; age; character; morality; and socio-economic background.

Mitigating factors are, among others:[275] any settlement having been reached between the offender and victim; admission of the offence; straightforwardness in giving a statement; remorse, or voluntary surrender after committing the offence; whether the amount of loss is relatively small; and the offence's seriousness according to the public. The narrative guidelines also list factors to be considered in recommending suspended sentences, which are:[276] whether the offender is 'underage' (no specific age is given); any settlement between the offender and victim; whether the victim withdraws his or her report or complaint; whether the offender has compensated for the loss; the public sense of justice,

As for the numerical sentence recommendation guidelines, the circular letter establishes five categories of offence seriousness, each with a range of minimum and maximum imprisonment punishments (not including fines), depending on the maximum penalties for particular offences.[277] For example, category one applies to cases without any mitigating considerations. The range for sentencing is between the maximum penalty for the offence or slightly lighter. Category two is to be used when there are more aggravating factors in the case than there are mitigating factors. Category three applies where the number of aggravating and mitigating factors are equal and the prosecutor should recommend around half of the maximum punishment. And so forth.

A similar model is used in sentencing recommendation guidelines for specific crimes. For corruption cases, Attorney General's Circular Letter No 003/A/JA/2010 divides recommendations into seven categories with different ranges for sentences to be recommended, and allows prosecutors to choose the appropriate charge by considering: the amount of loss to the state that the offence caused; the amount of profit gained by the offenders; and the amount of loss that was recovered, if any.[278] Prosecutors are also requested to consider the aggravating and mitigating factors provided in choosing the appropriate sentence recommendation within the range allowed.

2.5. Conditions for Appeal

Attorney General Circular Letter No. 013/A/JA/12/2011 indicates that prosecutors must appeal any sentence imposed by the courts for general crimes that is less than half of what

[274] Attorney General Circular Letter SE: 013/A/JA/12/2011.
[275] Attorney General Circular Letter SE: 013/A/JA/12/2011.
[276] Attorney General Circular Letter SE: 013/A/JA/12/2011.
[277] Attorney General Circular Letter SE: 013/A/JA/12/2011.
[278] Attorney General Circular Letter No 003/A/JA/2010.

prosecutors recommended.[279] For special crimes, like corruption, the appeal threshold is below two-thirds of the recommended sentence.[280] The only exception to these rules is where part or all of the legal arguments provided by the prosecutor concerning the factors to be considered in sentencing are accepted by the judges (the rationale for this exception is not clear).[281] This policy, as discussed in Chapter 7, significantly influences sentence outcomes.

3. The Corruption Eradication Commission (the KPK)

The Corruption Eradication Commission (the KPK) is an independent commission that has the power amongst other things to prevent and eradicate corruption, including to investigate and prosecute corruption cases as well as money laundering that is connected to corruption.[282] The KPK was established as a response to pervasive corruption across the country, including in law enforcement agencies and the judiciary. As a result, the Law gives strong power to this commission.[283] Many provisions in the KUHAP do not apply to the KPK. For example, the KPK does not need judicial permission to intercept phones or other devices, to detain suspects, or to search and confiscate (Articles 12(1) (a), 39(1) and 47(1)).

Unlike the Prosecutor's Office, the KPK does not have either narrative or numerical guidelines for preparing sentence recommendations. Usually prosecutors in the KPK rely on sentences proposed in similar cases, and, to some extent, adjust them to reflect sentences imposed by judges in similar cases.[284]

4. The Court, Trial and Sentencing

4.1. Court Structure and Jurisdiction

Most criminal cases are tried by the general court,[285] the first instance court, which is located at the district level (usually referred to as the District Court, or *Pengadilan Negeri*). Decisions of the District Court, including the sentences imposed, can be appealed to the High Court (*Pengadilan Tinggi*) located at the provincial level. The Supreme Court (*Mahkamah Agung*), has jurisdiction to hear appeals (cassation) of District Court and High

[279] Kejaksaan Agung, *Pedoman Tuntutan PIdana Perkara Tindak Pidana Umum* (Surat Edaran Jaksa Agung RI Nomor SE: 013/A/JA/12/2011), 1451. This guideline only applies to cases that are considered general offences, such as theft, murder and the like.
[280] Attorney General Circular Letter No. 003/A/JA/05/2002 B.1. a.
[281] Attorney General Circular Letter No. 003/A/JA/05/2002.
[282] Article 74 and its Elucidation of Law 8 of 2010 on Prevention and Eradication of Money Laundering.
[283] For example, it can supervise, or even take over, corruption cases handled by police or prosecutors (Article 8 of Law 30 of 2002 on Corruption Eradication Commission).
[284] Interview with former Deputy of KPK #18 (Jakarta, 31 August 2017). KPK records data concerning nature of cases its handles, the sentence recommendation proposed and the sentence imposed.
[285] There are four branches of the judicature in Indonesia: the general court (which deals with criminal and civil cases); the religious court (which tries, mainly, family and some property matters for Muslims); the administrative court (which has jurisdiction to hear disputes between citizens and government over administrative decisions); and the military court (which has jurisdiction over crimes, mainly those that are committed by military personnel, and military administration matters). For a detailed discussion of the Indonesian court system, see Butt and Lindsey (n 269) 82-91.

Court decisions in certain circumstances, such as where they have made an error in applying or violating the law, or if the decision fails to comply with requirements provided by the law (Article 30 of Supreme Court Law[286] and Article 253(1) of the KUHAP). Only a few types of cases fall outside the Supreme Court's jurisdiction, including decisions concerning criminal cases involving crimes punishable by one year or less of imprisonment and/or fines (Article 45A of Supreme Court Law). In principle, in cassation, the Supreme Court cannot alter a sentence unless it violates substantive or procedural law, such as when it exceeds the maximum or minimum penalty allowed.[287] However, there are plenty of cases where the Court has increased or reduced the lower courts' sentences outside these limitations.[288] The Supreme Court can also reconsider, through the *Peninjauan Kembali*, case review process, any case that has already been decided upon and which is no longer otherwise appellable (including its own cassation decisions). This remedy is only available in certain, limited circumstances, for example, where new important evidence has only come to light after the case has been decided (Article 67 of Supreme Court Law and Article 263(1) of the KUHAP).

In addition, most judges in Indonesia are 'career judges', meaning they are recruited soon after completing law school and spend their entire careers as judges.[289] There are two other types of judges: non-career and ad-hoc. Non-career judges can be appointed only as justices of the Supreme Court from other sectors of the legal profession such as lawyers or law academics. They can serve in the position until retirement. Ad-hoc judges, meanwhile, are appointed to sit on special courts (*pengadilan khusus* – discussed below). They do not necessarily come from the legal profession, and only serve for limited periods. [290]

Some statutes create special courts which have jurisdiction for particular types of cases, including criminal cases, such as corruption or fishery-related crimes. These special courts reside under the general court. They usually also introduce new or different procedural laws, such as providing time limits for the trials, or, involving ad-hoc judges as members of the panel.

4.2. Trial and Sentencing Proceedings

Overview of Procedure

In principle, each case is heard by a panel of (a minimum of) three judges. Usually the most senior judge becomes the head of the panel. Some minor offences, or traffic violations, are tried by a single judge. As mentioned, there is no jury system in Indonesia. Decisions about verdicts and appropriate sentences are made by all three judges. Dissenting judgments are possible but are not common. Since criminal proceedings apply an inquisitorial system,

[286] Law 14 of 1985 as amended.
[287] See, e.g., Decision 39 K/Kr/1961, 1953 K/Pid/1988 and 06 K/Pid.HAM.AD HOC/2005.
[288] See, e.g., Decision 285 K/Pid.Sus/2015.
[289] Butt and Lindsey (n 269) 80.
[290] Article 12(d) of Law 49 of 2009 on Anti-Corruption Court, for example, states that to be appointed as an ad-hoc judge, a candidate must be a graduate of law or another field as long as he or she has experience of the relevant legal issues. It also states that an ad-hoc judge serves for five years and can be re-appointed for one more period (Article 10(5)).

the judges actively control the proceedings and are involved in investigation of the facts of the case, including by directly questioning defendants and witnesses if they choose.[291]

The KUHAP recognises three types of trials: ordinary examinations (*acara pemeriksaan biasa*); summary examinations (*acara pemeriksaan singkat*); and expedited examinations (*acara pemeriksaan cepat*). Ordinary examinations – which involve a full court session (usually over several months)[292] – are used for most criminal cases. Expedited examinations are used to try minor offences that are punishable by up to three months' imprisonment, custodial punishment or a Rp7.5 million fine (A$750), including minor theft, embezzlement, insult or slander,[293] as well as traffic violations.[294] Expedited cases are heard by a single judge, decided in one day with much simpler procedures, and cannot be appealed. Summary examinations, meanwhile, are used in simple cases other than those tried under expedited examination where the application of the law is straightforward and considered to be easy to prove (Article 203(1)). In a summary examination, the trial is expected to be completed within a few days.[295]

The key processes for ordinary examinations are as follow. They commence with the prosecutor reading the indictment letter; the defendant can respond (if he or she wishes); there is an evidential hearing; the judges deliberate to decide the verdict (and sentence); and then the judges read out the decision. As shown, the guilt-finding (finding concerning the facts of the cases and the verdict) and sentencing process are combined in a single process.

Evidence, Expert Witnesses, and Rights of the Accused

Judges can only convict a defendant if they have the strong belief that a crime has been committed by the accused, and that belief must be supported by at least two valid pieces of evidence, which include (Articles 183-4 of the KUHAP): witness testimony; expert witness testimony; documentary or physical evidence; *petunjuk*, which can be loosely translated as 'circumstantial evidence'; and testimony of the accused. Expert witnesses are usually called to give professional opinions or interpretations of facts, evidence and laws, as opposed to the offender's mental state, condition, character or behaviour, or types of measures or punishment to be imposed. The accused has a limited right to silence during the trial stage. Article 175 of the KUHAP states: 'if an accused does not want to or refuses to answer a question posed to him or her, the presiding judge (can) encourage him or her to do so'. Further, in cases involving multiple offenders, this right is sometimes curbed by the practice of splitting trials, so that a defendant can be called as a witness against his or her co-defendant(s), which would incriminate him or her.[296] The accused has other rights,

[291] Butt and Lindsey (n 269) 224.
[292] Courts are expected to complete trials within five months (Supreme Court Circular Letter No. 2 of 2014).
[293] Articles 315, 364 and 373 of the KUHP.
[294] Article 267 of Law 22 of 2009 on Traffic and Public Transportation.
[295] The KUHAP does not mention the time limit for simple examination. It only mentions that after prosecutors read the charge, judges should allow a maximum of fourteen days for the prosecutor to conduct further examinations and seven days for the accused to prepare his or her defence (Article 203(3) (b and c)).
[296] Ismail, Andi Muhammad Sofyan, and Nur Azisa, 'Assessing the Role the Crown Witness in the Criminal Procedure Process in Indonesia' (2018) 75 *Journal of Law, Policy and Globalization* 109.

including the right to counsel (Article 54), as well as the right to call witnesses and experts to give evidence for his or her defence (Article 65).

Sentencing Deliberation and Announcement of the Judgment

After the hearing processes, the judges adjourn the trial and conduct internal deliberations to decide the verdict and the sentence, including the reasoning supporting it (Article 182(3) and (5) of the KUHAP). The court, unlike the Prosecutor's Office, does not have narrative or numerical sentencing guidelines to assist with the sentencing process. There are only general policies on how to deal with specific issues in sentencing law, or for specific offences, as is discussed in detail in the next chapter. In the deliberation process, the presiding judge asks the other judges in the panel, from youngest to oldest, to share their opinions. While judges are encouraged to come to a unanimous decision, the majority decision will prevail. If there is no majority, the most beneficial decision for the defendant will be chosen (Article 182(6)(b)), including as regards types or severity of punishment to be imposed. In practice, however, some judges take an alternative approach, that is, to simply calculate the sentences proposed by all judges (the length of imprisonment sentence, or the amount of the fine), and divide the total by the number of judges in the panel.[297] This approach creates an unfair advantage because the presiding judge, who has the last say during the sentencing process, can propose an extreme imprisonment sentence or fine so the end result will be consistent with what he or she wants.[298] Further, the presiding judge's voice can be more influential than others in the context of the patrimonialism common to Indonesian court culture.[299]

Once the court has reached a verdict and chosen a sentence, the trial session is resumed and the judgment is pronounced in open court. Soon after that, the court must prepare a written judgment which should include, among other things (Article 197(1)):

c. the indictment (*dakwaan*), as mentioned in the indictment letter (*indictment letter*);
d. a concise description and reasoning concerning the facts, conditions or contexts, as well as evidence found in the trial as the basis to reach the verdict;
e. the charge (*tuntutan pidana*), as mentioned in the letter of indictment (*surat tuntutan*);
f. provision(s) in the law that are the basis of the decision, including aggravating and mitigating factors.

Generally, District Court decisions are relatively short, between 10 to 25 pages (except for complex cases, like murder). Most decisions will include a summary of the charges and evidence gathered in the trial, as well as the elements of the crime/s and whether the evidence supports the judges to convict the accused. As discussed in other chapters, the legal reasoning employed to reach the decision is generally very minimal. Aggravating and mitigating factors are written as check lists, and few decisions refer to the objectives of punishment to justify the sentence imposed. Decisions of special courts are similar in

[297] Interviews with Judge #9 (Jakarta, 15 January 2017) and Judge #4 (Jakarta 14 December 2016).
[298] Interview with Judge #9 (Jakarta, 15 January 2017).
[299] Asmara (n 17) 345-60; Daniel Pascoe, 'The District Court: Sentencing Decision as Evolving Legal Culture?', in Melissa Crouch (ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge University Press, 2019) 69.

nature, although they may have differences in length. For example, Anti-Corruption Court decisions are normally longer, partly because they usually involve multiple offenders as well as more witnesses and other evidence. High Court and Supreme Court decisions are generally much shorter than decisions of first instance courts. They mainly copy and paste a summary of the charges and the sentences of earlier courts, the appeal request, and provide very short reasoning and the judgment.

4.3. Supervision and Evaluation of Sentence

Each District Court should have at least one Supervisory and Evaluation Judge (*Hakim Pengawas dan Pengamat*) to evaluate the enforcement of custodial, imprisonment and suspended sentences, as well as the effectiveness of the punishments imposed on offenders (Articles 227 and 280(1), (2) and (4) of the KUHAP). These include observation of correctional authority facilities, interviews with correctional officers and inmates concerning programs implemented in prisons, the effect of punishment on inmates' behaviour, as well as the fulfilment of their rights.[300] In practice, however, many of these activities are conducted as merely proforma exercises, with little critique or substance.[301]

C. Conclusion

This chapter has shown that, in principle, Indonesian criminal laws do not provide sufficient guidance with respect to sentencing. The provisions regarding sentencing, particularly in the KUHP, are designed to provide wide sentencing discretion to the judiciary. Although some features in special-purpose criminal statutes limit this discretion, particularly mandatory minimum penalties, these are poorly articulated and thus create problems in implementation. As a consequence, this minimal guidance, along with a range of other non-legal factors, creates disparity and disproportionality of sentencing in practice, as will be demonstrated in the following chapters.

[300] Supreme Court Circular Letter No. 7 of 1985.

[301] See e.g., Asep Ilham Taufiq, 'Pelaksanaan Tugas Hakim Pengawas dan Pengamat Pengadilan Negeri Yogyakarta bagi Narapidana Penjara di Lapas Wirogunan dan Lapas Narkotika' (2016) 5(2) *Supremasi Hukum* 142.

CHAPTER 4
SUPREME COURT GUIDANCE POLICIES ON SENTENCING

As mentioned in Chapter 2, another source of sentencing law, beside statutes, is guidance provided by the Supreme Court, either in its decisions or policies. In Indonesia, Supreme Court guidance is vital because, as discussed in Chapter 3, the KUHP and other statutes do not provide adequate regulation of sentencing, leaving the Court to develop its own protocols. As a response to this and, in particular, problems in the application and interpretation of laws by judges, the Supreme Court has developed a number of sentencing directions or policies in the form of case law, circular letters and regulations, which are discussed in this chapter. I argue, however, that the guidance and directions developed by the Court are, like the KUHP and other statutes, far from adequate.

A. Firm Jurisprudence (Case Law) on Sentencing

In Indonesia, case law or jurisprudence (*yurisprudensi*) is, theoretically, regarded as a source of law, along with customs, doctrines and, of course, statutes and regulations, which are the primary sources.[302] This particularly applies to so-called "firm jurisprudence" (*yurisprudensi tetap*), that is, where there are repeated Supreme Court decisions on a particular legal issue. Yet, as in other civil law countries, these decisions do not have binding force as they would in common law countries; they are more like what would be understood as "persuasive authorities" in common law countries.[303] These collections of firm jurisprudence, chosen by an internal team from thousands of Supreme Court decisions each year, is annually published by the court itself.[304]

While it might be expected that firm jurisprudence will complement sentencing guidance in the KUHP and special statutes, it provides only minor support. From a close review of hundreds of cases that form part of firm jurisprudence in Indonesia, only a few decisions deal with sentencing. As listed in Table 4.1 below, most of them are relatively abstract or merely reaffirm clear provisions in the law.

Table 4.1: Supreme Court Firm Jurisprudence on Sentencing

Legal Issue	Firm Jurisprudence
Imposing punishment beyond the maximum	The Supreme Court has jurisdiction to alter lower court (first instance or appellate court) decisions that impose sentences beyond

[302] See, e.g., Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell, 2005) 426-428; Puslitbang Hukum dan Peradilan MA-RI, 'Kedudukan dan Relevansi Yurisprudensi untuk Mengurangi Disparitas Putusan Pengadilan' (MA-RI, 2012) 12-6.

[303] Between civil law countries, the degree to which firm jurisprudence is seen as authoritative varies. See, e.g., Pompe (n 301) 428-35; Mary Garvey Algero, 'The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation' (2004) 65 *Louisiana Law Review* 775, 787-8; and Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1996) 1 *The American Journal of Comparative Law* 419.

[304] The Supreme Court now publishes firm jurisprudence under the title "landmark decisions" in its annual report.

Legal Issue	Firm Jurisprudence
penalty in the law	the maximum penalty limit provided in the law (Decision 39 K/Kr/1961[305] and 1953 K/Pid/1988).[306] Courts are prohibited from imposing punishments beyond the maximum penalty in the law.
Imposing a penalty and an additional penalty outside of the law	The Court cannot impose any penalty not outlined in Article 10 of the KUHP – in this case, ordering the convict to leave the property, despite the property not belonging to the convict (Decision 59 K/Kr/1969[307] and 74 K/Kr/1969).[308]
	The Court cannot impose temporary conditions in Article 14C(2) – such as a compensation order or a restraining order – on an offender who is sentenced to only one month of suspended imprisonment (Decision 167 K/Kr/1979).[309]
Imposing two principal punishments	The Court can impose two types of principal punishments, provided the special statute states that the penalty for the offence can be alternative or cumulative (in this case, the Supreme Court confirmed the lower court decisions that only imposed one type of punishment since the special statutes in question explicitly states that the punishment for the offence at hand is '...years of imprisonment and/or...rupiah fines') (Decision 119 K/Kr/1972).[310]
	The Court should impose two types of principal punishments, provided that the special statute states that the penalty for the offence is cumulative (in this case, the Supreme Court nullified lower court decisions that only imposed one type of punishment since the special statutes in question explicitly reads '...years of imprisonment and ...rupiah fines') (Decision 76 K/Kr/1981).[311]
Reducing a suspended sentence by the detention period	The Court cannot calculate the time that an offender had spent in detention prior to the verdict to reduce a suspended sentence (Decision 148 K/Kr/1969).[312]
Requirement to provide reasons in imposing a punishment	The Supreme Court has jurisdiction to alter lower court decisions that impose sentences without adequate reasoning (Decision 1953 K/Pid/1988[313] and 863 K/Pid/1994).[314] This means that courts are obliged to provide reasons in sentencing.

[305] Chidir Ali, *Yurisiprudensi Hukum Pidana Indonesia* (Armico, 1986) 77-8.

[306] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1994* (MA-RI, 1994) 69. The Supreme Court rejected the cassation appeal by the defendant in this case, who argued that the lower court decisions were too severe since the offence was beyond his control and he was still young and the bread winner of the family.

[307] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1969* (MA-RI, 1969) 29.

[308] Ali (n 304) 81.

[309] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1980* (MA-RI, 1980) 5-6. In this decision, the Supreme Court confirmed the high court decision that annulled lower court decision, which sentenced the offender to one month of suspended punishment and ordered him to pay compensation for the victim's damage. According to Article 14C (2) of the Criminal Code, such order can only be imposed if judges sentence the offender to more than three months imprisonment or custodial punishment.

[310] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1974* (MA-RI, 1974) 109-10.

[311] Jaringan Dokumentasi dan Informasi Hukum, Mahkamah Agung RI, <https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=select&id=297>.

[312] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1971* (MA-RI, 1971) 12.

[313] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1994* (MA-RI, 1994) 69.

[314] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1993* (MA-RI, 1993) 155. The Supreme Court rejected the defendant's appeal in this case, which claimed that the punishment imposed by the lower courts, which was four and a half years or imprisonment, was not proportional to the small harm of her forgery offence, which only cost the victim less than A$900.

Legal Issue	Firm Jurisprudence
	The Appeal Court cannot alter lower court decisions (in this case, increasing a penalty) simply by stating that it was too lenient. Instead, it must state specific reasons to justify it (Decision 202 K/Pid/1990).[315]
Use of aggravating factors	The Court cannot aggravate a sentence only because an offender did not admit to the offences in the first place, such as when he or she initially denied committing the offence or was not straightforward in making statements before admitting the offence (Decision 451 K/Kr/1981).[316]
Departing from an indictment in sentencing	The Court may sentence an offender with a lesser offence when prosecutor charges him or her using a similar but aggravated offence. In this case, the prosecutor accused the offender of robbery (Article 353(1) and (2)) but the Supreme Court, based on the evidence in the case, sentenced him for aggravated theft (Article 363(1)) (Decision 693/K/Pid/1986).[317]
Binding force of the statutory minimum penalty	Judges may not impose a sentence under or above the statutory minimum/maximum penalty since it will 'create bad precedent…and hinder the achievement of the punishment objectives, which are to be beneficial, bring justice and maintain legal certainty' (in this case, the Supreme Court increased the 5 years' sentence of the High Court for a key perpetrator of human rights violations in East Timor to 10 years, the mandatory minimum penalty of the offence under the Human Rights Law: Decision 06 K/Pid.HAM.AD HOC/2005).[318] This decision also asserts that 'according to legal principles and judicial practice, the boundary of judicial independence in determining a sentence is between the minimum and maximum penalty'.[319]
	The Supreme Court can, in very specific cases, impose sentence below the minimum statutory penalty to meet the 'call of justice' (in this case the Supreme Court only imposed one year of imprisonment on an offender who received just A$299 for assisting a corruption offence, which is below the four years mandatory minimum (Decision 2399 K/Pid.Sus/2010). This decision reasons that, while corruption offences should not be treated lightly, regardless of the amount of state loss, nevertheless in determining a sentence, the Court needed to balance 'the culpability of the offender and his or her monetary gain from the offence'.[320]

As shown above, most of the firm jurisprudence consists of the Supreme Court merely correcting obvious mistakes made by the lower courts in interpreting or implementing the law, such as: imposing two principal punishments (Decision 119 K/Kr/1972);[321] inflicting a penalty or additional penalty outside the law (Decisions 59 K/Kr/1969); and 74 K/Kr/1969);[322] calculating detention periods as a reduction of a suspended sentence

[315] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1994* (MA-RI, 1994) 40.
[316] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 1982* (MA-RI, 1982) 65.
[317] Jaringan Dokumentasi dan Informasi Hukum, Mahkamah Agung RI, <https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=select&id=446>.
[318] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 2008* (MA-RI, 2008) 415.
[319] Ibid 418.
[320] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 2011* (MA-RI, 2011) 489.
[321] As shown in Table 4.1 above, the wording of the statutes in question specify whether the punishment should be cumulative or not.
[322] Article 10 of the KUHP states that there are only five types of principle punishment: capital punishment,

(Decision 148/K/Kr/1969);[323] or obliging courts to give reasons or justifications in sentencing (Decisions 1953 K/Pid/1988; 863 K/Pid/1994; and 202 K/Pid/1990).[324] The only novel and meaningful guidance contributed by firm jurisprudence are the last three entries in Table 4:1: the use of aggravating factors; the rule on departing from an indictment, and; the binding force of statutory minimum penalties. Further, there has never been a firm jurisprudence decision that discusses the issue of the aims of punishment.[325]

There is only one firm jurisprudence decision that discusses aggravating factors that can or cannot be considered by judges in sentencing outside the very limited provisions on these matters in the KUHP. As mentioned, in Decision 451 K/Kr/1981, the Supreme Court held that the court cannot increase a sentence based on the offender's denial of the offence or his or her non-straightforward attitudes in giving statements at trial. This ruling is important to guaranteeing the non-self-incrimination principle.[326]

In Decision 693/K/Pid/1980, the Supreme Court outlined the possibility of judges departing from the prosecutor's indictment in certain conditions. As mentioned in Chapter 3, according to criminal law procedure, judges should generally make decisions based on indictments, which include the specific provision/s used to charge the offender.[327] Nevertheless, there are cases where evidence from the trial leads judges to conclude that the offence meets the element of a crime in another provision of the statute that was not raised by the prosecutor, for example when an offender is charged with aggravated theft but the evidence suggests that he or she only committed theft. The Court confirmed that in such a case judges may sentence offenders based on the most suitable provision, as long it is still the same type of offence as in the indictment.

The most important guidance offered by firm jurisprudence relates to the question of how judges should deal with mandatory minimum punishments in cases where imposing them may create injustice due to, among other factors, the relatively minor harm caused by the offence or the marginal culpability of the offender. This is particularly critical since mandatory minimum penalties in some statutes are drafted in such a manner that they can be applied to such cases, as discussed in Chapter 3. As mentioned, in a 2005 decision (06 K/Pid.HAM.AD HOC/2005), the Supreme Court held that the mandatory minimum

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imprisonment, custody, fine and confinement. Additional punishments, such as ordering the convict to leave a property may, arguably, be given only if the court imposes a suspended sentence. Furthermore, Article 14c(2) clearly states that temporary conditions, as additional punishments, can only be imposed if judges sentence the offender to more than three months of suspended imprisonment. See further discussion in Chapter 3.

[323] Compare with Article 14B (3) of the KUHP.

[324] Compare with Article 197(1) d-f of the Criminal Procedural Law, as discussed in Chapter 3.

[325] Nevertheless, Supreme Court judges sometimes mention the aims of punishment in individual cases, such as to educate or reform the offender, to prevent reoffending, to bring justice to the public and victim. See, e.g., Decisions 1104 K/Pid/2010, 1746 K/Pid.Sus/2013, 1501 K/Pid.Sus/2009 or 1360 K/Pid.Sus/2015.

[326] See Bryan H. Ward, 'Sentencing Without Remorse' (2006) 38 *Loyola University of Chicago Law Journal* 131, 157-164. What is more common in other jurisdictions is the opposite, that the court may treat offender's admission of the offence (guilty plea), or his or her assistance to law enforcement and judges, as mitigating factors which warrant a sentence reduction. Even though sentencing discounts for guilty pleas are, theoretically and practically, problematic. See, e.g., Ashworth, *Sentencing and Criminal Justice* (n 6) 170-171; John H. Blume and Rebecca K. Helm, 'The Unexonerated: Factually Innocent Defendants Who Plead Guilty' (2014) 100 *Cornell Law Review* 157.

[327] Article 182(3) and (4) of Criminal Procedural Law.

imprisonment provision in the Human Rights Law should be followed, regardless of the nature of the case, to achieve the lawmaker's intention and maintain the separation of powers between the judiciary and the legislative branch.[328] Five years later, however, in Decision 2399 K/Pid.Sus/2010, the Supreme Court changed its position and allowed judges to depart from the mandatory minimum penalty in the Corruption Eradication Law in certain circumstances, to ensure a just outcome. However, it did not elaborate criteria as to when such a departure is allowed, except for broad principles – including that judges should balance 'the culpability of the offender and his or her monetary gain from the offence', and consider the 'call for justice in the society' in doing so.[329] It is also unclear whether the small value gained from the offence in the case, which was approximately A$290, should be used for future reference in deciding similar cases, or whether such departure is also allowed in non-corruption cases. The very brief reasoning provided, which is commonly in Supreme Court decisions, makes it hard for the case to be practically applied as a more general principle. This is especially so because there is no tradition in the Indonesian legal system about to how to extrapolate *ratio decidendi* from firm jurisprudence, except to simply copy the wording of the decision.[330] Further, this ruling only applies to the Supreme Court justices since it clearly states that only they – not lower court judges – can decide when to deviate from the minimum statutory penalty.

Aside from its limited coverage and generality, the main problem with firm jurisprudence is its actual authority. In practice, many Indonesian judges, including Supreme Court justices, do not follow firm jurisprudence, or consider it authoritative. As will be shown in the findings of this research, judges and justices frequently depart from firm jurisprudence, or even their own previous legal interpretations, without providing clear or reasonable justifications for various reasons.[331] Further, many justices and judges may not even be aware of the existence of some jurisprudence.

B. Sentencing Policy in Circular Letters

A more widely acknowledged and authoritative source of sentencing guidelines is Supreme Court circular letters (*surat edaran*) – policy documents that are circulated to all courts and are to be followed by all judges. Although most circular letters govern aspects concerning administrative and organisational matters, some also regulate substantive and procedural legal matters, including sentencing. To some extent, circular letters are considered to be more authoritative than firm jurisprudence because they are not only a regulatory tool, but also an instrument of control used by the Supreme Court in its supervisory function and, as a result, can more easily be enforced with disciplinary sanctions.[332] More importantly, by publishing circular letters the Supreme Court can

[328] Supreme Court Decision 06 K/Pid.HAM.AD HOC/2005 in Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 2008* (MA-RI, 2008) 415-8.
[329] Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 2011* (MA-RI, 2011) 489.
[330] It is common practice in every volume of firm jurisprudence for the Court's publication team to merely cut and paste the key sentence/s from the decisions chosen as the jurisprudence and place them at the top of the page, followed by the actual decision as reference.
[331] These reasons include misconceptions of judicial independence principles, weak selection methods of firm jurisprudence, judicial corruption and so forth. Pompe (n 301) 437-56.
[332] Ibid 269.

address specific legal questions or issues, based on its assessment of problems in lower court decisions, issues raised during annual judicial national meetings, or even judges' direct questions to the Supreme Court. In addition, it is much easier to promulgate such circulars since they usually only consist of one or a few pages.[333]

In the past, the issuance of circular letters regarding substantive and procedural legal matters was somewhat random and each circular letter usually only addressed one topic. However, in the last couple of years, the Supreme Court has begun to publish circulars annually and one circular letter may cover several legal issues. From 1959 to 2016, approximately two dozen circular letters concerning sentencing were issued. These can be categorised into three groups: first, those that generally instruct judges on how to sentence, mainly for serious offences which attract public concern; second, those that provide elaborated sentencing guidance for certain offences; third, those that lay down interpretations of sentencing laws or other laws that affect sentencing. These three issues, as well as a proposal to design numerical sentencing guidance, are discussed below.

1. General Instructions on How to Sentence Serious Offences

More than half the circular letters concerning sentencing contain Supreme Court instructions to lower courts on sentencing for a range of serious offences that attract public attention (listed in Table 4.2 below), calling for 'proportional punishment' (*pidana yang setimpal*), meaning a firmer or stiffer punishment,[334] without elaborating principles and contexts to guide lower courts in issuing such punishments.

Table 4.2: Types of Offences That Required Severe Punishment

Type of Offences	Ground
Economic crimes (including trafficking in goods, illegal food stockpiling and mark up, copyright infringement)	Circular Letter No. 6 of 1959, Circular Letter No. 8 of 1961,[335] Circular Letter No. 4 of 1967, Circular Letter No. 5 of 1973, Circular Letter No. 8 of 1976, Circular Letter No. 2 of 1987, and Circular Letter No. 1 of 2000.
Corruption	Circular Letter No. 5 of 1973, Circular Letter No. 1 of 2000, Circular Letter No. 3 of 2001, and Circular Letter No. 12 of 2010.
Drug offences	Circular Letter No. 5 of 1973, Circular Letter No. 8 of 1976, Circular Letter No. 1 of 2000, and Circular Letter No. 3 of 2001.
Illegal logging	Circular Letter No. 3 of 2001, Circular Letter No. 3 of 2001, and Circular Letter No. 1 of 2008.

[333] Ibid.

[334] There was also one instruction, Circular Letter No. 2 of 1960, which, in essence, requested judges to impose more lenient sentences on offenders who commit minor offences. It states that judges are advised to use Article 20 of the KUHP – which allows convicts to leave prison after normal working hours – if they are to punish them with not more than one month of imprisonment or custody. This circular letter was issued as a response to the request of the head of Correction Facilities at that time due to the problem of overcrowding in prisons. However, with the enactment of Law 12 of 1995 on Correction Facilities, which abolished compulsory work in prison, this policy became practically inoperative.

[335] This Circular Letter was later revoked by Circular Letter No. 12 of 1985.

Type of Offences	Ground
Illegal fishing	Circular Letter No. 5 of 1978, and Circular Letter No. 3 of 2001.
Rape	Circular Letter No. 1 of 2000, and Circular Letter No. 3 of 2001.
Subversion	Circular Letter No. 15 of 19641 and Circular Letter No. 5 of 1973.
Offences against Religion	Circular Letter No. 11 of 1964.
Robbery (bank, stores, etc.)	Circular Letter No. 5 of 1980.
Obstruction of national vital objects	Circular Letter No. 5 of 1980.
Human rights violations	Circular Letter No. 1 of 2000.
Environmental destruction	Circular Letter No. 1 of 2000.
State loan offences	Circular Letter No. 3 of 2001.

In earlier policies, the Supreme Court used more direct language, for example, 'it is *instructed* that judges all over Indonesia punish *criminals* (*penjahat-penjahat*) who commit economic crimes *with severe punishment* [emphasis by the author]'.[336] In more recent instructions, less explicit language is used, such as, 'judges are *expected* to impose an *equitable punishment* that is proportional to the severity and the nature of the offence [emphasis by the author]',[337] although the message is basically the same – demanding that judges impose stiff punishments. Almost none of the policies explain what factors should be assessed in determining a proportional punishment or when more severe punishments are warranted. Instead, the instructions give vague reasoning, such as 'to create deterrence for the offender'[338] or so that the punishment 'is not against the public sense of justice'.[339] Further, another circular letter commands judges to '*hold a position*, that is *to be in the front row in combating* the root of those crimes [emphasis by the author]', in this case, corruption, drugs offences, illegal logging, illegal fishing, rape, and state loan offences.[340] Only Circular Letter 5 of 1980 offers more specific guidance, stating that judges should pay particular attention to the dangerous nature of offence *vis à vis* the surrounding context of the offence and the conditions of the offender when calling for a more severe punishment for robbery, murder, or destruction of the national's vital objects.[341]

One can argue that the issuance of this type of circular letter indicates the Supreme Court's support of particular punishment objectives, particularly deterrence. However, evidence suggests that these policies are simply a response to lower courts imposing unjustifiably

[336] Circular Letter No. 6 of 1959. See similar expression in Circular Letter No. 8 of 1961 or Circular Letter No. 11 of 1964.
[337] See, for example, Circular Letter No. 1 of 2000 or Circular Letter No. 3 of 2001.
[338] See, for example, Circular Letter No. 1 of 2008 on Guidance on Handling Forestry Offences, Circular Letter No. 12 of 2010 on Guidance on Sentencing Corruption Offences.
[339] Circular Letter No. 1 of 2000 on Punishment to be Proportional with the Nature of the Offence.
[340] Circular Letter No. 3 of 2001.
[341] National vital objects (*obyek vital nasional*) are defined as areas/locations, buildings/installations, and/or businesses that concern the general public, state interest and security, as well as strategic sources of state revenue (see, for example, Presidential Decision 63 of 2004).

lenient punishments in serious cases. When instructing judges to be firmer in sentencing corruption cases, for instance, the Supreme Court asserts 'from its own observation and public evaluation, there is a tendency for first instance and appellate court judges to conduct business as usual in imposing sentences, thus failing to create a positive image of the judiciary'.[342] The Court even voices explicit concerns about the possibility of corruption and bias being indicated by disproportionate sentences imposed by lower courts, by alleging that:

> insufficient reasoning on acquittal verdicts or disproportionate punishments … may be caused by judicial misconduct, third party intervention or public pressure and the like, [therefore] the Heads of the Appellate Courts should observe and report such decisions to the Chief Justice of the Supreme Court in a timely manner. [343]

2. Interpretation of Sentencing Laws and Related Laws

Most circular letters that touch upon issues of how judges should interpret sentencing laws (or other laws that relate to sentencing) merely restate clear guidance that is already provided by statutes or the firm jurisprudence discussed earlier. In Circular Letter No. 7 of 2012, for instance, the Supreme Court repeats Decision 119 K/Kr/1972 and Decision 76 K/Kr/1981 concerning when judges must impose two principal punishments. This circular letter also restates clear provisions in various laws concerning the possibility of judges imposing additional punishments when not requested by the prosecutor[344] and limitations on restitution punishment (*uang pengganti*) in corruption offences,[345] as well as the prohibition on increasing penalties imposed by lower courts at the reconsideration stage (*peninjauan kembali*).[346]

Further in Circular Letter No. 7 of 2012, reiterated in Circular Letter 3 of 2015, the Supreme Court instructed that lower court judges and Supreme Court justices cannot apply different provisions from those used by the prosecutor, as is already prescribed in Article 182(4) of the Criminal Procedural Code.[347] This circular letter is a response to two different questions. First, whether Supreme Court justices can apply, for example, theft provisions in the KUHP when the offender (who, for example, only cut down several trees for personal use or basic needs) was (unjustly) charged with provisions in special statutes on forestry that required imposition of longer or severe minimum penalties.[348] The second relates to the question of how to deal with a case where an offender is a drug user

[342] Circular Letter No. 12 of 2010.
[343] Circular Letter No. 12 of 2010.
[344] Circular Letter No. 7 of 2012 [45] merely reaffirms Article 35 of the KUHP, which states that judges have discretion to give additional punishments even if not requested by the prosecutor in the indictment.
[345] In Circular Letter No. 7 of 2012 [24], the Supreme Court restated Article 18(1)b of Law 31 of 1999 on Corruption Eradication, which provides that the restitution to be paid by the convict in relation to particular corruption offences should be as much as the illicit assets or profits gained from the offence.
[346] Compare Article 266(2) b point 4 of the Criminal Procedural Code with Circular Letter No. 7 of 2012 [4-5]. A similar policy is, again, repeated in Circular Letter No. 4 of 2015 [8]. 'Special review' is a mechanism where the Supreme Court retries a case previously decided by any court where there are special conditions, such as new evidence, among others.
[347] As discussed in Chapter 3, this article provides that sentencing judges should refer to the charge being provided by the prosecutor.
[348] Circular Letter No. 7 of 2012, 9.

(violating Article 103 or 127 of the Narcotics Law), but he or she is incorrectly charged under provisions (usually Articles 111(1), 112(1) or 114(1) of the Narcotics Law) that target drugs producers, sellers or traffickers, which carry more severe penalties, but have similar elements to the provision prohibiting drug use.[349] While these policies may be seen as a reassertion of prescriptions in the law, they at least clarify that the firm jurisprudence in Decision 693 K/Pid/1986 does not apply to these types of cases.[350]

A number of circular letters also readdress, or, in some cases, amend firm jurisprudence concerning the binding status of mandatory minimum sentence provisions. Initially, in Circular Letter No. 7 of 2012 (which discusses the mandatory minimum in the Corruption Eradication Law), the Supreme Court reaffirmed Decision 06 K/Pid.HAM.AD HOC/2005 and Decision 2399 K/Pid.Sus/2010, which held that judges (presumably including Supreme Court justices) cannot generally impose penalties below the statutory minimum penalty.[351] The circular also adds further clarification that when the law provides a mandatory minimum penalty, judges are not allowed to impose suspended sentences as an alternative.[352] However, in Circular Letter No. 3 of 2015, the Court allows judges to depart from the mandatory minimum penalty in Narcotics Law cases where, as mentioned, drug users are incorrectly charged under other provisions that provide severe mandatory minimum penalties, for example, provisions intended to target drug traffickers, not users. Further, in Circular Letter No. 1 of 2017, the Supreme Court expanded its permission for judges to depart from minimum penalties under the Juvenile Criminal Justice System. This exception is only applicable in cases where an adult defendant has committed sexual offences against under-age persons in specific contexts, such as when the matter has been settled outside of the court between the defendant and the victim (and their families), including if they later marry, or the act was consensual and not perpetrated by a father to his child or by a teacher to his or her student.[353] These examples indicate some policy repetition, but also that the Supreme Court is not afraid to expand policy in *ad hoc* fashion.

The only circular letter issued that provides new sentencing guidance is Circular Letter No. 4 of 2016, where the Court, implicitly, requires lower courts to fully consider mitigating circumstances in a case. This policy states that when lower courts fail to do so,

[349] Circular Letter No. 7 of 2012, 31-32 and Circular Letter No. 3 of 2015. Articles 111(1) and 112(1) of the Narcotics Law provides a minimum of four years imprisonment for those who 'plant', 'grow', 'own', 'keep' or 'possess' certain types of drugs. The minimum penalty increases to five years for 'offering', 'selling', 'buying' or 'receiving' drugs (Article 114(1)). These stringent provisions are aimed at drugs producers, sellers or traffickers. However, due to some ambiguous wording (such as 'own', possess', 'buying, or 'receiving'), they are frequently abused by the police or prosecutors to charge drug users, in order to extort higher payments to stop the prosecution or alter or recommend lighter charges.

[350] As mentioned, in Decision 693 K/Pid/1986 the Supreme Court allows courts to impose a sentence based on a provision beyond those relied on by the prosecutor in the case of simple offences (as opposed to aggravated offences). Circular Letter No. 7 of 2012 explicitly exclude this rule in the cases mentioned above (such as when drug user is incorrectly charged under provisions that aim to target other types of drug offences).

[351] Circular Letter No. 7 of 2012, 23.

[352] Circular Letter No. 7 of 2012, 23.

[353] Supreme Court Circular Letter No. 1 of 2017 [6]. In fact, this circular letter does not refer to the Juvenile Criminal Justice System Law (Law 11 of 2012), nor mention 'sexual offences', but simply 'offences.' However, from the content of the circular letter, it is safe to assume that it was meant to be applied to offences stipulated in the Juvenile Criminal Justice System Law.

the Supreme Court can reduce sentences imposed, even when the cassation is requested by the prosecutor and the defendant does not ask for a sentence reduction.[354]

In addition to the lack of new policy guidance and the *ad hoc* policy-making discussed above, the efficacy of circular letters is also questionable. Many judges, including justices of the Supreme Court, tend to ignore the guidance provided in circular letters, for example, Circular Letter No. 7 of 2012, which obliges judges to sentence according to the prosecutor's charges and follow mandatory minimum sentences.[355] This distinction between guidance and judicial practice undermines and delegitimises the very existence of circular letters as policy-making instruments.

3. Elaborate Guidance on Sentencing Certain Offences

A number of circular letters provide more elaborate guidance for sentencing in drug and corruption offences. These aim to assist judges to choose the most appropriate provisions of the laws the prosecutor used to indict an offender (this has an impact on the minimum and maximum penalties that can be imposed). For example, Circular Letter No. 7 of 2009 (which was later enhanced by Circular Letter No. 4 of 2010) provides elaborate criteria for an offender to be categorised as drug-user offender, as opposed to a seller, distributor or producer of drugs/narcotics. These include, among others: the total amount of drugs/narcotics possessed by the offender (on arrest); the criminal record of the offender for similar offences; the offender's medical assessment; and other evidence proving that the offender was a mere user. It also encourages judges to rehabilitate drug users instead of sending them to prison, as well as outlining timelines for the rehabilitation process and requesting judges to consult with an expert in determining rehabilitation prospects.[356] While one may disagree with the adequacy or appropriateness of some of the criteria, this guidance is vital because the vague provisions in the law have led to ill-motivated applications,[357] or at least broadly varying interpretations, of the law by enforcement agencies and judges.[358] As a consequence, many drug-users whose actions may warrant more lenient punishment or even just rehabilitation may be charged with, and sentenced to, long mandatory minimum periods of imprisonment, thus worsening their condition and contributing to the already serious overcrowding of correction facilities.[359] Similarly, in Circular Letter No. 7 of 2012, the Court provides guidance for interpreting problematic provisions of the Corruption Eradication Law, particularly Articles 2(1) and 3, which have

[354] Circular Letter No. 4 of 2016, 3.
[355] See, for examples, Decision 750 K/Pid.Sus/2014 [8-9], Decision 1127 K/Pid.Sus/2014 [15-6], Decision 2303 K/Pid.Sus/2013 [11-2].
[356] Point 5 of Circular Letter No. 4 of 2010.
[357] Such as to charge drug users with other provisions with higher minimum penalties to extort them for payments to alter the charges or recommend lighter sentences.
[358] Rifqi S. Assegaf, 'The Supreme Court: *Reformasi*, Independence and the Failure to Ensure Legal Certainty', in Melissa Crouch (ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge University Press, 2019) 31.
[359] On August 2016 for instance, the prisons and detention centres in Indonesia hold more than 70,000 inmates and detainees beyond their capacity. Approximately 50% have been charged or sentenced for drugs-related offences. 'Kapasitas Lapas Berlebih, BNN Mulai Fokus Rehabilitasi Napi Narkoba' *Kompas* (online) 7 August 2016 <http://nasional.kompas.com/read/2016/09/07/20404731/kapasitas.lapas.berlebih.bnn.mulai.fokus.rehabilitasi.napi.narkoba>.

similar elements but with significantly different minimum penalties. This issue will be discussed in more detail in Chapter 9.

4. Numerical Sentencing Guidelines

In July 2020, the Supreme Court passed Regulation No. 1 of 2020 on detailed guidance on sentencing under Article 2(1) and 3 of the Corruption Eradication Law, in the form of numerical guidelines.[360] The content of these guidelines is, in general, similar to the Public Prosecutor's guidelines on sentence recommendations (discussed in Chapter 2), which includes different ranges of sentence to be imposed, depending on the state losses caused by the offence, the level of the offender's culpability, the amount gained by offenders, and whether any amounts have been recovered.[361] It also provides an additional list of aggravating and mitigating considerations beyond what is provided in the law, such as if the offender obstructed justice (for example, preventing someone from reporting the offence or from being a witness, or concealing evidence), committed the offence for the first time, showed remorse, or if the offence was done due to economic necessity.[362]

While this guidance is a positive development, it is not without problems. Overall, it provides a relatively severe range of penalties without allowing judges to depart from them in any circumstances. For example, the range of imprisonment penalties to be imposed on offenders who cause between Rp1 to 50 billion (AU$100,000-250,000) of state loss is from six to 13 years. As the result, a low ranking government official who merely assists the commission of an offence that causes Rp1 billion losses to state (without knowing exactly the potential impact of his or her actions) receives a minimum of six years of imprisonment.[363] Another crucial issue is that offenders who voluntarily return the profit they have obtained from their crimes (not the state loss) will receive a significantly mitigated sentence,[364] although, as mentioned in Chapter 2, the Corruption Eradication Law provides that such profits can be confiscated, and allows courts to force offenders to repay them (or receive imprisonment as a substitute).

The idea of detailed sentencing guidelines is not new. In 2001, the Supreme Courts' National Meeting (*Rapat Kerja Nasional*)[365] discussed the issue of sentencing disparity and concluded that:

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[360] As discussed in Chapter 2, 'numerical sentencing guidelines' is a sentencing model where ranges of punishment are prescribed in a definite manner as the normally-indicated sanction to be imposed by judges for various criminal acts.

[361] Attorney General Circular Letter No 003/A/JA/2010.

[362] Supreme Court Regulation on Sentencing Guideline for Corruption Offences Under Article 2 and 3 of Law 31 of 1999 on Corruption Eradication [25].

[363] Rifqi S. Assegaf, 'Catatan terhadap Perma Pedoman Pemidanaan Korupsi', *Hukumonline* (online), 8 August 2020 <https://www.hukumonline.com/berita/baca/lt5f2e43f870610/catatan-terhadap-perma-pedoman-pemidanaan-korupsi-oleh--rifqi-s-assegaf/>.

[364] Ibid.

[365] The National Meeting is an annual meeting, attended by all Supreme Court Justices and heads of the High Court from every Indonesian jurisdiction, to discuss and propose policy recommendations on various issues faced by the judiciary.

> 2. The variety of punishment purposes, such as retributivism, deterrence, incapacitation and rehabilitation, although all aiming to achieve the same goal – that is social defence – are incompatible and even conflict with one another. The KUHP does not provide legal standards for sentencing and sentencing guidelines, so that judges can impose sentences with discretion that is too broad, thus creating obvious disparity.
> …
> 4. Such disparity not only hampers the idea of equal justice under the law, but is also disconnected from that idea, thus this National Meeting should come up with guidance on sentencing to develop an honoured and admired judiciary. [366]

The meeting developed explicit recommendations to overcome the above issues,[367] including: to prepare national level sentencing guidelines (presumably in the form of a circular letter) and establish a sentencing institution with power to audit and evaluates sentences practices; and to prepare provincial level guidelines that consider the living law in the community. The recommendations also provided principles, elements, and even simple templates, of the proposed guidelines, which must include, among other factors, minimum and maximum penalties for every offence that is of public concern, including economic crimes, corruption, drugs-related offences, human rights violations, environmental crimes, coastal and forestry offences as well as general offences, such as murder, rape, extortion, and forgery.[368] Nonetheless, the Meeting also recommended that the guidelines should allow departure when there are reasonable mitigating or aggravating considerations, and that the guidelines should be reviewed annually to adjust to social needs.[369] Unfortunately, the recommendations have never been implemented (aside from on corruption, with the recent guidance mentioned above).

C. Supreme Court Regulations Relating to Sentencing

The Supreme Court also has the power to issue regulations to fill gaps in procedures and laws (Article 79) in the form of Supreme Court Regulations (*Peraturan Mahkamah Agung*). As with other types of regulations, these legal instruments are binding on the public, not only judges. Although most of the regulations issued predominately concern procedural matters, there is at least one that touches upon more substantive sentencing issues with respect to certain type of offences – namely, Regulation 3 of 2017 on Guidance on Handling Women-related Cases. This Regulation forbids judges to consider the sexual habits or record of a female victim as a justification to free or mitigate the sentence of a person who has committed offences related to women, presumably including sexual offences, harassment, and discrimination (Article 5 c).

D. Conclusion

This chapter has shown that, in general, the Supreme Court has failed to meaningfully supplement the limited sentencing guidance in the KUHP and other statutes, either through firm jurisprudence or circular letters or regulations. Most of the guidance

[366] Mahkamah Agung, *Himpunan Hasil Rapat Kerja Nasional Tahun 2001 s.d 2003* (MA, 2004) 58.
[367] Ibid 60.
[368] Ibid 60-1.
[369] Ibid 61.

provided merely reiterates already clear provisions in the law, or responds in an *ad hoc* fashion to certain sentencing practices. No specific policy has been issued concerning punishment objectives to be adhered to by judges. Further, some of the circular letters are ambiguous or contradictory, or have quickly been amended, creating confusion. Most importantly, the circulars lack authority, as illustrated by their inconsistent application by the Supreme Court justices themselves. By comparison, the Prosecutor's Office offers much better and detailed guidance concerning what factors should be considered in recommending sentences (including aggravating and mitigating factors), as well as how to calculate or estimate sentences based on numerical sentence recommendation guidelines. The weakness of judicial guidance on sentencing and wide sentencing discretion, along with a range other non-legal factors, contribute to disparity and disproportionality in sentencing practice, as will be demonstrated in the next few chapters.

CHAPTER 5
DATA AND METHODS OF THE QUANTITATIVE ANALYSIS

As mentioned in Chapter 1, the main research questions this thesis seeks to answer are:

1. To what extent are sentences imposed by different judges in the studied courts consistent and proportionate, as well as fair (unbiased) to offenders from different socio-economic backgrounds?
2. What are the legal and extra-legal factors that contribute to sentencing outcomes?
3. How do judges choose different types of penalties to be imposed?
4. How do judges justify mitigating and aggravating factors to be employed in particular cases?

As to the first question, this thesis particularly focuses on the sentencing of theft-related offences, which are usually committed by offenders of lower socio-economic status, and corruption, which is committed predominantly by offenders of middle and higher socio-economic status. As outlined in Chapter 1, this study uses both qualitative and quantitative methods in approaching its questions. The qualitative methods have been discussed in Chapter 1. This chapter describes the quantitative methods, including statistical analysis techniques, used to answer the first two questions concerning consistency and proportionality of sentences, as well as the legal and extra-legal factors that influence them.[370]

A. Sample of Decisions and Court Locations

Scholars use different methods to assess consistency (or proportionality) of sentencing. The two main methods are: using simulation, where judges are asked to make decisions for hypothetical cases; and assessing sentencing outcomes of real cases, either from cases selected based on their similarity, or cases selected at random.[371] This study uses the second method, to ensure more objective outcomes,[372] as well as for practical reasons—unlike simulation, it does not require participation from judges.

1. Types of Offences

As mentioned, three groups of offences are studied in this thesis: theft-related offences, embezzlement-related offences, and corruption. These offences were chosen because they are all mainly concerned with comparatively similar harm, that is, monetary harm (with a few exceptions, such as robbery or burglary, which can also involve physical or

[370] The other two questions require basic statistical methods: reckoning each type of penalty imposed and each mitigating and aggravating factor used across the decisions studied. Further, the question of fairness (unbiased) will be answered by combining the results of the quantitative and qualitative methods.

[371] James M. Anderson, Jeffrey R. Kling and Kate Stith, 'Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines' (1999) 42(1) *Journal of Law and Economics* 271, 279-81.

[372] As argued by some scholars, in a simulation method there is no guarantee that a judge will approach the hypothetical cases with the seriousness and deliberation that they would bring to a real case. Anderson et al (n 370) 280; Pamela Samuelson, 'Sentence Review and Sentence Disparity: A Case Study of the Connecticut Sentence Review Division' (1977) 10(5) *Connecticut Law Review* 5, 12.

phycological harms).[373] Further, the majority of offenders, particularly with regard to theft-related offences and corruption, come from different socio-economic backgrounds (see data concerning this below), so comparing these offences addresses the first research question mentioned above.

The KUHP does not have distinct expressions for different types of theft, such as burglary or robbery. Basically, these offences are all classified as 'theft' (*pencurian*), but with additional elements, and have different maximum penalties.[374] To easily differentiate between theft-related offences, this thesis uses the terms shown in Table 5.1 below.

Table 5.1 Theft-related Offences in the KUHP

Offence Category & KUHP Provision	Offence Definition	Maximum Penalty
(Simple) Theft Art. 362	Stealing property (including day 'burglary'[375])	5 years of imprisonment or Rp900,000 fine
Aggravated Theft Art. 363(1)	1. Stealing livestock; 2. Theft during a natural disaster, riot or war; 3. Theft by night in a 'dwelling or at an enclosed yard where a dwelling stands' (night burglary); 4. Theft by more than one offender; or 5. Theft involving the use of force or deceit in order to access the place of the crime or to obtain the property (e.g., breaking, entering, climbing, damaging or using counterfeit keys, false orders, or a disguise)	7 years of imprisonment
Aggravated Burglary Art. 363(2)	The offence as in Art. 363(1) 3 (night burglary), when committed by more than one offender or when involving the use of force or deceit in order to access the place of the crime or to obtain the property (as in Article 363(1) 4 or 5)	9 years of imprisonment
Minor Theft Art. 364	The offence as in Art. 362 as well as Art. 363(1) 4 and 5 if the amount of the stolen goods is not more than Rp2.5 million and not done inside a dwelling or in an enclosed yard where a dwelling stands (i.e. not burglary)	3 months of imprisonment or Rp250,000 fine
Robbery Art. 365(1)	Theft preceded, accompanied, or followed by force or threat of force against persons	9 years of imprisonment
Aggravated	The offence as in Art. 365(1) above, done by night at a	12 years

[373] See a similar approach in Michael Cassidy and Carole Gibbs, 'Examining Sentencing Patterns and Outcomes for White-Collar and Property Crime Offenders' (2019) 14(1) *Victims and Offenders* 75.

[374] Court decisions or legal textbooks, however, often distinguish simple theft (Art. 362) from other theft-related offences by adding some qualifications, such as 'minor theft' (for offence under Article 364), 'aggravated theft' (*pencurian dengan pemberatan*) for offences under Article 363 (1) and (2), or 'theft with violence' (*pencurian dengan kekerasan*) for offences under Article 365 (1) and (2).

[375] The term 'burglary' here is used to describe an act of theft by entering into 'a dwelling or an enclosed yard where a dwelling stands' without an element of force when entering the property. According to Article 363 (1) [3] of the KUHP, only night-time 'burglary' is considered aggravated theft. As a consequence, day burglary is (or should be) considered (simple) theft under Article 362. Soesilo, an eminent commentator on the KUHP, also implicitly classifies day burglary as theft as in Article 362. See R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP) serta Komentar-komentarnya Lengkap Pasal Demi Pasal* (Politeia, 1981) 218.

Offence Category & KUHP Provision	Offence Definition	Maximum Penalty
Robbery Art. 365(2)	'dwelling or at an enclosed yard where a dwelling stands', in a public street, or on public transportation; done by more one offender; involving force or deceit to access the place of the crime or to obtain the property; or, resulting in serious bodily harm.	imprisonment

* minimum imprisonment penalties for all offences are one day (or, alternatively, a suspended sentence)

The KUHP follows a similar structure for element of crime and maximum penalties for types of embezzlement. Below are the terms and related provisions that will be used in relation to embezzlement-related decisions.

Table 5.2: Embezzlement-related Offences in the KUHP

Offence Category & KUHP Provision	Offence Definition	Maximum Penalty
Simple Embezzlement Art. 372	Unlawful appropriation of property that belongs to another, and which the offender has in his possession by means other than crime	4 years of imprisonment or Rp900,000 fine (A$90)
Minor Embezzlement Art. 373	The offence as in Art. 372 where the embezzled property does not consist of livestock or if the amount of the property is not more than Rp2.5 million (A$250)	3 months of imprisonment or Rp250,000 fine (A$25)
Aggravated Embezzlement Art. 374	Embezzlement committed by a person who has possession of the property on account of his personal service, or of his profession, or for monetary compensation	5 years of imprisonment

* minimum imprisonment penalties for all offences are one day (or, alternatively, suspended sentence)

Unlike the above two offences, corruption is regulated in a special statute, Law 31 of 1999 on Corruption Eradication. This statute sets out various categories of offences. This thesis only assesses offences under Articles 2(1) and 3 of the law because they are the most commonly used provisions. The offences in these provisions are as follows:

Table 5.3: Articles 2(1) and 3 of Law 31 of 1999

Provision	Offence Definition	Minimum and Maximum Penalty
Art. 2(1)	Illegally enriches him or herself, another person or a corporation in a way that damage the state finances and economy	Minimum 4 years of imprisonment and Rp200 million fine (A$20,000) and maximum 20 years of imprisonment and Rp1 billion fine (A$100,000)
Art. 3	Aiming to profit him or herself, another person or a corporation, misuses his or her authority, opportunities, or means at his or her disposal	Minimum 1 year of imprisonment and/or Rp50 million fine(A$5,000) and maximum 20

Provision	Offence Definition	Minimum and Maximum Penalty
	which arise because of the office and the position he or she holds, and by doing so could damage state finances and economy	years of imprisonment and/or Rp1 billion fine (A$100,000)

While these two provisions have significantly different minimum and maximum penalties, the elements of these crimes are generic, meaning that an act meeting the elements of Article 2(1) will often also meet the elements in Article 3. This issue is acknowledged by the Supreme Court. In 2012, the Court issued Circular Letter No. 7 of 2012, which requests courts to consider the level of harm caused by the offence to determine which provision should apply. It stated that Article 2(1) is to be used in relation to corruption that causes more than Rp100 million (A$10,000) damages to state finances, while Article 3 is to be used in cases involving Rp100 million or less.

2. Sample of Decisions, Selection Methods and Courts' Location

The total number of cases studied is 1,096. The majority of these cases concern theft-related offences (701 cases), followed by corruption (205 cases) and embezzlement-related offences (190 cases). The term "case" here needs clarification. In practice, prosecutors can try several offenders who commit a collective offence in a single trial or separately. In this thesis, I treat each offender charged as a single case.

The selected decisions relating to theft- and embezzlement-related cases represent all relevant decisions of four district courts (first instance court) in big cities - Central Jakarta, South Jakarta, Bandung, and Tangerang - decided between 2011 and 2015 (excluding 2013)[376] published on the Supreme Court website (www.putusan.mahkamahagung. go.id). As for corruption, this study relied on decisions of the Jakarta Anti-Corruption Court (ACC) (which is located in the Central Jakarta District Court) and the Bandung ACC (which is located in the Bandung District Court) mainly between 2014 and 2015, also published in the same website. Unlike theft and embezzlement-related cases, corruption cases are only tried at first instance courts in provincial capitals. The majority of Jakarta and Bandung ACC judges also heard the theft and embezzlement cases from the Central Jakarta and Bandung District Courts.

The selection of court location is based on three considerations: first, the number of decisions published online; second, ease of access to relevant judges and prosecutors for interviews; and third, the likelihood of the courts having characteristics (caseload, nature of cases, and characteristics of judges)[377] similar to those of other courts.

The distribution of decisions studied is as follows.

[376] The year here refers to when the decision was announced at the end of the court session, not when the case was registered (which appears in the case registration number).
[377] Judges serving in these courts are usually senior judges who have served in various courts, rural and urban.

Table 5.4: Distribution of Decision by Court, Type of Offence and Year[378]

Court Location	Total Number of Cases			
	Year	Theft-related (N: 701)	Embezzlement-related (N: 190)	Corruption (N: 205)
Central Jakarta District Court/ Jakarta Anti-Corruption Court	2011/2	8	7	4
	2014	39	6	28
	2015	39	6	9
Sub total		**86**	**19**	**41**
South Jakarta District Court	2011/2	23	7	N/A
	2014	28	7	N/A
	2015	27	3	N/A
Sub total		**78**	**17**	**N/A**
Bandung District Court/ Bandung Anti-Corruption Court	2011/2	-	-	-
	2014	2	19	67
	2015	296	74	97
Sub total		**298**	**93**	**164**
Tangerang District Court	2011/2	41	12	N/A
	2014	155	42	N/A
	2015	43	7	N/A
Sub total		**239**	**247**	**N/A**

There is no published data about the population of different types of cases decided by each court each year. As a result, the representativeness of the samples is unknown.

B. Dependent and Independent Variables

To assess consistency and proportionality in sentencing, as well as the legal and extra-legal factors that influence sentencing outcomes, this thesis analyses correlations between relevant variables. For theft- and embezzlement-related offences, there is only one dependent variable included: the severity of sentences imposed, measured by the length of imprisonment. Particularly for corruption offences, this thesis also assesses the amounts of fines imposed, the lengths of custodial punishment as substitution for unpaid fines, and the lengths of imprisonment as substitution for unpaid restitution orders. Long lists of independent variables are assessed, as shown in Table 5.5 below, to ensure accuracy and reliability. Data for all variables have been collected directly from the decisions (by reading them) because the courts do not collect most of these data, while some data that were collected are not publicly available.[379]

[378] For a detailed distribution of each type of offence, see Chapter 6.

[379] The courts do record several data, such as types of offences in each court, types of sentences imposed, or gender of offenders, in their case management system, however, these data are not publicly available.

Table 5.5: Description of Independent Variables

Independent Variable	Examples of Measurement
Relates to Harms	
1. Type of offence	11 categories: such as “theft”, “aggravated theft”, “embezzlement”, or “Article 2(1)” (see type of offences discussed above)
2. Amount of loss to victims	7 categories, ordinal scale: “petty”, “small”, “medium”, “medium-large”, “large”, “large-grand”, and “grand” (see definition of each category in Table 5.6).
3. Type of victim	3 nominal level categories: "individual", “business", and "government"
4. Recovery of loss	4 interval categories: “0-25%”, “>25%-50%”. “>50%-75%”, and “>75%-100%”
5. Repaying illicit gains	Same as above
6. Forgiveness by victim	Binary: “victim forgave” versus “victim did not forgive”
Relates to Culpability	
7. Number of offences	Binary: "single offence" versus "multiple offences"
8. Reoffending status	Binary: "first-time offender" versus "reoffender"
9. Role of offender	Binary: “offender” versus “assisting”
10. Amount of illicit gain received	In Rupiah
Relates to Mitigation & Aggravation	
11. Total of mitigating considerations	Total number of mitigating factors considered (“first time offender”, “remorse/promise not to reoffence”, “admitting to the offence/pleading guilty”, “courteous demeanour during trial”, “breadwinner of the family”, “restitution or promise to return loss”, “has not derived benefit from the offence”, “young/old age”, “victim’s forgiveness/conciliation”, “serving the country/meritorious”, and “others”)
12. Total of aggravating considerations	Total number of aggravating factors considered (“public disturbance”, “harm to the victim/state”, “contrary to government program”, “has profited from the offence”, “recidivist”, “not admitting the offence”, “injured/traumatized the victim”, “multiple offences”, and “others”)
Relates to Offender’s Characteristic	
13. Gender	Binary: “male” versus “female”
14. Age	4 interval categories: “16-19”, “19-21”, “22-65”, and “>65”.
15. Occupation	7 nominal level categories: “not working”, “student”, “labour/equivalent”, “private/government employee”, “mid-level bureaucrat/executive”, “high-ranking official/executive”, “private”
Others	
16. Length of prosecutor’s recommended sentence	In years
17. Number of offenders	Total number of offenders
18. Duration of pre-trial detention	In months (calculated from the duration of detention by the police, prosecutors, and judges)

Independent Variable	Examples of Measurement
19. Type of goods stolen/embezzled	Binary: “motorbike” versus “other goods”
20. Court location	4 nominal level categories (for theft and embezzlement-related offences): "Central Jakarta", “South Jakarta", "Bandung ", and “Tangerang"; and 2 categories for corruption offences: “Jakarta ACC” and “Bandung ACC"

The choice of these variables was based on two factors: first, the prediction of their relevance to the sentencing outcomes, according to the law and theories or perspectives discussed in Chapter 2, as well as interviews with judges; and, second, the availability of the data in the decisions, including whether they can be objectively measured. This means that generalisation cannot be avoided. For example, most decisions only differentiate offenders’ roles in an offence according to the categories provided by the law, for example, between “offender” and “assisting”. In reality, there are nuances in each category. For example, in an offence performed by multiple offenders, one “offender” may be the ‘mastermind’, and so deserving of the harshest punishment, while others may be simply the executors. Such differentiation is not included in this assessment because it would have required more detailed analyses of decisions (which would have been difficult, due to the large size of the sample). It would also have necessarily involved the researcher's subjective interpretation.

The analysis also does not include, for example, offenders’ race, which is one of the main predictors of sentencing outcomes in some countries, because such information is not presented in the decisions. In any event, due to the social context in Indonesia there are thought to be few serious racial issues in the context of sentencing for the studied offences.[380] The absence of this variable does not influence the accuracy and reliability of the findings. Similarly, the analysis does not include variables such as judges’ characteristics (e.g., age, gender, or length of service), which are not available in the decisions or in other publicly available data.[381]

[380] Racial discrimination in Indonesia is mainly concerned with the socio-cultural, economic and other human rights of Papuans, who constitutes very small percentage of the population. There are also some allegations of racial discrimination against ethnic Chinese. However, no study that I know of specifically assesses the impact of race in sentencing. Further, while there are indications that foreigners of many different races disproportionally receive capital punishment and there is at least one case where the court viewed being foreign as itself an aggravating factor (Decision 772/K/Pid/2007), these are only concerned with drugs offences, which is outside the case study range of this thesis. See, for example, Colman Lynch, ‘Indonesia's Use of Capital Punishment for Drug-Trafficking Crimes: Legal Obligations, Extralegal Factors, and The Bali Nine Case’ (2008) 40 *Columbia Human Rights Law Review* 523, 564.

[381] judges serving in the Jakarta, Bandung, and Tangerang courts are usually those who have previously served in rural or small urban courts for more than 20 years. Therefore, it is safe to assume that they were all relatively senior and experienced.

C. Defining Sentencing Consistency and Proportionality as well as Socioeconomic Groups of Offender

There are several key concepts or terms used in this study that need to be defined: "consistency" (or, its opposite, "inconsistency" or "disparity"); "proportionality" (or, "disproportionality"); "similar case"; and "margin of tolerance". Further, this thesis frequently groups offenders based on their socioeconomic status to assess the potential of biases in sentencing, which requires clarification. Below are explanations of each concept or term.

1. Consistency, Similar Cases and Margin of Tolerance

Consistency means that similar cases are treated alike. Accordingly, "inconsistency" or "disparity" can be justified or unwarranted, depending on the similarity (or dissimilarity) of the cases compared, although in this thesis, I will occasionally use the term 'inconsistency' for 'unwarranted'. 'Unwarranted disparity' occurs when a panel of judges, or different panels of judges, sentence similar cases differently,[382] usually because of extra-legal factors.[383] Therefore, determining 'similar cases' is crucial. This thesis defines 'similar cases as cases that have similar levels of harm and culpability (similar seriousness of offence) without the presence of meaningful mitigating or aggravating factors, as shown in Table 5.6 below.

Table 5.6: Definition of Similar Cases

1.	Same type of punishment (only imprisonment)
2.	Same offence (same provision in the law)[384]
3.	The victim is an individual, not a business or government (except in corruption and aggravated embezzlement cases[385])
4.	Common types of stolen or embezzled goods (excluding charitable money)
5.	Completed offence (excluding an attempt)
6.	Committed by adult offender (between 21 and 65 years old)
7.	Committed by first-time offender (excluding recidivist)
8.	Single offence (excluding multiple-offending)
9.	The offender is the perpetrator (excluding assisting an offence)
10.	Threatening victims with sharp weapons (only in robbery cases)

[382] Stephen J. Schulhofer, 'Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity' (1992) 29 *American Criminal Law Review* 833, 835-6.
[383] Charles W. Ostrom, Brian J Ostrom and Matthew Kleiman, 'Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing' (Report, U.S. Department of Justice, 2004).
[384] For corruption cases, 'same offence' is defined as an offence that caused Rp100 million (A$10,000) or less of loss to state finances, or cases that caused damage beyond that amount, regardless of the provision used in the charge as stipulated in Supreme Court Circular Letter No. 7 of 2012. See further discussion on this issue in Chapter 9.
[385] In these two offences, the type of victim assessed is business or government because the majority of victims were the state, state-owned companies, or private businesses.

11.	No other significant aggravating and mitigating factors (for example: denying the offence; compensating for the loss or promising to do so; being forgiven by the victim; and other specific personal mitigation (offender was pregnant, a single parent, or sick; the offence was motivated by urgent need, etc.)
12.	Similar group of loss

Group of Loss		**Range of Loss** (Rp.)
Petty	:	0-2.5 million (A$0-250)
Small	:	> 2.5-25 million (A$250-2,500)
Medium	:	> 25-100 million (A$2,500-10,000)
Medium-large	:	> 100-500 million (A$10,000-50,000)
Large	:	> 500 million-1 billion (A$50,000-100,000)
Large-grand	:	> 1-10 billion (A$100,000-1 million)
Grand	:	Above 10 billion (above A$1 million)

13.	The amount of profit gained from the offence (only in corruption cases). The grouping is the same as the grouping of loss, above

The reason for choosing these definitions is mainly that they reflect a similar level of harm and culpability according to the law, and also because they represent the majority of the samples. To some extent, they also reflect judges' interpretation of an offence's seriousness. Cases with a different type of offence, or with the same offence but with a different level of loss, for example, obviously make the culpability of the offender or the harms they caused dissimilar. Even if two offenders commit the same offence with the same losses but one has major mitigating or aggravating considerations (such as repairing the harm, being underage, or stealing charity funds), the two cases should be considered as dissimilar because these factors may significantly influence sentencing outcomes. Choosing to focus on the particular nature of offence or offenders (such as first-time offender, main perpetrator, or attempted offence) ensured that the study compared cases in which offenders had similar levels of culpability.

This choice was also made because these kinds of cases constitute the majority of the case samples, so more similar cases can be compared. Similarly, in determining similar theft cases, only one particular type of victim—individual natural persons—was included because most victims in these types of offences were individuals, and also because judges generally view offences that harm individuals as more serious than those that harm a business or the government.[386] For particular offences, such as robbery, there was an additional variable considered, that is the type of assault (including types of weapon used, if any). The categorization of different groups of loss is based on the law[387] and personal judgment, as well as the distribution of groups in the sample. As shown, this thesis is relatively strict in defining similar cases. While this reduces the number of cases to be assessed, it also makes the assessment more objective.

[386] See discussion of this issue in Chapters 6 and 7.

[387] The law, for example, clearly defines minor property offences as offences that cause up to Rp2.5 million loss (A$250).

Another issue concerns the degree of sentencing variations that are still tolerable. This study introduces a "margin of tolerance", where a sentence is considered consistent if its severity is not far below or above the median sentence of similar cases. A sentence that is outside the "margin of tolerance" is considered as "unjustified" or "unwarranted" disparity. For imprisonment, the margins of tolerance are set as follows:

Table 5.7: Margin of Tolerance of Different Offences

Type of Offence	Margin of Tolerance
Theft, Aggravated Theft, Embezzlement, and Aggravated Embezzlement	12 months (6 months below or above median sentence for similar offences)
Aggravated Burglary, Robbery, and Aggravated Robbery	18 months (9 months below or above median sentence for similar offences)
Corruption	24 months (12 months below or above median sentence for similar offences)

These margins of tolerance are set based on the span of minimum and maximum penalties for each type of offence; the complexity of factors to be assessed; and, to a lesser degree, the common sentencing outcomes of certain offences. They also consider different perspectives between judges and offenders on what is considered an unwarranted disparity.

The span between the minimum and maximum penalties for each offence, which indicates the level of discretion allowed by laws, of course matters. When the span is wide, the possibility of disparity between sentences is bigger. The probability of wider disparity in sentencing for aggravated robbery, for example, which carries a maximum of 12 years imprisonment, is more expected than in theft-related offences, which carry a maximum of only five years imprisonment (or a fine, as an alternative). Another factor related to this issue is the common sentencing outcomes for certain offences. As will be shown in Chapter 6, the judges in this study never imposed the maximum penalties allowed in sentencing any type of offence. In corruption cases, for example, the most severe sentence was less than half the maximum penalty allowed (nine years of 20 years of maximum penalty), even though twelve of the cases involved very big losses, between approximately Rp70 billion and Rp600 billion (A$7-60 million). Similarly, of 134 aggravated robbery cases, only four offenders received between six and seven years of imprisonment, far below the maximum penalty for the offence (which is 12 years, with optional additional imprisonment for cases with certain aggravating circumstances), even though some involved threatening or harming victims with sharp weapons or guns. This indicates that, in reality, most judges did not consider the maximum penalties in the law as the upper ceiling, which makes it reasonable to fix a narrower margin of tolerance.[388]

[388] Some may interpret the above data as indicating judicial "self-discipline" in ensuring consistency in sentencing. Understanding the absence of severe sentences (closer to the maximum penalties) in cases involving serious harm shown above, I argue that this practice is driven by other reasons.

Some offences also involve more complex factors to be considered, making it more difficult for judges to come to a consistent sentence. Corruption offences, for example, are always committed in groups, where the degree of involvement of each offender might differ slightly from one to another. Corruption also involves factors such as how much profit each offender gains from the offence, which influences the culpability of the individual offenders. Robbery also involves non-monetary harms, such as humiliation or physiological harm as a result of threats made to victims, and these change with different characteristics and contexts. All these factors increase the probability of justified disparity.

Lastly, judges and offenders' different views of what is considered unwarranted disparity are also taken into account in determining the margin of tolerance. What is considered as a small disparity - one year, for example - may be seen as reasonable by judges but not by offenders.[389] To balance both views, a relatedly rigid margin of tolerance is desirable.

As for fine sentences, no margin of tolerance was introduced. This is because the majority of the fines imposed (71 per cent) were identical (Rp50 million or A$5,000), so consistency or unwarranted disparity can be assessed by simply assessing the decisions.

2. Proportionality

Proportional sentencing means that different cases are treated differently, according to their level of seriousness, that is, their level of harm and/or culpability. Since the harms and the culpabilities between cases can vary, in assessing proportionality this thesis will also compare "similar cases" as defined earlier, but of different types of offence (which indicates the difference of harm and culpability, reflected in different minimum or maximum penalties), *or* of same offence but with different levels of loss. As an example, the first case concerns an adult first-time offender committing the completed theft of an individual victim, causing the victim a loss of Rp1 million (A$100). The second case concerns an offender, with matching characteristics, committing the same offence but causing a loss of Rp100 million (A$10,000), again to an individual victim. If the judges were to sentence these offenders similarly, then the decisions would be considered disproportional because they did not consider the difference in the harms that they caused (with the assumption that neither individual victim is considered vulnerable). It would also be considered disproportionate if an offender who stole goods worth Rp100 million received a similar sentence to an offender who committed robbery (that is, injured the victim of the theft), even if the value of the 'stolen goods' was just Rp1 million.

3. Socio-economic Status of Offenders and Sentencing Biases

One of the purposes of this study is to know whether or not sentencing practice in Indonesia is affected by the socio-economic status of offenders. Therefore, defining different socio-economic groups of offenders is important. This is, however, very difficult, mainly because this study only relies on court decisions, which do not provide such information. The best information that can be located in court decisions to generalize

[389] Samuelson (n 371) 11.

offenders' socio-economic groups are offenders' occupations and educational backgrounds, as well as the availability and the nature of their legal representation (that is, whether they used legal aid or private lawyers). This thesis will only use the above variables in making assertions, not as independent variables to statistically assess the role of socio-economic status in sentencing. More importantly, as will be shown below, differentiation between socio-economic groups of offenders, in general, is already represented in the types of offences they committed.

Most decisions (62 per cent) did not mention the educational backgrounds of the offenders. Of those that did, the data show that almost all theft-related offenders were of low educational background (secondary or below), compared to embezzlement and, in particular, corruption offenders, as presented in Table 5.8 below. On the other hand, the majority of corruption offenders (75 per cent) had an under- or post-graduate diploma.

Table 5.8: Distribution of Offender's Educational Background

Educational Background	Type of Offence		
	Theft	Embezzlement	Corruption
≤ Primary	80	7	6
Secondary	133	35	38
Diploma/undergraduate	3	14	77
Postgraduate	-	1	36
Unknown	485	133	48

In terms of occupation, the majority of theft offenders (83 per cent[390]) were either not working or working in low-income sectors, as part-time/fulltime labourers, peasants, drivers or other similar occupations ("labour/equivalent"), with estimated monthly incomes of between Rp2 million and Rp3 million (A$200-300).[391] In contrast, the majority of corruption offenders were mid-level executives or bureaucrats (e.g., managers or Echelon III-IV officials)[392] and high-ranking officials or executives (e.g., members of the legislature, Echelon II and above state officials, or directors of companies or state-owned companies). Their monthly take-home income may range from Rp8 million to around Rp100 million (A$800-10,000). As for embezzlement offenders, the majority were private or government employees, such as salespersons, cashiers, shop attendants, teachers or

[390] This number only reflects the percentage of the total number of cases in which the offenders' occupation is clear; it does not include the cases where the offenders' occupation is given as 'private', which cannot be categorised.

[391] 'Ini UMR Jawa Barat 2015', *Kompas* (online), 22 November 2014 < https://regional.kompas.com/read/2014/11/22/07020041/Ini.UMK.Jawa.Barat.2015>; 'UMR Tangerang 2015 Ditetapkan Rp 2,72 Juta', *Tempo* (online), 21 November 2014 <https://metro.tempo.co/read/623423/umk-tangerang-2015-ditetapkan-rp-273-juta>; Pemerintah Provinsi DKI Jakarta, UMP dan Inflasi di DKI Jakarta 2000-2015 <http://data.jakarta.go.id/dataset/upahminimumprovinsidaninflasididkijakarta/resource/3ddd1c6e-39a7-489b-a475-34b5ffdf929>.

[392] An 'echelon' is a public service rank. Officials in Echelons III and IV have usually worked for between 15 to 30 years, depending on the size of the organization. In the local government structure, for example, a sub-district level (*Camat*) is headed by an Echelon III official. As a comparison, a deputy minister is Echelon I.

administrative staff, with estimated average monthly incomes of between Rp2 million and Rp6 million (A$200-600).

Table 5.9: Distribution of Offenders' Occupations

Occupation/Position	Type of Offence		
	Theft	Embezzlement	Corruption
Not Working	197	5	2
Student	6	-	-
Labour/equivalent	237	30	2
Private/government employee	99	105	42
Mid-level bureaucrat/executive	-	5	83
High-ranking official/executive	-	5	75
Private (unclear)	179	40	1

There were 220 cases where the decisions only referred to offenders' occupation as "private" (*swasta*) without further description, making it difficult to classify them.[393]

Also, the majority of offenders charged with theft and embezzlement-related offences (93 per cent and 75 per cent respectively) were not represented by lawyers, at least at trial. A few (mainly those who had committed more serious offences)[394] hired private lawyers or received legal assistance, presumably *pro bono*, from legal aid lawyers.[395] In contrast, most corruption offenders (93 per cent) were represented by private lawyers.

Table 5.10: The Presence and Type of Legal Representation

Presence and Type of Legal Representation	Type of Offence		
	Theft	Embezzlement	Corruption
No Legal Representation	406	94	9
Legal Aid Lawyer	8	8	6
Private Lawyer	23	23	190
Unknown[396]	264	65	-

Based on these characteristics, it is safe to assume that the overwhelming majority of theft-related offenders and, to lesser degree, embezzlement-related offenders, were of lower-socio-economic status, while most corruption offenders were of middle and higher status.

[393] In these cases, it seems that the decisions relied simply on offenders' occupational status as written in their Resident Identity Cards (*Kartu Tanda Penduduk*).

[394] The 14 theft and 16 embezzlement offenders who were represented by private lawyers were those who committed theft and embezzlement of a value exceeding Rp100 million (A$10,000).

[395] The categorization of private and legal aid lawyers here is based on the name of the office where the lawyers' work. This can be misleading because some small private law firms put 'legal aid' (e.g., *Lembaga Bantuan Hukum* X) in their names.

[396] These decisions did not mention whether or not the offenders were represented by lawyers. In such cases, the defendants were most probably not represented by lawyers.

D. Methods of Data Collection and Analysis

1. Data Collection and Input Processed

As mentioned, data of all variables were collected directly from online published decisions. Each decision was downloaded from the Supreme Court website and read, and relevant variables were inputted into an Excel form. To minimise data input error, a control mechanism was put in place.[397] Using statistical software, the data were then analysed.

2. Types of Statistical Analysis

The analysis of consistency and proportionality was done with a simple technique. Similar cases were selected and the median of sentences imposed was calculated. Once the median sentence was known, the total number of sentences imposed inside or outside the margin of tolerance were counted to determine the level of sentencing disparity. Similarly, the study compared the median of sentences imposed in cases that were similar but had different levels of losses, or different offences, to assess their proportionality.

In assessing legal and extra-legal factors that influenced judges in determining the length of sentences imposed, more complex statistical analysis techniques were used, namely bivariate and multiple regression analysis (in this case, path analysis). Bivariate analysis is used to evaluate "relationship" (either "association" or "correlation", depending on the types of the data) between two variables: a dependent variable (in this study, the length of imprisonment sentence imposed by judges) and an independent variable (in this study, each of the independent variables discussed before). Since this only takes into account the relationship of two variables, it has inherent limitations. As an example, if a bivariate analysis result were to show an association between gender and sentencing outcomes, for example, that female offenders on average received shorter imprisonment sentences than male offenders, this could indicate that the judges indeed considered gender in sentencing. Alternatively, the result could be because the majority of female offenders only committed lesser offences, or caused smaller harms than male offenders, or that the relationship was triggered by small samples of outlier cases. Here, multiple regression helps. Multiple regression informs correlation between several independent variables and a dependent variable to provide evidence that helps to draw causal inference of the predicted influence of independent variable(s) with the dependent variable.[398] To do that, theories or hypotheses are needed to test predicted variables that might correlate with the dependent variables. This is why conducting bivariate analysis is important. As discussed before, in selecting the independent variables for this study, I relied on the sentencing theories

[397] Approximately 10 per cent of data concerning theft and embezzlement-related cases were rechecked by other persons hired for data input. This is sufficient because decisions of these types of cases are usually short, between 7 to 25 pages long, and do not involve complex facts or legal issues. As for corruption decisions, considering their complexity and length (usually about 100-200 pages), 50 per cent of the data inputted were rechecked.

[398] Jihye Jeon, 'The Strengths and Limitations of the Statistical Modeling of Complex Social Phenomenon: Focusing on SEM, Path Analysis, or Multiple Regression Models' (2015) 9(5) *World Academy of Science, Engineering and Technology International Journal of Economics and Management Engineering* 1634, 1637.

discussed in Chapter 2, contextualized by interviews with judges and the relevance of the variables according to bivariate analysis.[399]

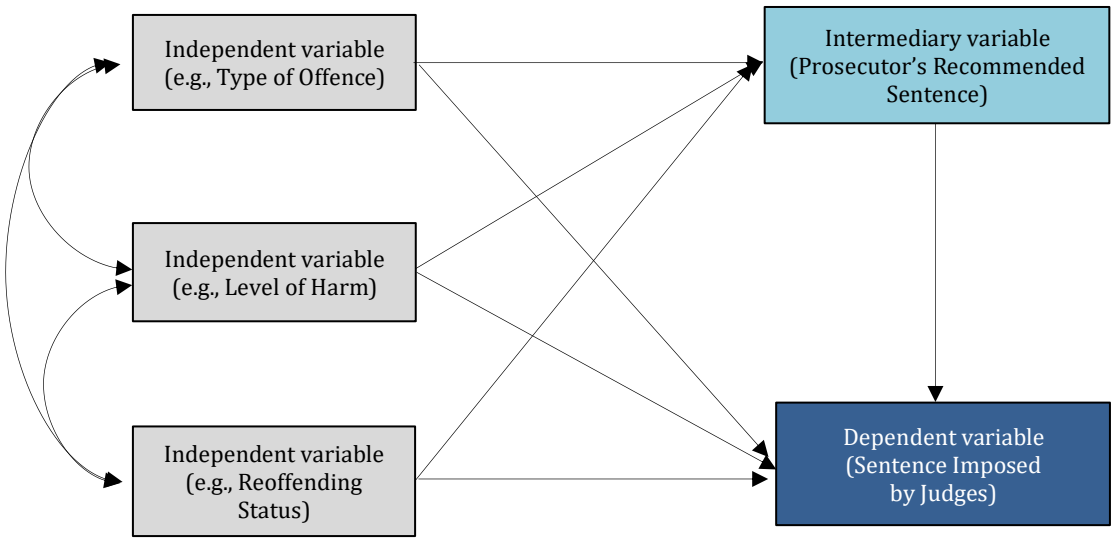
The problem with multiple regression techniques is that they are only applicable when the independent variables are not highly correlated with each other (no multicollinearity).[400] In this research, as will be shown in the bivariate analysis results (Chapter 7), the prosecutor's sentence recommendation is highly correlated with other independent variables. This is because prosecutors base their recommendations, like judges, on factors such as the types of offences committed, the role of offenders, or surrounding mitigation and aggravation factors. To overcome this, this thesis uses a particular multiple regression technique: path analysis.

Like other multiple regression techniques, the purpose of path analysis is to examine the causal connection between a dependent variable and independent variables.[401] Unlike other multiple regression techniques, however, it assesses the direct and indirect relationship between independent variables and a dependent variable. Indirect relation occurs when one or more independent variable(s) influences a dependent variable (*through* or *via* one or more independent variable(s) as intermediary(ies), sometimes called the intermediary or mediator variable). [402]

In the path model used for this study, the intermediary variable is the sentence recommendation proposed by the prosecutor. Other independent variables included were selected according to the following criteria: (a) the size and the significance of correlations or associations between independent variables (Table 5.5) and sentencing outcomes as indicated by the bivariate analysis results; and (b) specific reasons. For example, types of offences committed in corruption cases (between violation of Articles 2(1) and 3 of the Corruption Eradication Law) are not included in the path analysis because they are concerned with almost identical elements of crimes.[403] For an illustration of the path model used, see Figure 5.1 below.

[399] Without conducting bivariate analysis, there will be too many variables (including irrelevant ones) that may complicate the model.
[400] Jeon (n 397) 1637.
[401] In path analysis, the independent variable is usually called "exogenous variable" while the dependent variable is called "endogenous variable".
[402] Jeon (n 397) 1637-8; Kohei Adachi, *Matrix-Based Introduction to Multivariate Data Analysis* (Singapore: Springler, 2018).
[403] See further discussion on this issue above and in Chapter 9.

Figure 5.1: Illustration of the Path Model Used



E. Limitations

There are numbers of limitations in this statistical analysis. The first concerns the representativeness of the sample. As mentioned before, there are no publicly available data about the case population of different types of offences decided by each court, which means that the representation of the sample of decisions being studied is unidentified. Due to practical reasons mentioned before, this thesis assesses only a few district courts and Anti-Corruption courts in urban western Java. Consequently, the possible differences in sentencing practice, particularly in rural areas, cannot be captured. As a result, the results cannot claim to fully represent sentencing practice in the selected court, let alone Indonesia as a whole.

The second limitation concerns data availability, consistency and reliability. There were, for example, 76 theft and embezzlement-related cases where the total amount of loss caused by the offences was not written in the judgment. The decisions only mentioned the types of goods being stolen or embezzled. As a result, the amount of losses was estimated by the value of the stolen goods, including by comparing them to the price of similar goods sold online. Further, as shown before, many of the decisions did not state the occupation of the offenders. A few decisions also missed information concerning some variables—such as dates of offenders' pre-trial detention—or contained conflicting information, for example, stating that the offender was a first-time offender but, at the same time, a recidivist.[404]

More estimations were made on cases concerning corruption, mainly because some variables were not explicitly stated in the decisions. For example, the amount of illicit profit obtained by each offender (which indicates the offender's culpability) was sometimes not stated in the decision (or in the charge). In such cases, this thesis estimated

[404] For examples of these issues, see Chapter 6.

the amount of illicit profit from the amount of restitution (*uang pengganti*) that the court ordered them to pay.[405] The problem is that sometimes courts simply order all offenders to pay an equal amount of restitution, irrespective the actual profit gained by each offender. Moreover, there were cases where one or some of the offenders returned all the illegal profits received by all offenders, or recovered part or all of state losses, and judges mitigated the sentences of all the offenders. Further, some judges, including Supreme Court justices, mistakenly associated illicit profits gained by the offenders with state losses,[406] partly because the inconsistency of this matter in the Corruption Eradication Law[407] and how state loss is measured by law enforcers and/or expert witness.[408] Such mistakes have not been adjusted (corrected) because this thesis seeks only to uncover judges' interpretations, or understanding, of "the facts" (including what they perceived as illicit gain) and the sentences they imposed.

Further, the statistical analysis does not directly assess association or causality between an offender's socio-economic status and the length of imprisonment imposed on them. However, as discussed, such association can be made because, in general, different types of offences are committed by offenders of different socio-economic statuses. This was confirmed by the interviews with judges.

The last limitation concerns the statistical technique used. Path analysis can only measure variables with interval (scale) or ordinal data, which have value or rank.[409] This means that variables with nominal data, such as location or gender, could not be measured using this technique.[410] Nonetheless, as will be shown in Chapter 7, this limitation does not significantly influence the analysis because, according to bivariate analyses, most variables that have association or correlation with sentencing outcomes were interval or ordinal data.

[405] As discussed in Chapter 3, a restitution order is an order for an offender to repay illicit profits they obtained from the offence.

[406] Nur Syarifah, *Mengupas Permasalahan Pidana Tambahan Pembayaran Uang Pengganti dalam Perkara Korupsi* (8 December 2015) Lembaga Kajian dan Advokasi untuk Independensi Peradilan <https://leip.or.id/mengupas-permasalahan-pidana-tambahan-pembayaran-uang-pengganti-dalam-perkara-korupsi/>.

[407] Article 18(1) b of Corruption Eradication Law clearly states that courts can impose restitution (*uang pengganti*) orders to the amount of, at maximum, the total of illicit profits received by offenders. However, when the elucidation of the Law describes one of the new features of the Law, that is imprisonment as a substitute for unpaid restitution, it indicates restitution as a payment for recovering the state loss.

[408] For example, in cases involving mark-ups in building a school, the state loss is measured based on the total cost of the project, not the amount of money that the contractors (or other parties) received through the mark-up. As a result, when offenders recovered all of the state loss to receive sentencing discounts, which is quite common, it is as if the state got the new building for free. Interview with Judge #9 (15 January 2017). See further example in Fitria Hady, 'Keabsahan Pengembalian Kerugian Negara Melebihi Nilai dan Pengembalian Aset Pihak Ketiga (Analisis Putusan Tindak Pidana Korupsi No. 1122K/Pid.Sus/2013 dengan terpidana Isnain Ibrahim dan Adem Mustofa)' in Choky R. Ramadhan (ed), *Anotasi Putusan Tindak Pidana Korupsi* (MaPPI FHUI, 2015) 67.

[409] Jeon (n 397) 1638.

[410] Nominal data only contains groups or categories, so that they do not have value to be sorted (measured).

CHAPTER 6
CONSISTENCY, PROPORTIONALITY AND FACTORS MITIGATING AND AGGRAVATING SENTENCING: GENERAL FINDINGS

This chapter answers the first research question posed in the introductory chapter, namely, to what extent is sentencing of theft, embezzlement-related and corruption offences consistent and proportionate, as well as fair (unbiased) towards offenders from different socio-economic backgrounds? It also investigates how judges use the mitigating and aggravating considerations elaborated in Chapter 3 in practice. I will begin by analysing the types of sentences commonly imposed by judges before demonstrating the presence of sentencing disparity and disproportionality in the cases studied. I will also show that judges use mitigating and aggravating factors in an unjustifiable and arbitrary manner, including to favour offenders from middle and higher socio-economic backgrounds.

A. Types of Sentences Imposed

1. Overreliance on Imprisonment Sentences

Overall, judges overwhelmingly prefer imprisonment sentences over other types of available punishments, such as fines or suspended sentences. Of 891 offenders who committed theft and embezzlement-related offences, only seven received suspended jail sentences. No corruptor received a suspended sentence, because the law prohibits it.[411] Fines were imposed on corruption offenders, but were not used in any simple theft or embezzlement cases, despite the Supreme Court's efforts to encourage the use of these types of punishments, including by increasing the amount for fines available through Supreme Court Regulation 2 of 2012.

On one hand, the overuse of incarceration is troubling. As will be shown in this chapter and Chapter 8, this has created disproportionality in sentencing in less serious cases, such as theft or embezzlement, where levels of loss are lower and major aggravating circumstances are absent. Moreover, these cases usually involved socially-disadvantaged offenders,[412] suggesting that there were social and economic issues underlying the commission of the offences. Further, due to poor Indonesian prison conditions and a lack of rehabilitation programs,[413] imprisoning minor offenders only causes more damage to

[411] As mentioned, Articles 2(1) and 3 of the Corruption Eradication Law provide for mandatory minimum terms of imprisonment which means judges cannot impose suspended sentences. See further discussion on this issue in Chapter 9.

[412] See Chapter 5 concerning the demography of offenders committing different types of offences.

[413] See discussion of issues faced by correctional facilities in, e.g., Widayati, Lidya Suryani, 'Rehabilitasi Narapidana dalam Overcrowded Lembaga Pemasyarakatan (Rehabilitation of Prisoners in Overcrowded Correctional Institution)' (2016) 3(2) *Negara Hukum* 201; Asian Watch, 'Prison Conditions in Indonesia' (An Asian Watch Report, 1990) <https://www.hrw.org/legacy/reports/pdfs/i/indonesa/indonesi908.pdf>. This means that placing offenders who commit less serious offences in prison can turn them into "professional criminals" or increase involvement in drugs abuse. Furthermore, because many of the offenders were previously working, sending them to prison causes economic losses to them and families (in addition to other non-material losses), as well as jeopardising their future employment because it is much harder for ex-convicts get jobs.

offenders and their families, as well as imposing further burdens on an already overpopulated prison system.[414]

Further, there seem to be no standards or pattern as to how judges impose (or prosecutors propose) suspended sentences. Suspended sentences were used in cases with large losses, including where no mitigating conditions were presented, but also in less serious cases, such as offences with relatively small losses committed by young offenders, as shown below.

Table 6.1: All Decisions Concerning Suspended Sentences

Offence	Loss (thousand, Rp)	Recommended Sentence (months)	Sentence (months)	Pre-trial Detention (months)	Key Mitigating Consideration
Theft	3,000	6 (suspended)	6 (suspended)	0.6	Young offender, 23 yo (Decision 1282/2011/PN.Tng)
Aggravated Theft	5,000	9 (suspended)	9 (suspended)	0.5	Young offender, 17 yo (Decision 1188/2014/PN.Tng)
Embezzlement	Unclear	2	2 (suspended)	0	Defendant asked for forgiveness from the victim (Decision 992/2012/PN.Jkt.Sel)
	315,000	6 (suspended)	3 (suspended)	1.7	Reconciliation between defendant and victim, the defendant repaid the loss and the victim withdrew the police report (Decision 1800/2014/PN.Tng)
	409,746	24	10 (suspended)	0.97	N/A (Decision 1099/2009/PN.Jkt.Sel)
	432,275	36	6 (suspended)	Unclear	(1) The defendant tried to repay the loss; (2) the initial relationship between the defendant and the victim was business-related; (3) the case was decided by the civil court; (Decision 1469/2011/PN.Jkt.Pst)
Aggravated Embezzlement	13,325	6 (suspended)	4 (suspended)	Unclear	Defendant repaid the loss (Decision 614/2014/PN.Bdg)

On the 'positive' side, the fact that almost all offenders receive the same type of punishment (imprisonment) indicates some degree of consistency in sentencing.

[414] 'Sudah Over Kapasitas Lapas Harus Revitalisasi', *Gatra* (online), 23 September 2018 <https://www.gatra.com/rubrik/nasional/347625-Sudah-Over-Kapasitas-Lapas-Harus-Revitalisasi>.

In their written decisions, judges offer no formal reasons why they chose certain types of punishment over others, in this case, mainly imprisonment. Contemporary decision-writing differs from historical judicial practice, when judges commonly gave written reasons for their choice of sentence.[415] During interviews, some judges claimed that there is no point in imposing fines because most of the defendants charged with theft and embezzlement could not afford to pay fines due to their economic circumstances, and therefore would eventually have to serve detention as a substitute.[416] As it was put by one judge, 'how can a petty thief pay a fine when the motive of the offence itself is financial deprivation?'[417] This argument, however, is not convincing. The maximum fine for theft or embezzlement is less than one million rupiah (approximately A$90). Most defendants, arguably, can afford such fines or find ways to pay them.[418] Besides, many defendants from low economic backgrounds manage to bribe or make illegal payments when requested by law enforcers or judges.[419] There is a more plausible argument: a fine is generally considered 'too soft' a punishment.

Certainly, a number of judges and prosecutors (presumably, also lawmakers and the public) consider fines alone (not as cumulative to imprisonment) as 'too soft' and, accordingly, believe imposing it may create dissatisfaction on the part of both victims and the public, and be unlikely to deter crime.[420] This is also the reason why lawmakers do not make increasing the level of fines in the KUHP a priority, or why there are only very few offences (outside those stipulated in the KUHP and local regulations, or those targeting the corporation as an offender) that are punishable with only fines. Commenting on the encouragement to impose non-incarceration punishments for less serious offences in Supreme Court Regulation 2 of 2012 and the Criminal Code Bill, one judge said 'Where are the deterrent effects? ... It will make people think that it is okay to commit theft'.[421] Further, imposing fines might also give the impression to the public that 'justice can be bought'[422] in its literal meaning. This concern is understandable, considering the public's distrust of the judiciary, as shown in a number of surveys,[423] and the fact that fines are

[415] Samples of decisions rendered in the 1950s indicate that judges examined different options for sentences (between fine and imprisonment) as well as considered defendants' financial conditions before determining the most appropriate punishment to be imposed. See Roeslan Saleh, *Keputusan-keputusan tentang Perkara Pidana* (Gadjah Mada, 1958) 223.

[416] Interviews with Judge #12 (Bandung, 20 January 2017), Judge #4 (Jakarta, 14 December 2016) and Judge #7 (Tangerang, 10 January 2017).

[417] Interview with Judges #12 (Bandung, 20 January 2017).

[418] Of 187 defendants imprisoned for theft and embezzlement, the majority (147 defendants or 79 per cent) were employed when committing the offence.

[419] See, e.g., Asmara (n 17) 161, 279 and 346-7. See Chapter 7 for discussion of corruption practices in sentencing.

[420] Interviews with, among others, Judge #5 (Jakarta, 6 January 2017), Judge #8 (Jakarta, 12 January 2017), Judge #10 (Jakarta, 12 January 2017) and Prosecutor #15 (Jakarta, 5 January 2017).

[421] Interview with Judge #5 (Jakarta, 6 January 2017).

[422] Interview with Judge #12 (Bandung, 20 January 2017).

[423] See, e.g., 'Survei Kompas: Citra TNI Naik Hingga 94 Persen, Citra DPR Terendah', *Kompas* (online), 21 October 2017 <https://nasional.kompas.com/read/2017/10/21/07122651/survei-kompas-citra-tni-naik-hingga-94-persen-citra-dpr-terendah>; 'Indeks Negara Hukum Indonesia Mengalami Penurunan', *Kompas* (online), 5 September 2017 <https://nasional.kompas.com/read/2017/09/05/16285241/indeks-negara-hukum-indonesia-mengalami-penurunan?page=2>.

almost never used as alternatives to imprisonment, except in traffic violations.[424] In short, members of the judiciary generally seem to believe that the only way to deter crime and to bring about justice is through incarceration.

Judges' reluctance to impose fines is also influenced by the fact that prosecutors very seldom, if ever, recommend this type of punishment for 'street crimes'. Therefore, if judges were to impose fines, the prosecutor would likely appeal the decision,[425] which is problematic because it would create an additional workload for judges, as well as other undesirable effects, as explained in Chapter 7. Meanwhile, prosecutors recommend against fines because they too see fines as a soft punishment that will not deter crimes

Further, when an offender fails to pay a fine (which is very common),[426] the state accounting system records the unpaid fine as a financial liability of the prosecutor's office, that will only be 'cleared' if and when the offender completes his or her detention in substitution. As a consequence, if the offender has not completed the detention by the end of the financial year, which sometimes happens, the prosecutor's office's yearly financial report will include the unpaid 'debt'.[427] This, of course, discourages prosecutors from recommending fines as an alternative to imprisonment.

In the corruption cases considered in this study, there was only one case where the judge did not impose a fine, even though the majority of the defendants (165 persons) were sentenced under Article 3 of the Corruption Eradication Law, which does not impose a mandatory fine. This case concerned the illegal selling of subsidised rice-for-the-poor worth less than Rp4.5 million (A$450), for which the offender was sentenced to one year's imprisonment for violating Article 3.[428] Although the decision did not mention the reason for not imposing a fine, it is safe to assume that the judges interpreted the fine in Article 3 as an alternative penalty to imprisonment under Article 2. This is because Article 3 specifically uses the term 'imprisonment and/or fine' when referring to types of punishment that can be applied to those who commit offences under this provision, in contrast to Article 2, which only uses the word 'and'. Supreme Court Circular Letter 7 of 2012 and Decision 119 K/Kr/1972 discussed in Chapter 8 reaffirm this issue.[429] So, why then do judges still impose fines *and* imprisonment in other cases under Article 3? One explanation is that some judges understand fines and imprisonment in Article 3 as mandatory, cumulative punishments, as opposed to alternatives.[430] One of the judges interviewed, for example, argued that if the term "and/or" is to be interpreted as an alternative, then judges would also be allowed to impose only a fine without

[424] One judge interviewed said that she could not recall a single case where she or her colleagues imposed a fine, except in traffic offences or in cases where fines were mandatory: Interview with Judge #5 (Jakarta, 6 January 2017).
[425] Interview with Judge #13 (Bandung, 20 January 2017).
[426] Gatot Supramono 'Hukuman Pidana Denda di Indonesia' (2008) XXII(270) *Varia Peradilan*, 35.
[427] Interview with Prosecutor #15 (Jakarta, 5 January 2017).
[428] Decision 017/2014/PN.Bdg.
[429] Supreme Court Circular Letter 7 of 2012 [26].
[430] Interviews with Judge #11 (Jakarta, 19 January 2017) and Judge #13 (Bandung, 20 January 2017).

imprisonment, which is not the position of the Supreme Court.[431] A more pragmatic reason is because the prosecutor practically always recommends fines in addition to imprisonment; if judges do not apply both penalties this will lead the prosecutor to appeal the decision.[432] This also explains why in the one outlying case mentioned above the judge did not impose a fine: the prosecutor did not request it.

As in the case of fines, prosecutors and judges also consider suspended sentences as too lenient, and thus seldom recommend or impose them.[433] As prosecutors seldom propose suspended sentences, this creates a vicious circle, whereby if judges apply this type of sentence it opens their decision up to appeal by prosecutors, which they see as undesirable. This partly explains why suspended sentences are mainly imposed in cases where the prosecutors recommend them, as shown in Table 6.1 above. Furthermore, the fact that almost all offenders (99.5 per cent) were detained prior to and during the trial also leaves little room for judges to impose non-custodial sentences. If a judge believes that an offender deserves only a light penalty, it is safer to simply sentence him or her according to the period that he or she has already spent in pre-trial detention.[434]

Overcrowding in prisons and the lack of capacity to rehabilitate offenders do not seem to be convincing reasons for judges not to impose imprisonment as the primary type of punishment. One judge noted that it is difficult to take overcrowding into consideration when sentencing because practically all prisons are overcrowded.[435] Another judge argued that, despite the dysfunction of the prison system with respect to rehabilitation, there is always a possibility that the offender will 'receive God's blessing' and repent.[436] In short, the judges were not much concerned about these practical, but important, constraints.

2. Limited Application of Additional Punishments and Special Orders

As discussed in Chapter 3, the KUHP gives discretion to judges to impose additional punishment on offenders who commit certain offences (including all offences covered by this study), such as publication of the court's verdict, confiscation of the instruments and proceeds of crime, or temporary deprivation of rights to hold office or to vote in, or be a candidate in, an election.[437] In corruption cases, judges can also order offenders to pay restitution (*uang pengganti*) to the government equivalent to the amount of the stolen assets, or withdraw some rights and benefits received by the offender.[438] In all cases studied, however, the only non-principal penalties imposed were confiscation of instruments and proceeds of the crime (which is also commonly imposed for other

[431] Interview with Judge #11 (Jakarta, 19 January 2017). As discussed in Chapter 4 and 9, the Supreme Court maintains that Article 3 should be read so that the imposition of an imprisonment sentence is mandatory but that a fine is optional but not necessary.
[432] Interview with Judge #13 (Bandung, 20 January 2017).
[433] Interviews with, among others, Judge #5 (Jakarta, 6 January 2017), Judge #8 (Jakarta, 12 January 2017) and Judge #10 (Jakarta, 12 January 2017).
[434] Interviews with Judge #5 (Jakarta, 6 January 2017) and Judge #10 (Jakarta, 12 January 2017).
[435] Interview with Judge #6 (Tangerang, 10 January 2017).
[436] Interview with Judge #5 (Jakarta, 6 January 2017).
[437] Article 35(1) of the KUHP.
[438] Article 18(1) of the Corruption Eradication Law.

offences)[439] and restitution orders. No corruption offender, for example, received an order for deprivation of the right to hold office or the right to vote in, or be a candidate in, an election,[440] despite activists and scholars advocating such measures[441] in reaction to many corruption offenders having been promoted to important government positions or (re)-running in elections just a few months or years after their release from prison.[442]

The absence of additional punishments (besides confiscation of instruments and proceeds of crime, as well as restitution orders) is not surprising, given supplementary punishments are largely ignored by prosecutors, and therefore not implemented by judges in practice. As one judge noted, he could not recall publication of the court's verdict or temporarily deprivation of rights (besides the right to hold office) ever being requested by prosecutors or imposed by judges.[443] There is even evidence that some judges lack knowledge of the existence of some of the additional punishments available. One judge, for example, wrongly claimed that the KUHP does not allow for, or recognise, temporary deprivation of rights in theft and embezzlement-related cases.[444]

Judges provided different, sometimes unconvincing, reasons, for not imposing temporary deprivation of rights to hold office or to vote in, or be a candidate in, an election, on corruption offenders. Some, for example, asserted that it is better to let the public decide, through election, whether ex-corruption convicts should be elected to public office.[445] One interviewee claimed that judges are not in a position to impose such punishments due to a lack of necessary information about the offenders' character and track record.[446] Therefore, he continued, it is better to leave such decisions to the offenders' superiors.

[439] This is because instruments and proceeds of the crime are needed as evidence in the trial or are to be returned to the victim after trial.

[440] Outside this case study, there are a few cases where the prosecutors (mainly the Corruption Eradication Commission) requested judges to impose this type of additional punishment, requests that were usually granted by judges. See, e.g., 'KPK: Hak Politik 26 Koruptor Dicabut Sepanjang 2013-2017', *Kompas* (online), 18 September 2018 <https://nasional.kompas.com/read/2018/09/18/13252541/kpk-hak-politik-26-koruptor-dicabut-sepanjang-2013-2017>. In a few cases, the Supreme Court revoked the offenders right to be elected as a public official for their lifetime, an order that violates the KUHP. See, Warih Anjari, 'Pencabutan Hak Politik Terpidana Korupsi dalam Perspektif Hak Asasi Manusia: Kajian Putusan Nomor 537k/Pid.Sus/2014 dan Nomor 1195k/Pid.Sus/2014' (2015) 8(1) *Yudisial* 23.

[441] 'Pencabutan Hak Pilih Dapat Beri Efek Jera Bagi Koruptor', *Kompas* (online), 19 September 2018 <https://nasional.kompas.com/read/2018/09/19/10440831/pencabutan-hak-dipilih-dapat-beri-efek-jera-bagi-koruptor>; Indonesian Corruption Watch, 'Jangan Biarkan Koruptor Menjabat Kembali Sebagai Kepala Daerah' https://antikorupsi.org/id/news/jangan-biarkan-koruptor-menjabat-kembali-sebagai-kepala-daerah (Media Release, Jakarta: ICW, 2012).

[442] In the 2019 election alone, there were 81 ex-corruption convicts who ran (or re-ran) for local and national legislatures. There were also 14 ex-convicts reappointed to strategic positions in just one provincial government. See, e.g., 'Daftar Lengkap 81 Caleg Eks Koruptor', *Kompas* (online), 19 February 2019 <https://nasional.kompas.com/read/2019/02/19/15075331/daftar-lengkap-81-caleg-eks-koruptor>; 'Mantan Narapidana Korupsi Jadi Pejabat di Kepulauan Riau', *Tribunnews* (online), 22 October 2012 <http://www.tribunnews.com/regional/2012/10/22/14-mantan-narapidana-korupsi-jadi-pejabat-di-kepulauan-riau>; 'Promosi Azirwan Ciderai Perang Lawan Korupsi', *Kompas* (online), 30 September 2012 <https://nasional.kompas.com/read/2012/09/30/20374650/Promosi.Azirwan.Cederai.Perang.Lawan.Korupsi>.

[443] Interview with Judges #11 (Jakarta, 19 January 2017).

[444] Interview with Judge #5 (Jakarta, 6 January 2017). See Articles 366 and 377 of the KUHP.

[445] 'Pencabutan Hak Politik Terdakwa Kasus Korupsi di Mata Penegak Hukum', *Hukumonline* (online), 26 January 2019 <https://www.hukumonline.com/berita/baca/lt5c4b83394dc77/pencabutan-hak-politik-terdakwa-kasus-korupsi-di-mata-penegak-hukum>.

[446] Interview with Judge #11 (Jakarta, 19 January 2017).

This argument, however, is contradicted by the practice of judges mitigating the sentences of offenders from civil servant backgrounds because of their 'meritorious service to the country', even without evidence of their actual contribution or record of service, including from their superiors, as will be discussed later in this chapter.

B. Consistency and Proportionality in the Severity of Sentences Imposed

Overall, this study finds that punishments imposed by judges, both in terms of the length of imprisonment and the amount for fines, are inconsistent and disproportionate. Sentencing disparity and disproportionality more often occurs in cases with larger losses (from A$10,000 and above), particularly in embezzlement and corruption cases. In fact, the widest sentencing disparities are found in the sentencing of grand corruption cases while the sentencing in petty theft offences is more consistent. Judges also substitute imprisonment for unpaid fines and unpaid restitution orders in an arbitrary manner. The following discussion will elaborate these issues.

1. Theft-related Offences

Of all theft-related cases (701 cases), the majority concerned aggravated theft (63 per cent), followed by aggravated robbery (19 per cent), and (simple) theft (13.5 per cent). Aggravated burglary and robbery comprised less than one per cent of the total cases studied. There were at least 58 cases that factually met the elements of the crimes of minor theft or minor embezzlement, but all were charged and sentenced under other provisions (detailed assessment of this issue appears in Chapter 8).

Overall, the average sentences imposed on offenders committing different types of theft-related offences, or the same offence but with different levels of loss, were relatively proportional to the seriousness of the offences, as shown in Table 6.2 below.

Table 6.2: The Average Length of Imprisonment for Theft-related Cases (N:695)

Categories of Loss	Length of Imprisonment Sentence by Types of Offence (in months)				
	Theft (N: 95)	**Aggravated Theft** (N: 444)	**Aggravated Burglary** (N: 16)	**Robbery** (N: 10)	**Aggravated Robbery** (N: 134)
Petty (≤ 2.5 million)	6.73	7.97	11.33*	17	19.06
Small (> 2.5-25 million)	9.98	14.01	19	17.16	21.97
Medium (> 25-100 million)	16.80	13.78	48	-	12*
Medium-large (> 100-500 million)	16.66*	19.10	-	-	21.5
Large (> 500 million-1 billion)	-	19.8	-	-	36*
Large-grand (> 1-10 billion)	-	39*	12*	-	78*

Categories of Loss	Length of Imprisonment Sentence by Types of Offence (in months)				
	Theft (N: 95)	Aggravated Theft (N: 444)	Aggravated Burglary (N: 16)	Robbery (N: 10)	Aggravated Robbery (N: 134)
Grand (>10 billion)	-	-	-	-	-
Average	**9.49**	**13**	**20.75**	**17.1**	**22.54**

* The number of these cases were very small, just four or less

As shown, on average (simple) theft offenders received lighter sentences than those who committed aggravated theft or aggravated robbery across almost all categories of loss. The average sentence for aggravated theft was also more lenient than for aggravated burglary or robbery. Similarly, the severity of sentences imposed on offenders charged with the same offence but in different categories of loss were, to some extent, proportional to the amount of loss that they caused. In the majority of cases, offenders who caused smaller losses received more lenient sentences than those who caused greater losses.

There are, however, a few exceptions. For example, the court imposed a 12-month imprisonment sentence on a defendant charged with large/grand aggravated burglary, which was more lenient than the average sentence imposed on, among others, small aggravated theft (14.01 months) or medium theft offenders (16.80 months). The average sentence for medium aggravated theft cases (13.78 months) was also lighter than for medium theft cases. Disproportionality also occurred in sentencing of the same offence across different categories of loss. Offenders who committed small aggravated theft, for example, were sentenced slightly more harshly than those who committed medium-large aggravated theft. Similarly, those who were charged with medium-large aggravated burglary received more lenient sentences compared to cases of small burglary.

Data on average sentences cannot, however, fully inform the degree or seriousness of sentencing disproportionality, because averages might be influenced by a few outlying cases or cases with different circumstances (such as differences in the number of offenders who have a criminal history or different mitigating/aggravating factors). Furthermore, averages do not reveal whether or not there is an issue of consistency (or disparity) in sentencing across similar cases. The next section assesses the proportionality and consistency of similar theft-related offences in detail (for a detailed definition of similar cases, see Chapter 5).[447]

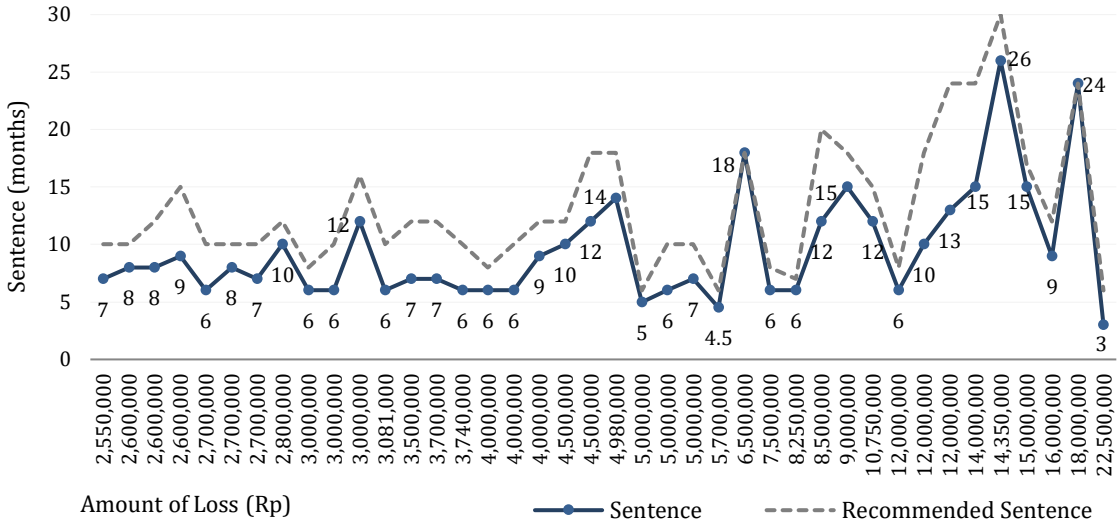
1.1. (Simple) Theft

The sentencing of similar petty theft offences was consistent. Of the 20 cases that fell into this category, sentences ranged between four and ten months' imprisonment. A slight disparity, however, appeared in the sentencing of similar small theft cases. Of 40 cases,

[447] As mentioned in Chapter 5, similar cases include cases with similar level of loss, done by a first-time offender and main perpetrator, constituting a single offence, harming an individual victim (excluding business or government), and involving no vital mitigating or aggravating circumstances.

seven defendants (17.5 per cent) were sentenced far above the seven-month median sentence (with 12 months as the margin of tolerance),[448] as shown below.

Graph 6.1: Disparity in Sentencing of Similar Small Theft Cases



The graph also shows that the length of the sentence imposed by the judge almost always mirrors the length of the prosecutors' recommended sentence. This indicates two things: that judges consider prosecutors' sentencing recommendations in sentencing; and that there is issue of parity in the recommended sentences.

On the issue of proportionality, as shown earlier in Table 6.2, the average period of imprisonment imposed on (simple) theft defendants was relatively proportional to the level of loss caused by their offences. The only exception was that the average sentence imposed on medium-large theft cases (16.66 months) was slightly more lenient than for medium theft (16.80 months). As an example, a person who stole Rp170 million worth of goods (A$17,000) was sentenced to just 14 months imprisonment,[449] which was about three months' shorter than the average imprisonment sentence for medium theft cases, and also significantly lighter than the sentences imposed in some small theft cases shown in Graph 6.1 above.

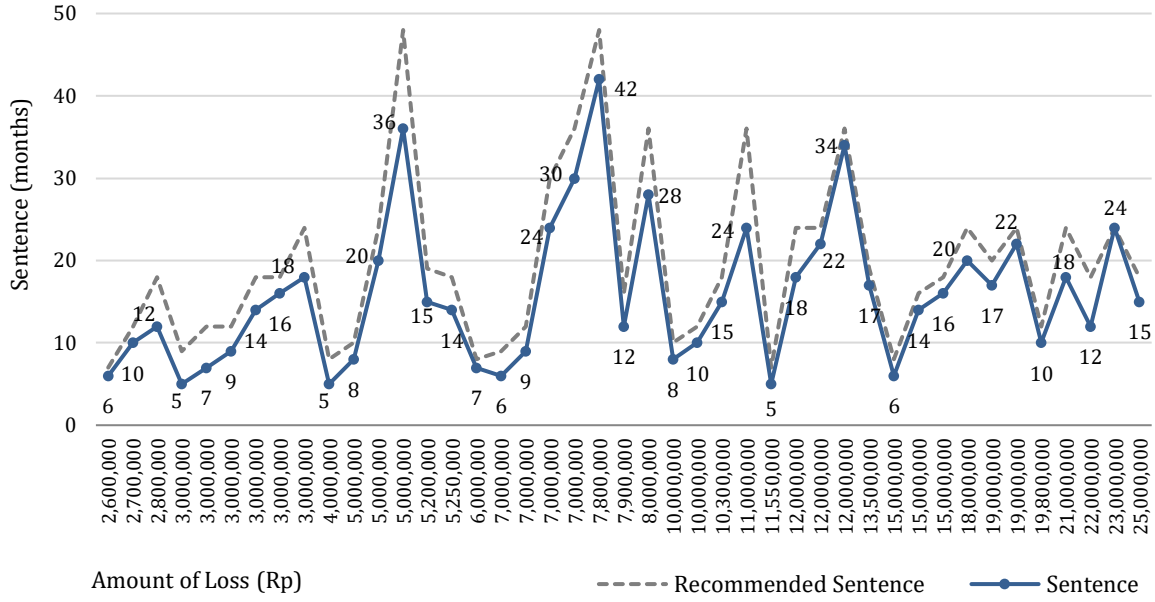
1.2. Aggravated Theft

More obvious disparities can be seen in the sentencing of similar aggravated theft cases across each category of loss. The greater the loss, the wider the disparities. Of 60 petty aggravated theft cases, for example, seven defendants (12 per cent) received sentences above the median (which was seven months). While involving only a small percentage of cases, it is seriously unjust for first-time offenders who stole property with the value of

[448] As discussed in Chapter 5 concerning research methods, I use 12 months as the margin of tolerance for the sentencing of theft, aggravated theft and embezzlement-related offences. A longer margin of tolerance applies for more serious offences, such as robbery or corruption.
[449] Decision 1330/2015/PN.Bdg.

just Rp1.5 million (A$150) or less to receive between 18-20 months in prison, compared to the median of just seven months.[450] The disparity increased in the sentencing of similar small aggravated theft cases. Of 148 cases, 44 defendants (30 per cent) were sentenced below or above the margin of tolerance, with 14 months as the median sentence.

Graph 6.2: Disparity in Sentencing of Similar Small Aggravated Theft Cases

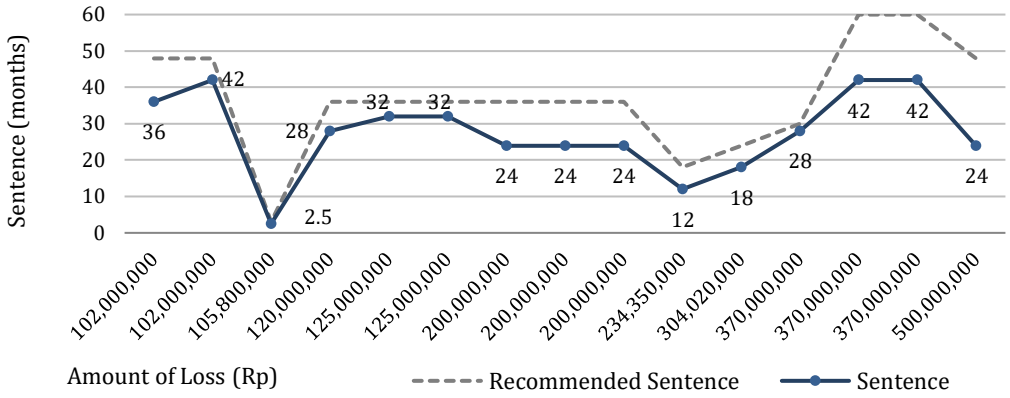


The degree of disparity in cases of small aggravated theft was also severe. The longest imprisonment sentence, 42 months, was imposed on a labourer who stole computers worth Rp7.8 million(A$780),[451] while the shortest sentences (five months imprisonment) were imposed on a number of defendants, including a man who stole Rp11.5 million (A$1,150).[452]

Similarly, five of 14 defendants (36 per cent) who committed medium aggravated theft were sentenced outside the margin of tolerance (where the median sentence was 17 months). This disparity was more acute in the sentencing of medium-large aggravated theft. Of 15 similar cases, eight defendants (53 per cent) were sentenced above or below the 24-month median imprisonment sentence, as presented below.

[450] See e.g., Decisions 57/2014/PN.Tng, 50/2015/PN.Bdg, 740/2015/PN.Bdg and 1199/2015/PN.Bdg.
[451] Decision 244/2015/PN.Bdg.
[452] Decision 1606/2012/PN.Jkt.Sel.

Graph 6.3: Disparity in Sentencing of Medium-Large Aggravated Theft Cases



If we add cases involving businesses as the victim, the disparity is much wider. There were a dozen medium-large cases (with losses ranging from Rp200 million to Rp400 million or A$20,000 to 40,000) where the defendants were sentenced to just 12 months' imprisonment or less for stealing from shops or state-owned companies.[453]

When we compare the sentences imposed on similar aggravated theft cases but with different levels of loss, there are also strong indications of sentencing disproportionality, as illustrated below.

Table 6.3: Examples of Severe Disproportional Sentencing in Similar Aggravated-Theft Cases across Different Levels of Loss[454]

Loss	Recommended Sentence (months)	Sentence (months)	Median Sentence (months)	Decision
300,000	12	14	7	1059/2015/PN.Bdg
500,000	16	14	7	2337/2015/PN.Tng
957,500	24	20	7	1199/2015/PN.Bdg
6.000.000	24	30	10	727/2015/PN.Bdg
7,800,000	48	42	10	244/2015/PN.Bdg
12,000,000	36	36	10	579/2015/PN.Bdg
150,000,000	18	12	18	1585/2014/PN.Jkt.Pst
234,350,000	18	12	18	1739/2013/PN.Jkt.Pst
302,680,000	12	8	18	750/2015/PN.Bdg
1,000,000,000	18	27	18	34/2015/PN.Bdg
9,643,187,300	42	39	N/A*	667/2015/PN.Tng

* There was only one large-grand aggravated theft case in the sample

[453] See, e.g., Decisions 750/2015/PN.Bdg and 303/2015/PN.Bdg.
[454] The only minor difference between cases in this table is the type of victim. The victims in Case 750/2015/PN.Bdg and 667/2015/PN.Tng were businesses, while the victims in all the other cases were individuals.

In one of the cases shown above, the judges sentenced an 18-year old first-time offender who had three young children to 30 months stealing only Rp6 million (A$600) worth of goods (i.e. a single motorcycle).[455] This sentence is not only far above the 10-month median sentence for similar offences and higher than the recommended sentence, which was unusual, but it is also significantly longer than sentences imposed in other cases involving much greater amounts.

When the sentences imposed in similar aggravated theft cases are compared with similar (simple) theft cases, disproportionality is also present. As shown earlier in Graph 6.1**,** (concerning small theft offences) there were a number of cases where the court sentenced defendants charged with small theft offences to more than 12 months' imprisonment. In contrast, there were many small (and a few medium-large) aggravated theft defendants who were sentenced to below one year (see Graphs 6.2 and Table 6.3).

To sum up, there is disparity in sentencing similar aggravated theft cases. Likewise, disproportionality in sentencing is found in both aggravated theft cases with different levels of loss, and as between aggravated theft and simple theft cases. Furthermore, disparity and disproportionally were more severe in cases involving larger losses.

1.3. Aggravated Burglary and Robbery

The total sample of aggravated burglary cases is too small for statistical analysis, as there are only 16 cases with different levels of seriousness. Therefore, I cannot evaluate the consistency and proportionality of sentencing for this offence. However, anecdotal evidence suggests that sentencing disproportionality is present here too. As an illustration, in one case, a person who stole jewellery worth Rp1.1 billion (A$110,000) was sentenced to just 12 months' imprisonment,[456] which is identical to the sentences imposed on offenders, in separate cases, were found guilty of stealing approximately Rp5 million (A$500) worth of motorbike or electronic goods.[457]

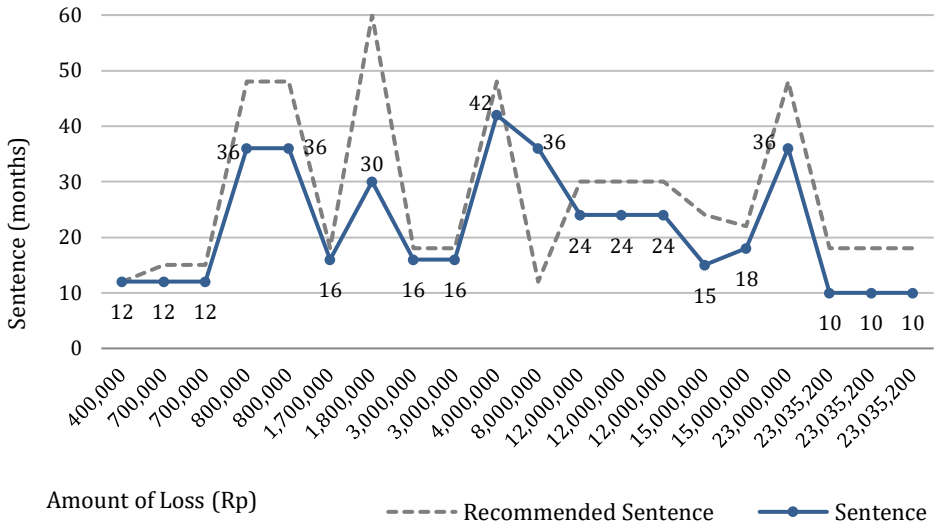
Similarly, the consistency and proportionality of sentencing in robbery cases cannot be assessed comprehensively due to the small sample size, only 10 cases. In general, the sentences appear relatively proportional. The sentences imposed in most small robberies without a weapon (i.e. snatching or verbal threats to the victim) were less than eight months,[458] while those involving hitting or threats with sharp weapons were between 18-27 months.[459] However, when the sentences imposed for small and unarmed robbery offences are compared with other less serious offences with similar losses, such as small theft or aggravated theft (discussed above), the former appear disproportionally lighter.

[455] Decision 727/2015/PN.Bdg.
[456] Decision 1361/2013/PN.Jkt.Sel.
[457] Decisions 863/2015/PN.Bdg and 1199/2014/PN.Tng.
[458] Decisions 1567/2012/PN.Jkt.Sel, 1345/2012/PN.Jkt.Sel, and 1410/2012/PN.Jkt.Sel. In only one case concerning snatching was the offender sentenced to 21 months' imprisonment, perhaps because he caused the victim to fall from a motorcycle: Decision 531/2015/PN.Bdg.
[459] See, e.g., Decisions 283/2015/PN.Bdg, 596/2015/PN.Bdg and 873/2015/PN.Bdg.

1.4. Aggravated Robbery

Unwarranted sentencing disparities were also exhibited in similar aggravated robbery cases (including similar types of assault or bodily harm). Of 20 petty and small aggravated robbery cases, six defendants (30 per cent) were sentenced below or above the median sentence of 16 months (with 18 months being the margin of tolerance), as shown below.

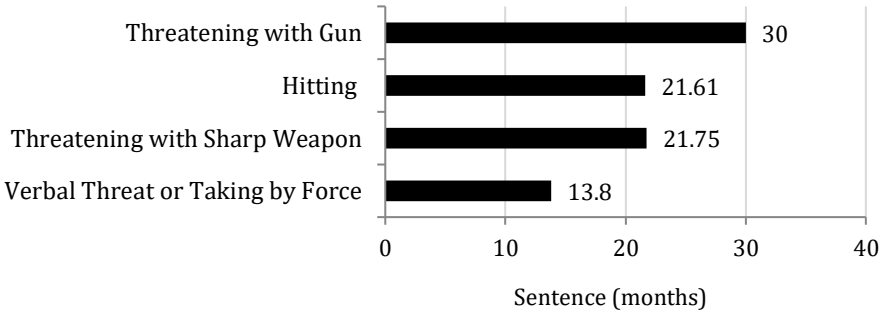
Graph 6.4: Sentencing Disparity Similar in Petty and Small Aggravated Robbery Cases (Threatening Victims with Sharp Weapons)



This disparity was not caused by, for example, the different types of weapons used or the impacts of the assaults. Defendants who threatened their victim with samurai swords or cleavers received similar sentences to those who used basic knives.[460]

On the other hand, the sentencing in aggravated robbery cases with different levels of gravity was, generally, proportional. As shown in Chart 6.1, the average sentence imposed increased in accordance with the type of assault perpetrated.

Chart 6.1: Average Length of Imprisonment in Aggravated Robbery Cases (Grouped by type of assault)



[460] Compare Decision 1159/2015/PN.Bdg and Decisions 325/2015/PN.Bdg and 447/2015/PN.Jkt.Sel.

There were, however, a number of cases where severe disproportionality was displayed, as shown in Table 6.4 below.

Table 6.4: Examples of Severe Sentencing Disproportionality in Aggravated Robbery Cases

Type of Assault	Financial Loss (Rp)	Recommended Sentence (months)	Sentence (months)	Elaboration and Decision
Verbal Threat	3,500,000	36	28	Threaten to hit the victim (Decision 346/2015/PN.Bdg)
Taking by Force	2,500,000	24	18	Snatching (Decision 337/2015/PN.Bdg)
	1,800,000	48	24	Snatching (Bandung Decision 248/2015)
Threatened with a Sharp Weapon	23,035,200	18	10	Tied up and threatened the victim with a cleaver (Decision 325/2015/PN.Bdg)
	22,000,000	24	15	Sealed the mouth and tied the hands of the victim and threatened with a cleaver (Decision 46/2015/PN.Bdg)
	23,000,000	48	36	Pointed a knife at the victim (Decision 680/2015/PN.Bdg)
Threatened with a Gun	300,000,000	18	10	Tied up and threatened the victim with a gun (Decision 1155/2015/PN.Bdg)

As shown, some offenders who committed aggravated robbery by verbal threat and who took goods by force (snatching) were sentenced to between 18-28 months' imprisonment, which was a much harsher punishment than the average of 13.8 months' imprisonment in similar cases. In another case, an offender charged with aggravated robbery, who threatened the victim with a gun and stole Rp300 million (A$30,000), received only 10 months' imprisonment in comparison to the average 30 months' imprisonment for similar offences.

When we compare sentences of aggravated robbery offences with other less serious offences, disproportionality is also present. As shown in Table 6.4 above, some aggravated robbery defendants received only 10 months' jail time, which is much more lenient than the sentences imposed in the small theft or aggravated theft cases discussed earlier.

2. Embezzlement-related Offences

Overall, the sentences for both embezzlement and aggravated embezzlement cases were proportional to the magnitude of the losses, as presented in Table 6.5 below.

Table 6.5: Average Length of Imprisonment in Embezzlement and Aggravated Embezzlement Cases (N:185)

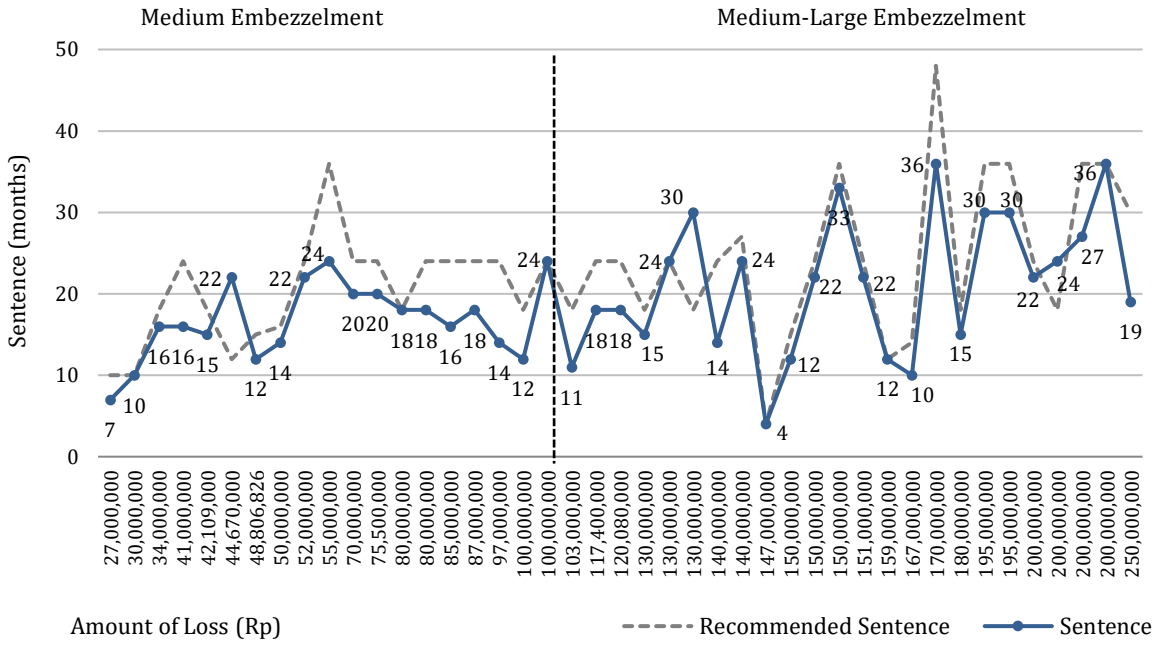
Category of Loss (Rp)	Embezzlement (months) N: 86	Aggravated Embezzlement (months) N: 99
Petty (≤ 2.5 million)	10.33	9
Small (> 2.5-25 million)	12.36	10.75
Medium (> 25-100 million)	17.36	13.90
Medium-large (> 100-500 million)	21.03	15.08
Large (> 500 million-1	18	17.6
Large-grand (> 1-10 billion)	25	18.86
Grand (>10 billion)	N/A	N/A
Average	**17.25**	**13.79**

As shown, the overall length of the prison sentences in both embezzlement and aggravated embezzlement cases increased as the amount of loss increased. The only outlier was the average imprisonment sentence in large embezzlement cases, which was more lenient than that of medium-large embezzlement. However, the average sentences in aggravated embezzlement cases across each category of loss were lower than the embezzlement sentences, despite the maximum imprisonment sentence for aggravated offences being one year longer than for simple embezzlement. This clearly shows disproportionality in sentencing between these two types of offences.

2.1. (Simple) Embezzlement

The sentencing in similar small and medium embezzlement cases was relatively consistent. Of 20 small embezzlement cases, only two defendants (10 per cent) were sentenced outside the margin of tolerance. Similarly, just three of 19 defendants charged with medium embezzlement (16 per cent) were sentenced relatively far below or above the median sentence. Much wider disparity, however, was displayed in the sentencing of medium-large embezzlement cases. Approximately 58.3 per cent of the defendants (14 out of 24 persons) received sentences below or above the 22 month median sentence, as shown in Graph 6.5 below.

Graph 6.5: Disparity in Sentencing of Similar Medium and Medium-Large Embezzlement Cases



Furthermore, in the two similar large-grand embezzlement cases that caused Rp1.2 billion[461] and Rp7.9 billion[462] rupiah losses (approximately A$120,000 and A$790,000), the court imposed 12 and 24 month prison sentences respectively. These sentences were much lighter than those imposed in a number of medium or medium-large embezzlement cases shown earlier, or even the sentence handed down to a petty offender who 'embezzled' three bedcovers worth just Rp750,000 (A$75), but was sentenced to 18 months' imprisonment.[463] These cases show that sentencing disparity and disproportionality are more acute in cases with larger losses.

2.2. Aggravated Embezzlement

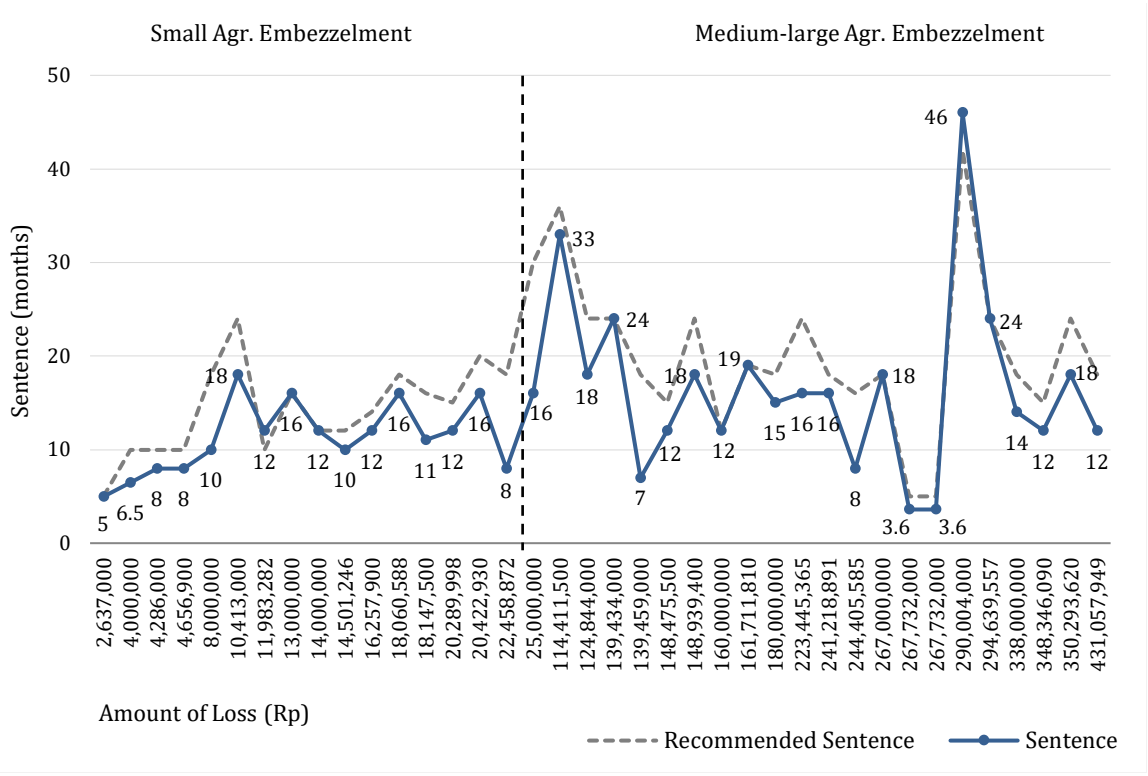
Judges were relatively consistent in the sentencing of aggravated embezzlement cases with smaller losses. In only one out of 17 similar small aggravated embezzlement cases[464] did a judge impose a sentence above or below the median sentence (see Graph 6.6 below). Similarly, of 14 medium aggravated embezzlement cases, only three defendants (21 per cent) were sentenced below or above the 15-months median sentence.

There was, however, wider sentencing disparity in similar medium-large aggravated embezzlement cases. Of 21 similar cases, eight defendants (38 per cent) received punishments far above or below the median punishment of 16 months (see Graph 6.6).

[461] Decision 409/2013/PN.Jkt.Sel.
[462] Decision 904/2014/PN.Bdg.
[463] Decision 1027/2014/PN.Jkt.Pst.
[464] In assessing the consistency of aggravated embezzlement cases, the study is limited to cases where the victim was a business because businesses represent the majority of similar cases, unlike in other offences.

There is not sufficient data to satisfactorily assess sentencing consistency in large aggravated embezzlement cases.

Graph 6.6: Sentencing in Similar Small and Medium-Large Aggravated Embezzlement Cases



There was also extreme disparity in the sentencing of medium-large cases with almost identical losses shown in Graph 6.6 (right side). Two offenders who caused approximately Rp267 million in loss (A$26,700) received just 3.6 months of imprisonment. Contrastingly, another offender who caused a Rp290 million loss (A$29,000) received a prison sentence almost 13 times longer (46 months). Judges also handed down imprisonment terms more than two years apart for an offender who caused a loss of Rp114 million (A$11,400) and received 33 months' imprisonment, and an offender who embezzled Rp139 million (A$13,900) and received just seven months in prison.

The above graph also indicates disproportionate sentencing between small and medium-large aggravated embezzlement cases. In some medium-large aggravated embezzlement cases, the court imposed sentences of 3.6-8 months, but imposed longer sentences, between 16-18 months, in small aggravated embezzlement cases. If we include the few similar large-grand aggravated embezzlement cases, the disproportionality is even more pronounced. For example, four defendants convicted of embezzling approximately Rp1.6 billion and Rp3.4 billion (A$160,000 and A$340,000) worth of goods received between 6 months and 15 months' imprisonment,[465] which was much lighter than that imposed in many similar cases with smaller losses shown in Table 6.5 above. These cases, again, show

[465] Decisions 943/2015/PN.Jkt.Pst, 941/2015/PN.Jkt.Pst and 323/2015/PN.Jkt.Sel.

that more severe sentencing disparity and disproportionality often occurred in cases with larger losses.

3. Corruption Offences

As discussed in Chapter 5, assessing consistency and proportionality in sentencing in corruption cases is more complex because judges also need to consider at least two other key factors that are not significant to deciding theft and embezzlement-related cases. The first, is the amount of profit each defendant received from an offence, which usually indicates the defendant's degree of culpability and role as well as the level of involvement in the offence. This is particularly important because most corruption cases in Indonesia are committed by multiple offenders. The second factor is how much of the profits or state loss the offenders have returned to the state prior to apprehension or conviction (this affects the level of harm caused by the crime and the amount of restitution offenders have to pay).[466] Therefore, these factors are considered in defining similar corruption cases.

Further, because the cases being studied in this section are only concerned with offences that cause losses of Rp100 million (A$10,000) or more (due to the small sample size of corruption cases with less than this amount of loss), I treat the violation of Articles 2(1) and 3 of the Corruption Eradication Law as the same offence, in line with the Supreme Court guidance on this matter (for further discussion of this issue, see Chapters 5 and 9).

3.1. Imprisonment Sentence

On average, the sentencing of corruption offences appears to be proportional, meaning that the length of the prison sentence increases with the amount of loss (and illicit gain), as shown in Table 6.6 below.

Table 6.6: Average Sentences in Corruption Cases (Article 2 [1] and 3) by Range of State Loss Caused

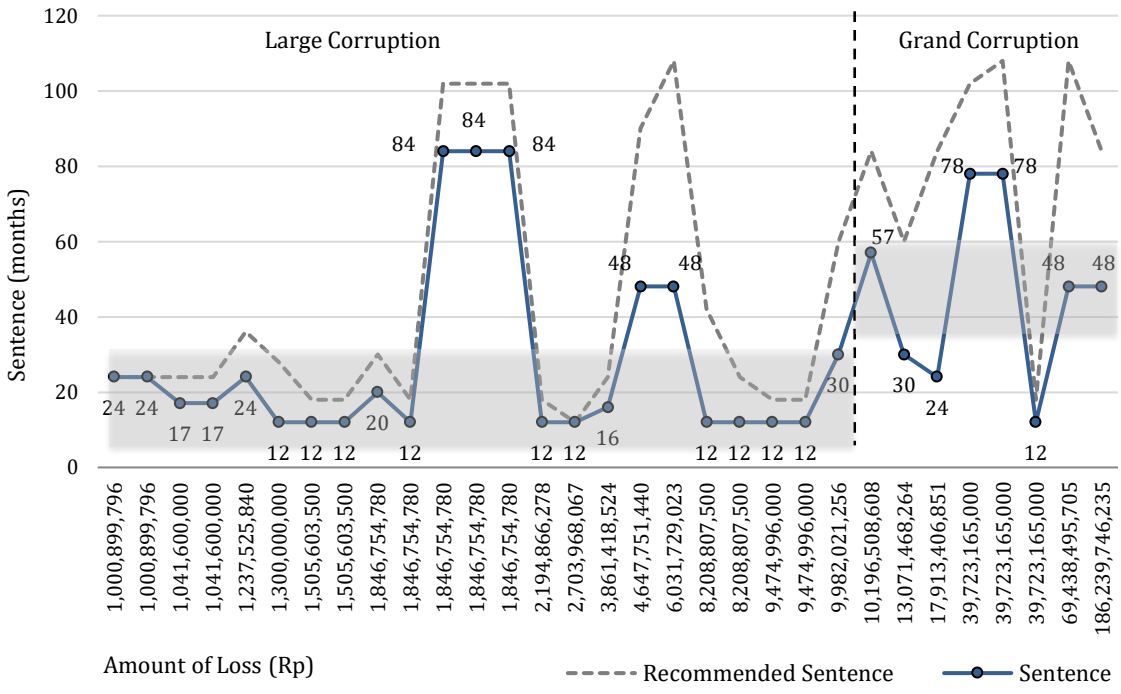
Categories of State Loss (Rp)	**Recommended Sentence** (months)	**Sentence** (months)	**Illicit Gain** (Rp)	**State Loss** (Rp)	**Total Cases** (N)
Small (≤ 25 million)	18	12	12,215,155	12,215,155	2
Medium (> 25-100 million)	24.92	19.69	50,848,346	60,609,994	13
Medium-large (> 100-500 million)	28.18	19.75	119,016,975	283,464,882	84

[466] These two factors are, for various reasons, seldom investigated or proven by law enforcers and judges in theft and embezzlement-related offences committed by multiple offenders. In theft and embezzlement offences, prosecutors and judges are more concerned with identifying the role of each offender, that is, whether he or she is the main perpetrator or only an accomplice to the offence, which can be considered a mitigating factor. In corruption cases (which are mostly perpetrated by multiple offenders), "who gets how much" and "how much of the profits or losses are repaid or returned" needs to be proven to calculate the amount of restitution (*uang pengganti*) to be paid by each offender. This creates a clearer picture of each offender's culpability and his or her level of involvement in the offence, which influences how judges sentence. Furthermore, unlike for theft and embezzlement-related offences, investigators and prosecutors usually offer more lenient sentence recommendations for corruption offenders who return or repay the illicit profits gained or the state losses.

Categories of State Loss (Rp)	Recommended Sentence (months)	Sentence (months)	Illicit Gain (Rp)	State Loss (Rp)	Total Cases (N)
Large (> 500 million-1 billion)	36.40	24.48	331,494,163	695,684,177	25
Large-grand (> 1-10 billion)	45.63	**32.66**	590,232,198	2,702,466,190	59
Grand (>10 billion)	92.18	**58.5**	5,111,796,512	104,129,746,929	22
Average	**40.76**	**28.12**	**810,992,496**	**12,333,258,793**	**205**

However, when individual cases and similar cases are compared, severe disparity and disproportionality are revealed. As shown in Graph 6.7 below, in six of 23 similar large corruption cases (including both where the defendants did not receive profit from the offence and where the losses were not repaid or returned) the judges imposed prison sentences far above the 17 month median sentence in similar cases, ranging from 48-84 months. Worse, six of eight defendants charged with similar grand corruption offences received far below or above the 48 month median imprisonment sentence.

Graph 6.7: Disparity and Disproportionality of Sentences in Similar Large and Grand Corruption Cases Where the Defendants Did Not Gain Profit and Did Not Repay the Losses[467]



The sentencing disparities were not caused by the relatively wide spectrum of loss in each category of loss. In the case of large corruption, for example, many of the defendants who

[467] As mentioned in Chapter 5, I was only able to capture cases where the amount of loss repaid or returned by the offenders (or other offenders tried in separate proceedings) was mentioned clearly in the decisions.

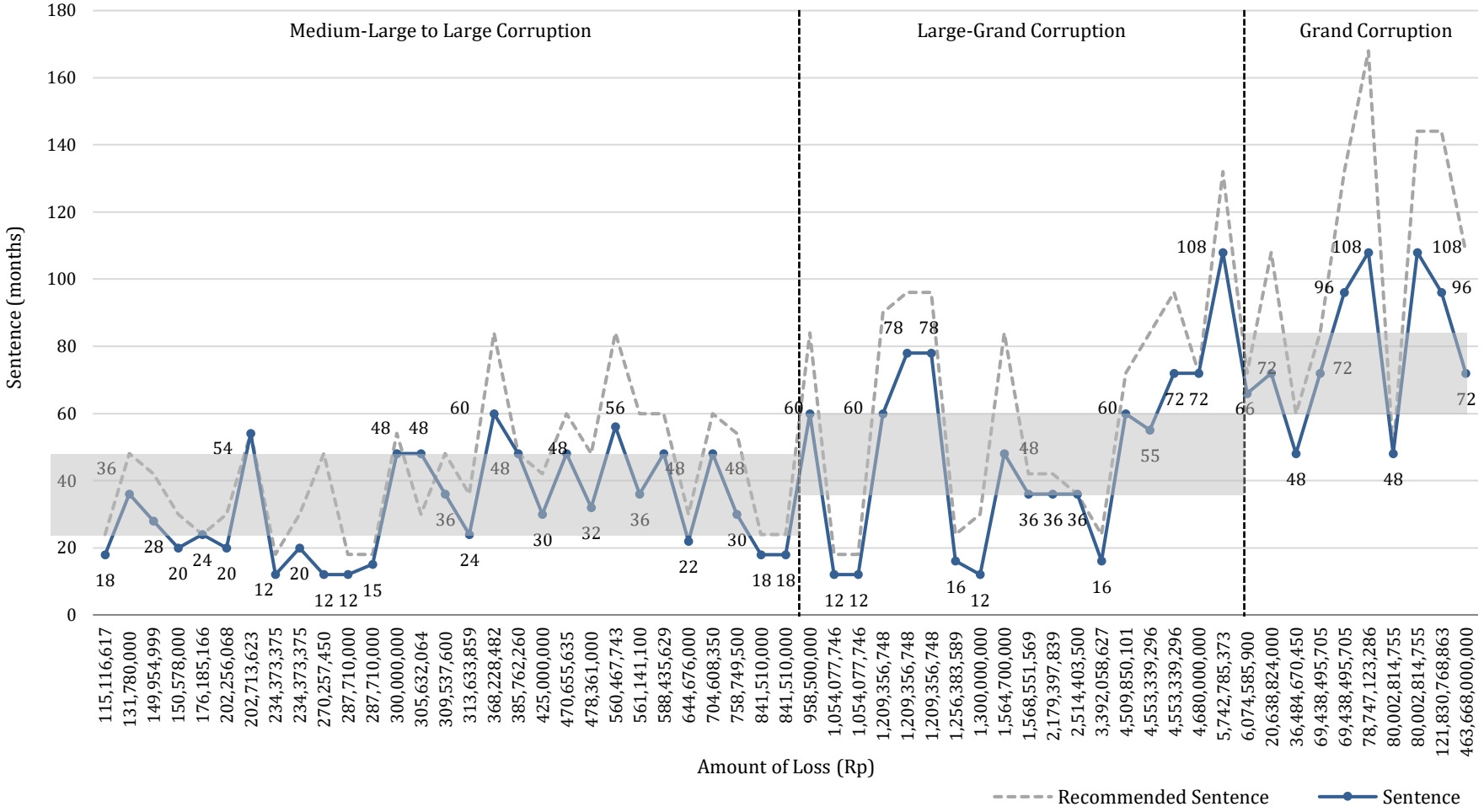
caused smaller amounts of loss (about Rp1 billion or A$100,000) received longer imprisonment terms than those who caused between Rp8-9 billion losses (A$800,000 and A$900,000). Further, in the case of grand corruption, an offender who caused almost Rp10.2 billion in state losses (A$1,019,600) was sentenced more severely (57 months of prison time) than an offender who caused almost 20 times that loss (approximately Rp186.2 billion or A$18.6 million), who only received 48 months' imprisonment.

Data in Graph 6.7 above also shows examples of disproportionality in sentencing between large and grand corruption cases. For instance, the court sentenced one defendant who caused almost Rp40 billion in state loss (A$4 million) to just 12 months' imprisonment, the exact same punishment as, or much lighter than, those imposed on offenders who caused loss to the state amounting to less than Rp2 billion (A$200,000).

Disparity can also be seen in sentencing of similar medium-large to grand corruption offences where the defendants received Rp100 million (A$10,000) and above in illegal profits and did not repay (or repaid only 20 per cent or less of) state losses. Of 63 cases in these categories, between 41-66 per cent of defendants were sentenced outside the margin of tolerance (see Graph 6.8 below).[468]

[468] The details are as follow: 46 per cent of defendants (18 of 30 persons) committed medium-large and large corruption (the median sentence was 30 months); 61 per cent (11 of 18 defendants) committed large-grand corruption (the median sentence was 48 months); and 66 per cent (6 of 9 defendants) committed grand corruption (the median sentence was 48 months).

Graph 6.8: Disparity and Disproportionality in Sentencing of Similar Medium-Large to Grand Corruption Cases (defendants received Rp100 million (A$10,000) or more in illegal profits and returned only 20 per cent or less of the state losses)

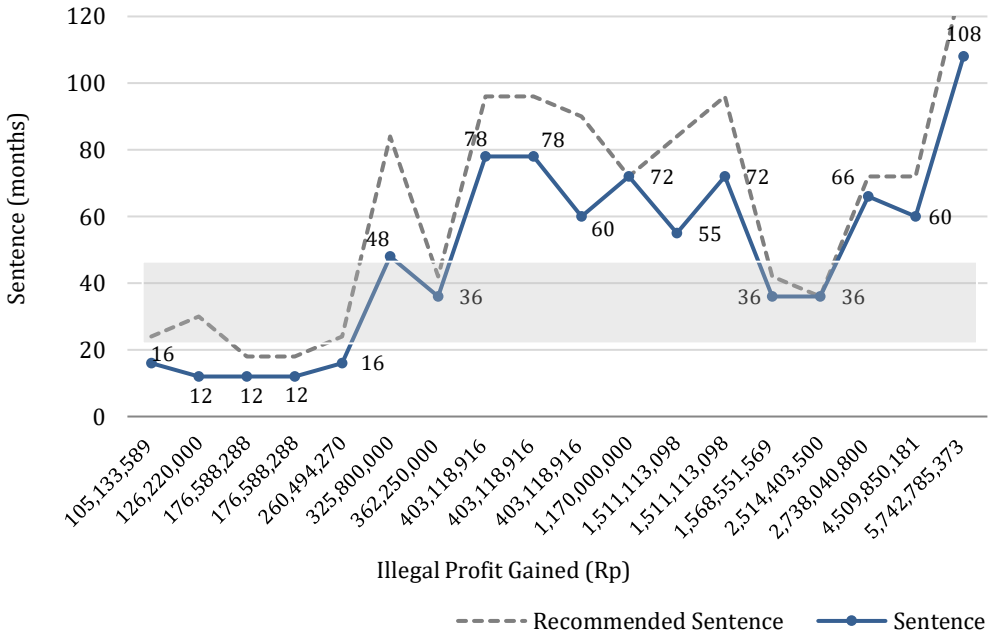


Graph 6.8 reveals severe disparities, indicated by sharp fluctuations in sentences imposed by judges. In the context of similar large-grand and grand corruption cases, there is an overall trend of judges imposing longer imprisonment sentences in cases involving larger losses. However, in large/grand cases, the difference between the sentences imposed in an offence that caused a Rp1 billion loss (A$100,000) and a Rp1.2 billion (A$120,000) loss was as wide as 66 months (between 12 and 78 months). Sharp disproportionality is also exhibited in grand corruption cases. In one case, the court sentenced a defendant causing almost Rp18 billion worth of state loss (A$1.8 million) to just one year imprisonment, while imposing much harsher average sentences in medium corruption cases (with Rp100 million and Rp500 million losses or A$10,000 and A$50,000 respectively), with the latter offenders receiving 31 month prison sentences. In another example, two defendants convicted for grand corruption, causing between Rp36.4 billion and Rp112.5 billion in state loss (A$3.64 million and A$11.25 million), received 48 months jail time, while other medium level corruption defendants were sentenced to between 54 and 60 months in prison for causing less than Rp400 million in state loss (A$40,000).

If we only compare sentences imposed on defendants charged under the same provision, disparity still exists, although it is narrower. As shown earlier in Graph 6.7, 26 per cent of offenders charged with large corruption were sentenced below or above the median sentence for similar cases. If we only include defendants convicted under Article 3 of the Corruption Eradication Law (20 defendants), that number decreases to 15 per cent.

However, when the comparison is made according to the amount of illicit money obtained by the offenders (as opposed to the amount of loss they caused), the disparity and disproportionality is even more severe, as shown below.

Graph 6.9: Examples of Sentences Imposed on Corruption Offenders According to the Amount of Illicit Profit Received



Of 18 offenders who received between Rp6-100 million in illicit profits (A$10,000 and A$600,000), caused losses between Rp1-6 billion (A$100,000 and A$600,000), and returned less than 25 per cent of the illicit profit gained, the majority (78 per cent) were sentenced below or above the 36 month median sentence. This result is not surprising. As will be discussed in Chapter 7, judges, in determining a sentence, quite rightly, put more emphasis on the amount of loss caused by the offence than the illicit gain received by the offender.

3.2. Fines and Imprisonment as Substitutes for Unpaid Fines

In general, fines imposed on most defendants in corruption cases were minimal. As mentioned, fines were issued in addition to prison sentence rather than as an alternative. The majority (70 per cent or 143 defendants) were ordered to pay just the minimum mandatory fine, Rp50 million (A$5,000), followed by Rp200-300 million or A$20,000-30,000 (21 per cent or 43 defendants) and Rp100-150 million or A$10,000-15,000 (6 per cent or 13 defendants). Only four defendants received a Rp500 million fine (A$50,000) and one received a Rp1 billion fine (A$100,000), the maximum fine allowed by law.

Overall, the fines imposed increased according to the loss caused, except in medium corruption cases (offences that caused loss between Rp100 million and Rp500,000 or A$10,000 and A$50,000).

Table 6.7: Amount of Fines Imposed across Different Categories of Losses

Categories of State Loss (Rp)	**Average Fine**	**N**
≤ 25 million	50,000,000	2
> 25-100 million	73,076,923	13
> 100-500 million	64,285,714	84
> 500 million-1 billion	84,000,000	25
> 1-10 billion	144,915,254	59
Above 10 billion	186,363,636	22
Average	101,219,512	205

This, however, does not mean that the individual fines imposed were proportional or consistent, as shown in 49 similar corruption cases[469] across different categories of loss in Table 6.8 below.

[469] This sample focuses on cases where the offenders were perpetrators (and not merely accomplices), did not receive any illegal gain from the offences, and they (or other co-offenders) did not repay losses or had only repaid 15 per cent of the state losses or less.

Table 6.8: Disproportionality and Disparity of Fines Imposed in Similar Corruption Cases

Amount of Loss Caused by Offence	Frequency of Fine/Sentence Imposed (Group by Level of Fine [Rp]) N: 49				
	50 million	100 million	200 million	250 million	500 million
Rp25-100 million	1	-	-	-	
> Rp100 million-1 billion	16	-	-		
> Rp1-10 billion	14	3	5	2	1
Above Rp10 billion	4	1	2	2	-

As shown above, judges imposed the same fine (Rp50 million) on defendants who committed offences of significant diverging gravity, ranging from those causing less than Rp100 million losses (A$10,000) to those causing losses above Rp10 billion (A$1 million). This clearly shows disproportionality in sentencing. At the same time, judges also imposed different fines on offenders convicted of large-grand corruption (causing Rp1-10 billion losses or A$100,000-1 million), ranging from Rp50 million to Rp500 million (A$5,000 to A$50,000), again indicating sentencing disparities.

The difference in the fines imposed was not caused by, for instance, judges' consideration of the differences in defendants' financial ability to pay fines. As a matter of principle, unlike prison sentences, fines imposed on offenders should be proportional to the defendants' financial resources so that every defendant, depending on their financial resources, will 'feel' the impact (hardship) of the punishment (fine) relatively equally, in accordance with their financial capacity.[470] However, the data suggests judges do not properly consider this issue. Disparity and disproportionality still exist when the defendant's occupation, as an indicator of their financial capacity, is considered (as seen in Table 6.9 below).

Table 6.9: Disproportionality of Fines Imposed on Corruption Defendants with Different Occupations (indicating defendants' financial capability)

Occupation/Position	Average Fine (Rp)	Average Loss (Rp)	Average Imprisonment (months)	Total Case
Unemployed or Labour/equivalent	125 million	1.8 billion	31	4
Private/government employee	101.2 million	2.5 billion	27.2	42
Mid-level official/executive	90.8 million	11 billion	27.1	83
High-ranking official/executive	114 million	20 billion	29.7	75
Private (Unclear)	50 million	314 million	24	1

[470] See further discussion of this matter in Chapters 3 and 6.

Table 6.9 shows that 'lower class' defendants - unemployed or 'blue-collar' workers - received the highest average fines (Rp125 million or A$12,500), despite causing small amount of loss. The fine imposed upon them were surely too high for them to afford.[471] Defendants from high-ranking official/business executive backgrounds received, on average, only slightly bigger fines than the majority of corruption defendants (Rp114 million or A$11,400) – still lower than the average fine for an unemployed or blue-collar defendant. This difference seems to correlate with the bigger average loss that they caused (an average loss of Rp20 billion or A$2 million) rather than their job status. These disparities are also confirmed by the bivariate analysis discussed in Chapter 7, which shows that the offender's occupation was not associated with the fine imposed.

Further, the disparity and disproportionality in fines was not caused by judges' preference for fines over imprisonment, or to compensate for lighter prison sentences. Overall, the amount of the fine imposed corresponded to the length of the offender's prison sentence. Defendants who were sentenced to between one and two years' imprisonment, for example, received an average fine of Rp60.7 million (A$6,070), while those who were sentenced to between two and four years' prison, received a Rp126 million fine on average (A$12,600). Offenders who received the highest average fines, Rp221 million (A$22,100), also received the longest sentences, four years and above.

These findings are not surprising. The judges interviewed in this study gave the impression that they do not carefully consider how to determine the amount of fines. A few judges mentioned that they simply impose the most lenient fine allowed because it is the prison sentence that matters the most.[472] One judge also stated that the fine imposed does not necessarily relate to the severity of the prison sentence.[473] These acknowledgements are supported by the arbitrary fines (and also prison sentences) imposed by the same panel of judges in similar cases involving different amounts of loss, as shown below.

Table 6.10: Examples of Disproportionality of Fines (and imprisonment) Imposed by the Same Panel of Judges in the Bandung Anti-Corruption Court across Similar Cases[474]

Amount of Illicit Profit Gained	**Amount of Loss**	**Amount of Fine** (Rp)	**Length of Imprisonment** (months)	**Decision**
None	270,257,450	50,000,000	12	Decision 67/2015/PN.Bdg
None	539,706,779	50,000,000	18	Decision 83/2015/PN.Bdg
None	76,001,420	50,000,000	12	Decision 122/2015/PN.Bdg
None	1,300,000,000	50,000,000	12	Decision 151/2015/PN.Bdg
None	9,982,021,256	50,000,000	30	Decision 101/2015/PN.Bdg
30,000,000	270,257,450	50,000,000	12	Decision 68/2015/PN.Bdg

[471] As mentioned in Chapter 5, the average monthly income of 'blue-collar' workers was between A$200-300.
[472] Interviews with Judges #13 (Bandung, 20 January 2017) and Judge #9 (Jakarta, 15 January 2017).
[473] Interview with Judge #9 (Jakarta, 15 January 2017).
[474] This sample focuses on cases where the offenders were perpetrators (and not merely accomplices), did not receive any illegal gain from the offences, and they (or other co-offenders) did not repay losses or had only repaid 10 per cent of the state losses or less.

Amount of Illicit Profit Gained	Amount of Loss	Amount of Fine (Rp)	Length of Imprisonment (months)	Decision
59,105,000	1,300,000,002	50,000,000	12	Decision 153/2015/PN.Bdg
75,742,387	151,484,775	200,000,000	48	Decision 135/2015/PN.Bdg
99,675,000	1,300,000,000	50,000,000	12	Decision 153/2015/PN.Bdg
126,220,000	1,300,000,000	50,000,000	12	Decision 153/2015/PN.Bdg
250,000,000	270,257,450	50,000,000	12	Decision 66/2015/PN.Bdg

As we can see, several offenders who committed similar offences but caused different amounts of loss to state finance, received identical fines and prison sentences (a Rp50 million fine and 12-month prison term). One offender who caused a Rp539 million loss (A$53,900) was ordered to pay a Rp50 million fine (A$5,000), which is the same as that imposed on an offender who caused a Rp1.3 billion loss (A$130,000). However, the lower-loss-causing offender received an 18-month sentence, whereas the higher loss causer received only 12 months – six months less. Further, if we compare cases where the offenders obtained illegal profits, disparity and disproportionality in fines (and imprisonment) can also be seen. In fact, the majority of offenders received the exact same fine, Rp50 million (A$5,000).

There is also disparity and disproportionality in how judges allocate custodial punishments as substitutes for unpaid fines. Defendants who were ordered to pay fines of Rp50 million (A$5,000), for example, received of the same substitute custodial punishment (one month) if they failed to pay the fines as those ordered to pay Rp500 million or Rp1 billion fines (A$50,000 or A$100,000), as shown in Table 6.11 below.

Table 6.11: Disparity in the Length of Substitute Custodial Punishment Imposed for Different Amounts of Unpaid Fines (range in total cases)

Amount of Fine (Rp)	Frequency of Substitute Custodial Punishment Imposed[475] (Grouped by length/months)					
	1 mos	2 mos	3 mos	4 mos	5 mos	6 mos
50 million	80	33	25	2	1	2
100-150 million	5	1	6	0	0	1
200-250 million	2	20	9	3	1	4
300 million	0	1	2	0	0	1
500 million	1	0	1	0	0	2
1 billion	0	0	0	0	0	1

This disparity or disproportionality also seems to have nothing to do with offenders' ability to pay the fines. The fact that defendants from high-ranking official/executive backgrounds received on average longer substitute imprisonment sentences (2.28

[475] The maximum length of substitute custodial punishment is six months and can only be extended to eight months where there is an aggravating factor in the case, such as multiple offending or reoffending (Article 30(3) and (5) of the KUHP). Despite there being at least 70 cases involving multiple offending, there was not a single case where judges extended substitute custody to eight months.

months) than mid-level officials/executives (2.1 months) or private/government employees (1.64 months) appears to be caused by the higher average fines imposed on them, as mentioned earlier.

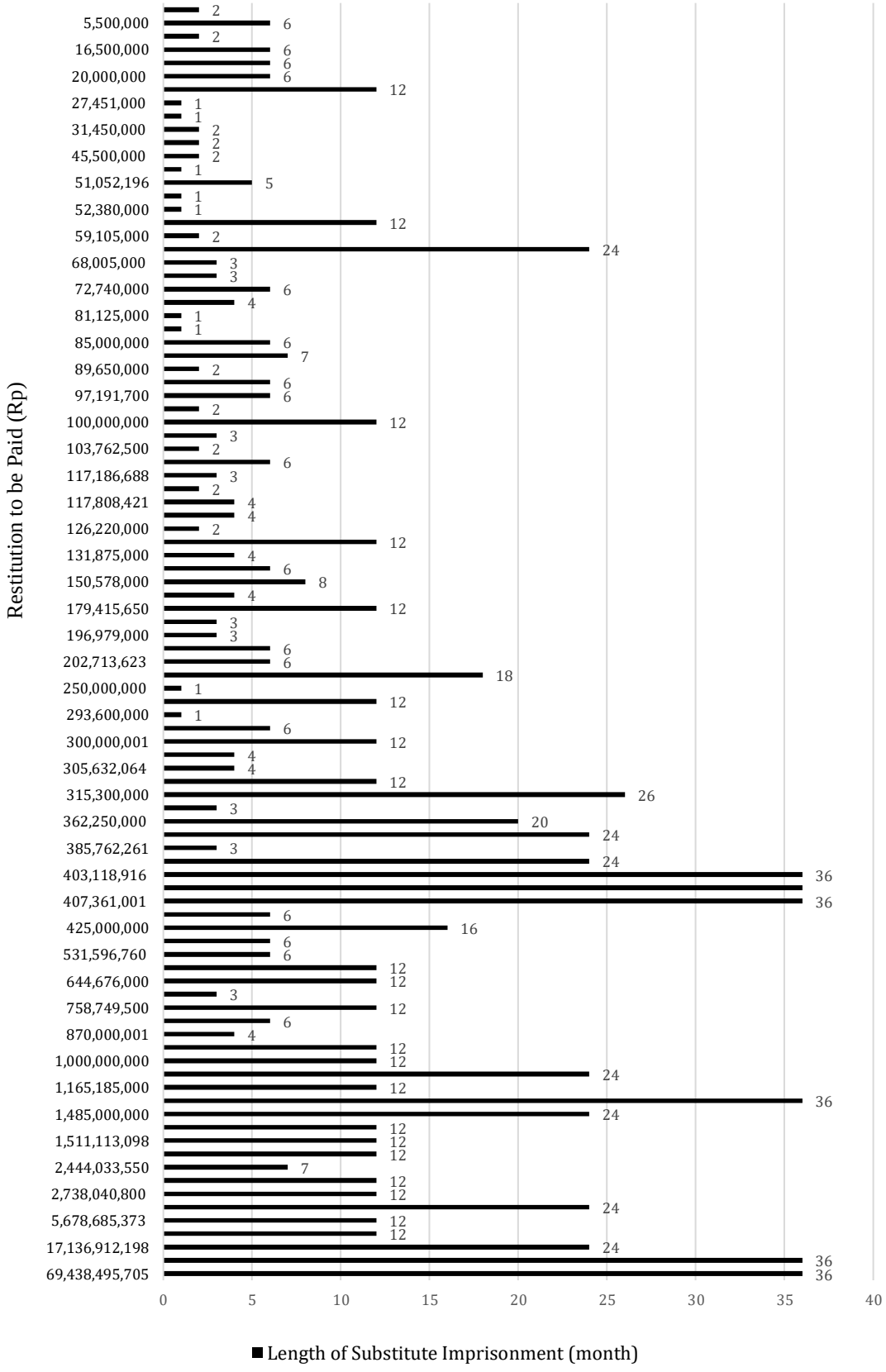
The disconnect between the amount of the fine imposed and the length of substitute imprisonment might affect the offender's willingness to pay the fine. If a person faces just an additional month of imprisonment for failing to pay a Rp500 million fine (A$50,000), he or she may simply decide not to pay it, which defeats the purpose of having a fine as a cumulative punishment. However, he or she might be more likely to pay it if facing six months' imprisonment as substitution.

3.3. Imprisonment as a Substitute for Unpaid Restitution

As mentioned in Chapter 3, restitution (*uang pengganti*) is money that corruption defendants must pay to offset illicit profits they obtained from the offence. Therefore, the criteria to determine the length of a substitute imprisonment sentence for unpaid restitution (which, according to the law can be as long as 20 years)[476] should be solely based on the amount of illicit profit acquired. The data suggests, however, that judges have no standard way of allocating imprisonment as a substitute for unpaid restitution, as shown in Chart 6.2 below.

[476] According to the law, judges have discretion to impose substitute imprisonment 'as long as it does not exceed the maximum penalty of the offence in the law' (Article 18(3) of Corruption Eradication Law). Because the maximum penalties for the offences under Articles 2(1) and 3 are 20 years, the maximum substitute imprisonment that can be imposed is also 20 years.

Chart 6.2: Disparity in the Length of Substitute Imprisonment Sentences Imposed for Different Levels of Unpaid Restitution



As shown, while defendants who were ordered to pay higher restitution were generally threatened with longer substitute imprisonment, there were many discrepancies (and some were very extreme). As an illustration, an offender who was ordered to pay approximately Rp293 million in restitution (A$29,300) received just a single month of substitute imprisonment,[477] 11 months less than that imposed on an offender who was ordered to pay Rp24,000,000 restitution (A$2,400).[478] In other cases, the length of substitute imprisonment imposed on an offender ordered to pay Rp59.5 million (A$5,950) was 24 months,[479] which was identical to that imposed on a man ordered to pay Rp17.13 billion in restitution (A$1.7 million).[480]

This disparity was not caused by individual judges' views on what constitutes a proper ratio between the amount of unpaid restitution and substitute imprisonment. The exact same panel of judges in the Bandung Anti-Corruption Court, for example, imposed inconsistent sentences of substitute imprisonments as shown in Table 6.12.

Table 6.12: Examples of Inconsistent Substitute Imprisonment Sentencing for Different Levels of Unpaid Restitution by the Same Panel of Judges in the Bandung Anti-Corruption Court

Restitution to be Paid (Rp)	**Length of Substitute Imprisonment** (months)	**Decision**
906,348,460	12	Decision 48/2015/PN.Bdg
470,655,635	6	Decision 17/2015/PN.Bdg
407,361,001	36	Decision 24/2015/PN.Bdg
403,118,916	24	Decision 8/2015/PN.Bdg
315,300,000	26	Decision 146/2015/PN.Bdg
89,436,750	7	Decision 63/2015/PN.Bdg
72,740,000	6	Decision 148/2015/PN.Bdg
57,336,000	12	Decision 23/2015/PN.Bdg

As in the case of fines, the ratio between the amount of restitution to be paid and its substitute imprisonment can significantly influence the offender's willingness to pay it (or opt to serve imprisonment instead). According to the law, prosecutors can forfeit and sell a defendant's assets to pay restitution.[481] Nevertheless, in most cases, prosecutors tend to let the defendant choose whether to pay the restitution voluntarily or serve the substitute imprisonment. Thus, it is critical that there be a reasonable ratio between the length of the substitute imprisonment imposed and the amount of restitution. For example, a defendant who is given the option of paying Rp59.5 million (A$5,950) in restitution or serving 24 months in substitute, might try his or her best to pay by any means necessary, because 'the price' of staying out of prison is only about Rp2.5 million (A$250) per month. On the other

[477] Decision 79/2014/PN.Bdg.
[478] Decision 25/2015/PN.Bdg.
[479] Decision 7/2015/PN.Bdg.
[480] Decision 48/2013/PN.Jkt.Pst.
[481] Article 18(2) of Law 31 of 1999 on Corruption Eradication.

hand, an offender who faces 36 months' substitute imprisonment for not paying Rp69 billion restitution (A$6,9 million) might decide they are better off not paying it, even if he or she can afford it.[482]

4 Comparing Proportionality of Punishments Between Different Groups of Offences

One of the purposes of this study is to verify the common perception that thieves are generally punished harsher than corruptors.[483] Anecdotal evidence in this study indeed shows that there are extreme disproportionalities in sentences between those imposed on offenders charged for small theft and embezzlement-related offences and big corruption cases, as illustrated below.

Table 6.13: Examples of Extreme Disproportionality in Sentencing of Corruption, Embezzlement and Theft-Related Cases *

Type of Offence	Loss (Rp)	Illegal Gain (Rp)	Sentence (months)	Decision
Theft (art. 362)	58,000	N/A	8	1265/2014/PN.Tng
	250,000	N/A	10	340/2015/PN.Tng
	14,350,000	N/A	26	2279/2013/PN.Tng
	12,000,000	N/A	27	807/2015/PN.Bdg
Aggravated Theft (art. 363(1))	6,000,000	N/A	30	727/2015/PN.Bdg
	12,000,000	N/A	34	2042/2011/PN.Tng
	12,000,000	N/A	36	579/2015/PN.Bdg
	7,800,000	N/A	42	244/2015/PN.Bdg
Embezzlement (art. 372)	7,000,000	N/A	20	1291/2015/PN.Bdg
	20,000,000	N/A	24	005/2015/PN.Tgn
Aggravated embezzlement (art. 374)	3,400,000	N/A	15	323/2015/PN.Jkt.Sel
	10,413,000	N/A	18	1518/2014/PN.Bdg
Corruption (art. 2(1) and 3)	750,000,000	641,330,000	12	95/2015/PN.Bdg
	1,446,573,460	906,348,460	12	48/2015/PN.Bdg
	2,194,866,278	1,487,500,000	12	32/2014/PN.Jkt.Pst

[482] This problem arose in, for example, the *Martias* Case. Martias, the CEO of Surya Dumai Group, was convicted for corruption offences and ordered to pay approximately Rp386 billion restitution (A$38.6 million), or just 18 months of substitute imprisonment. He refused to pay the restitution and preferred substitute imprisonment instead. However, the Corruption Eradication Commission, the prosecutor in this case, strategically announced a plan to auction off Martias' assets, mainly his shares in the company, which triggered a decline in stock value. To minimize further loss, Martias quickly paid the restitution order in full (in cash!). Unit Kerja Presiden Bidang Pengawasan dan Pengendalian Pembangunan, *Laporan Pemetaan Pengembalian Aset Hasil Kejahatan di Indonesia* (2013) 24.

[483] 'Kalau Pencuri Sandal Dihukum Lebih Berat dari Korupsi itu Menyakitkan', *Republika* (online), 21 January 2012 <https://www.republika.co.id/berita/nasional/hukum/12/01/02/lx69pw-kalau-pencuri-sandal-dihukum-lebih-berat-dari-koruptor-itu-menyakitkan>; 'Beda Vonis Anggodo dan Pencuri HP', *Viva* (online), 31 Agustus 2010 <https://www.viva.co.id/korupsi/174514-beda-vonis-anggodo-dengan-pencuri-hp>; 'Pencuri Buah Asam vs Kompol Arafat', *Okezone* (online), 21 September 2010 <https://news.okezone.com/read/2010/09/21/339/374102/pencuri-buah-asam-vs-kompol-arafat>.

Type of Offence	Loss (Rp)	Illegal Gain (Rp)	Sentence (months)	Decision
	3,413,025,000	1,165,185,000	12	131/2014/PN.Bdg
	9,474,996,000	224,683,500	12	75/2015/PN.Bdg
	36,484,670,450	770,291,375	48	36/2013/PN.Jkt.Pst
	80,002,814,755	550,000,000	48	59/2012/PN.Jkt.Pst

* Not including multiple offending or cases where the offender was a recidivist

If we compare the overall sentences imposed, corruptors were punished relatively more severely than thieves and fraudsters, at least at a face value, as shown in Table 6.14 below.

Table 6.14: Comparison between Average Sentences for Simple and Aggravated Theft, Embezzlement and Corruption*

Categories of Loss (Rp)	Theft & Aggravated Theft			Embezzlement & Aggravated Embezzlement			Corruption			
	Av. Sentence (months)	Av. Victim Loss (Rp)	N	Av. Sentence (months)	Av. Victim Loss (Rp)	N	Av. Sentence (months)	Av. State Loss (Rp)	Av. Illicit Gain (Rp)	N
Petty (≤ 2.5 million)	**7.7**	1,110,970	117	**9.8**	977,358	5	**-**	-	-	-
Small (> 2.5-25 million)	**13.11**	9,400,677	300	**11.33**	11,784,809	52	**12**	12,215,155	12,215,155	2
Medium (> 25-100 million)	**14.19**	51,109,838	37	**15.48**	59,309,336	42	**19.69**	50,848,346	60,609,994	13
Medium-large (> 100-500 million)	**18.9**	258,509,207	37	**17.95**	217,808,048	64	**19.75**	283,464,882	119,016,975	84
Large (> 500 million-1 billion)	**19.8**	620,000,000	5	**17.71**	678,190,756	7	**24.48**	695,684,177	331,494,163	25
Large-grand (> 1-10 billion)	**39**	9,643,187,300	1	**20.7**	2,859,717,246	10	**32.66**	2,702,466,190	590,232,198	59
Grand (>10 billion)	**-**	-		**-**	-		**58.5**	104,129,746,929	5,111,796,512	22
Average	**12.45**		**497**	**15.54**		**180**	**28.12**	**810,992,496**	**12,333,258,793**	**205**

* Not including cases where the court imposed suspended sentences, attempts or where the offender was a recidivist

As shown, offenders charged with corruption received overall relatively longer prison sentences than offenders charged with other offences in the same categories of loss, except in small cases.[484] If the sentences imposed are to be compared according to their levels of harm (the loss they caused to the victim or the state), the level of sentencing differences is arguably narrower especially for offences with smaller losses (one billion rupiah or less), since corruption cases, on average, cause slightly larger losses.

However, when examined further, as shown in Table 6.15 below, more than half the defendants charged with corruption (approximately 58 per cent) received light sentences, 18 months or less.[485] On the other hand, in 51 cases (25 per cent), judges imposed significantly longer imprisonment sentences, between 48 and 108 months. This means that the more severe average sentence for corruptors was influenced by the quarter of 'outlier' cases in this upper range.

Table 6.15: Range of Imprisonment Sentences Imposed on Offenders Charged with Different Types of Offences

Range of Sentences	Number of Cases and Percentage					
	Theft-related (excluding burglary & robbery) (N: 539)		**Embezzlement-related** (N: 185)		**Corruption** (N: 205)	
< 12 months	268	50%	58	31%	-	-
12 months	75	14%	22	12%	85	41%
> 12 to 18 months	125	23%	60	32%	32	16%
>18 to < 48 months	71	13%	45	24%	37	18%
≥ 48 months	0	-	-	-	51	25%

Furthermore, of the 51 corruption cases where the judges imposed long imprisonment sentences, the majority were concerned with very serious offences that cannot be compared with theft or embezzlement-related offences: 38 cases (75 per cent) were concerned with offences under Article 2 (1) of the Corruption Eradication Law (which mandates a minimum of four years imprisonment); and nine other cases were concerned with grand corruption (causing losses between Rp10 million and Rp594 million (A$100,000 and 59,400,000)).

More importantly, when the differences in the offences' minimum and maximum penalties – as the expression of an offence's seriousness – are put into the equation, corruptors are

[484] The difference is wider if the amount of illicit gain received by the offenders (as indicated by the 'actual profit of an offence') is used as the reference for comparison. However, such a comparison is misleading. Unlike in corruption cases, the amount of 'illegal gain' received by thieves and fraudsters is also the 'total loss' of the victim (the actual harm of the offence). Besides, the actual profit received by a thief from selling the stolen goods is usually less than the value of the goods itself. Also, in corruption cases, when the offence is committed by multiple offenders, they share the profits obtained by selling the goods.

[485] Of 117 defendants in this category, the majority, 85 persons (73 per cent), caused above Rp250 million in state loss (A$25,000). Forty-four of them also obtained between Rp100 million and 5.5 billion in illicit profit (A$10,000 and 550,000).

indeed punished disproportionally more leniently than thieves and embezzlers. This is because the minimum and maximum prison sentences for corruption are much longer, between one year and 20 years under Article 2(1), and four years and 20 years under Article 3. In contrast, the maximum prison terms for simple and aggravated theft and embezzlement are much lower, from four to seven years, with no minimum. There is also the possibility of imposing a suspended sentence, which is not available in corruption cases.

Judges' unfair treatment in sentencing corruption and theft offenders is also apparent in the legal interpretation they employ. As will be discussed in Chapters 8 and 9, judges tended to interpret the Corruption Eradication Law in a way that enabled them to sentence the defendants under a provision with lower minimum penalties (Article 3 of the Law), while remaining reluctant to do the same for minor theft defendants.

To conclude, the analysis above shows that while, on average, offenders convicted of corruption were punished slightly more severely than thieves and embezzlers, their punishments were, in fact, disproportionally lighter because corruption offences involve much more severe minimum and maximum penalties than theft and embezzlement-related offences.

C. The Use of Mitigating and Aggravating Considerations

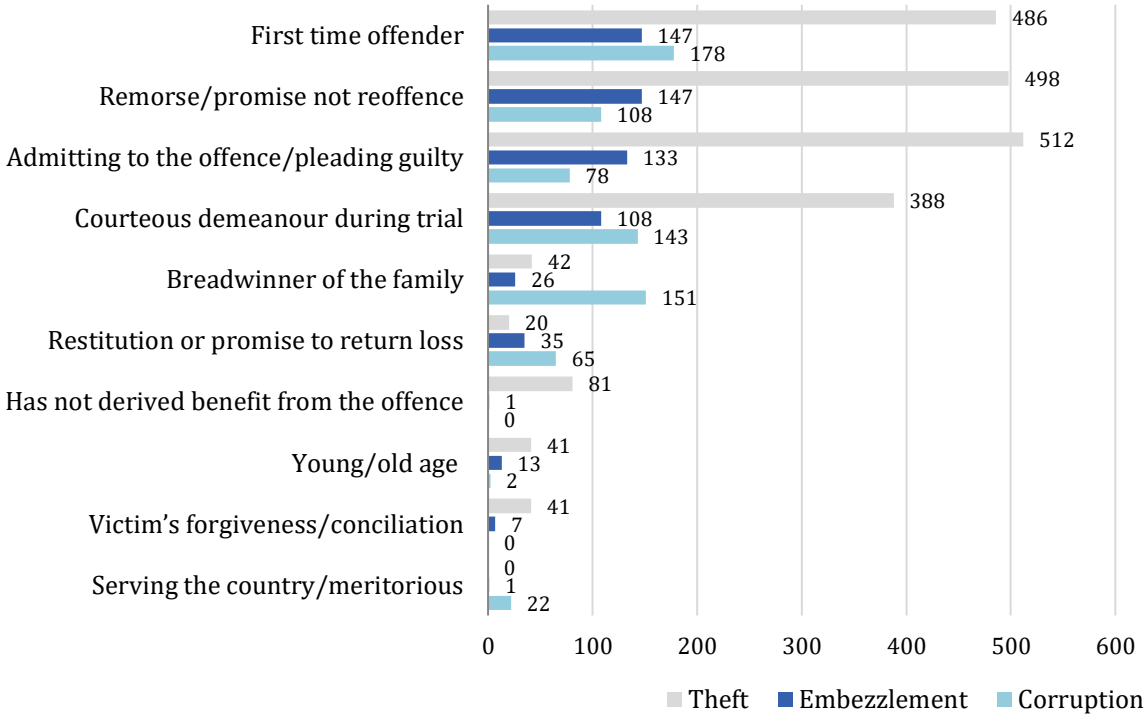
1. Description and General Analysis

As discussed in Chapter 3, the KUHP only lists a few general mitigating and aggravating factors,[486] including prior conviction, youth, attempt to commit a crime, and assisting crimes. These factors can increase or decrease the maximum or minimum[487] sanction for an offence by specific fractions, although they can also implicitly be used to lessen or increase sentence severity within the (original) maximum penalty of the offence. Furthermore, the KUHP, other statutes, or the courts' internal policies do not provide any particular punishment objectives that can guide judges in sentencing, aside from general requirements for judges to consider the gravity of the offence and the character of the offender.[488]

In practice, judges consider various mitigating and aggravating considerations that are beyond those that are specifically outlined in the law.[489] The common mitigating considerations used by judges are as follows:

[486] The term 'general' here refers to aggravating and mitigating factors that are applicable to all (or groups of) offences or offenders. This is in contrast to 'specific' aggravating and mitigating factors that are only applicable to specific offences (usually integrated in the definition of the offences).
[487] The only mitigating consideration that can reduce a mandatory minimum sentence provided by the law is an offender's young age.
[488] See discussion of this issue in Chapters 3 and 4.
[489] A single case can include more than one mitigating and/or aggravating consideration.

Chart 6.3: Common Mitigating Considerations

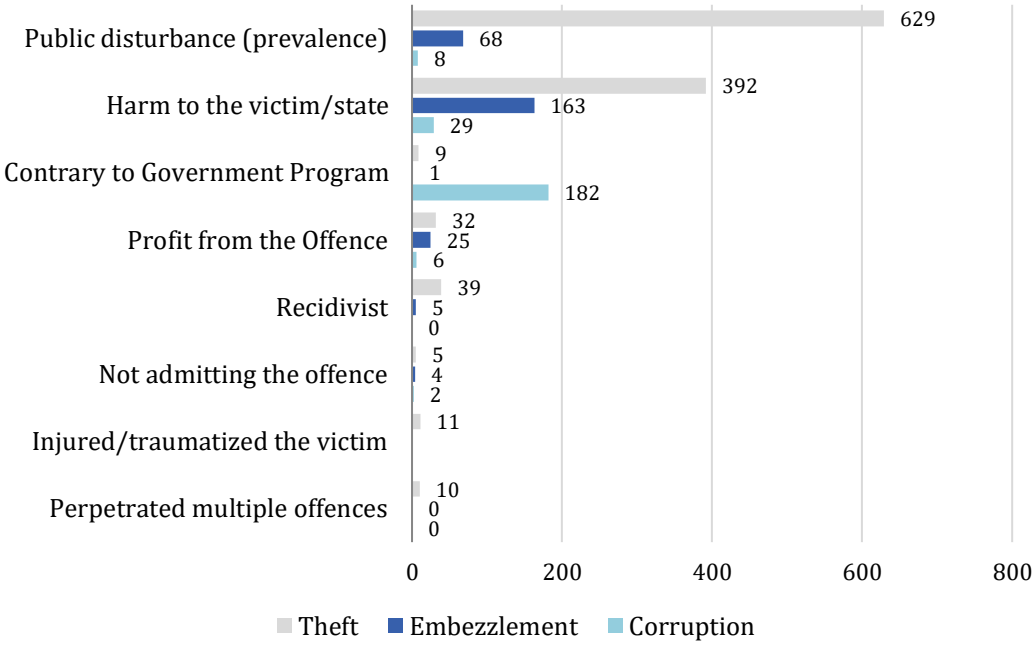


In a handful of cases, the judges also mitigated sentences on the basis of a defendants' personal circumstances (such as health issues[490] and poor educational background[491]), the impact of imprisonment on the defendant or their families (such as where the defendant was pregnant,[492] a single mother,[493] or had children).[494] In a very few cases, judges also considered the motive of the offender,[495] or the presence of provocation by the victim.[496]

Most of the aggravating considerations relied on by judges were also outside what is outlined in the law.

[490] See, e.g., Decisions 548/2014/PN.Jkt.Pst and 1000/2011/PN.Jkt.Pst, or 17/2015/PN.Bdg.
[491] Decision 36/2014/PN.Jkt.Pst.
[492] See, e.g., Decisions 955/2015/PN.Bdg and 2358/2014/PN.Tng.
[493] See, e.g., Decisions 2001/2014/PN.Bdg, 409/2013/PN.Bdg, 67/2014/PN.Bdg and 77/2014/PN.Bdg.
[494] See, e.g., Decisions 1332/2014/PN.Bdg, 2001/2014/PN.Bdg and 409/2013/PN.Jkt.Sel.
[495] In one theft case, the judges mitigated the sentence because of urgent financial need, where the offender needed money to pay hospital bills for a baby's delivery (Decision 1089/2014/PN.Tng). In another case concerning corruption, judges also gave a sentencing discount to an offender who committed the offence to support the running of the office where he worked (Decision 38/2014/PN.Jkt.Pst).
[496] This case concerned a motorcycle theft, where the court considered the fact that the victim left the key attached to the vehicle as provocation that mitigated the sentence (Decision 978/2012/PN.Tng).

Chart 6.4: Common Aggravating Considerations



A few decisions considered other aggravating factors, such as the fact that the defendant 'was not straightforward in giving a statement', or ran away from the scene of the crime,[497] or because the offence involved breach of trust[498] or premeditation,[499] or because it was done in a place of worship.[500] Some decisions mentioned the direct or indirect impacts of the offence, either on the victim directly or others. For example, the court increased the sentence for an offender who stole a wing mirror from a car because it posed danger to the victim and other traffic users.[501] Similarly, in robbery cases, any physical and psychological harm caused by the offender to the victim aggravated the sentence.[502] In a number of corruption cases, the court has increased the sentence because the offences damaged public trust in the government.

It is not wrong for judges to consider factors outside those minimally acknowledged in the law, as long as they can advance justified punishment objectives that support the functioning of the criminal justice system and promote proportionality and justice in sentencing.[503] However, some of the mitigating and aggravating considerations mentioned above do not achieve these ends and are also applied in a biased and subjective manner, as will be discussed below. Furthermore, some factors that should be considered in

[497] Decision 1154/2015/PN.Bdg.
[498] See, e.g., decisions 1335/2012/PN.Jkt.Sel and 162/2015/Bdg. These cases concerned aggravated embezzlement which, in essence, is an offence that breaches trust, so additional aggravating considerations on this basis are excessive.
[499] Decision 614/2014/PN.Jkt.Pst.
[500] Decision 1326/2012/PN.Jkt.Sel.
[501] Decision 1046/2015/PN.Jkt.Pst.
[502] See, e.g., decision 48/2011/PN.Jkt.Sel and 689/2014/PN.Bdg.
[503] Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing' (n 47) 1163. Andrew Ashworth, 'Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing' in Julian V. Robert (ed) *Mitigation and Aggravation at Sentencing* (Cambridge, 2011) 21.

mitigating or aggravating sentences were not (or were only very seldom) assessed, considered or mentioned. For example, almost no decisions assessed or considered the sophistication of offences (which indicates the level of planning)[504], or whether or not the offences were done 'professionally' or as part of crime syndicate. Even basic information on the motives for the offences (which signify the degree of culpability) was almost never considered or mentioned in the decisions. Also, no decision mentioned the degree of involvement (level or role) of the offender in offences involving multiple offenders as mitigation or aggravation, although, in several cases, judges differentiated punishment severity between offenders, which may indicate that the different offenders' roles were at least implicitly considered.

The accuracy and reliability of the mitigating and aggravating considerations used is also in question. There were instances where judges simply copied and pasted considerations from other, even unrelated, decisions. For example, in seven cases, the judges aggravated the sentences on the ground that the acts were 'against the government effort to combat drug [or gambling] offences', despite the fact that none of the offenders were involved in such acts.[505] There were also cases where judges used conflicting mitigating and aggravating considerations in the same decision, for example, stating that the offenders had no prior records but were also re-offenders.[506] In another decision, the court even said that the offender had benefitted from the offence but had also not profited from the offence at the same time![507]

If one compares the format and the substance of mitigating and aggravating considerations in todays' judgments and those made in the 1950s, the differences are obvious. Then, judges provided more substantive and elaborate considerations, and wrote them in 'full sentences', instead of 'check lists' as in the today's decisions. In a 1951 case concerning the use of an uncalibrated scale, for example, the judges elaborated the widespread nature of the offence in the locality at that time and the need for crime deterrence in response to this as an aggravating factor.[508] In another case concerning theft, the judges assessed a wide range of mitigating factors before giving a sentencing discount. These factors included the small amount of money received by the offender, the minimal harm of the offence – because the money stolen was confiscated and would be returned to the victim – as well as the psychological impact (distress) of criminal process on the

[504] There was one case where the court aggravated a sentence, stating that the offence (an aggravated theft where the offender stole Rp2 million worth of goods from a shop) was premeditated, without describing the planning process involved, or elaborating the level of planning (Decision 614/2014/PN.Jkt.Pst). Using this approach, most theft offences could be considered to be premeditated.

[505] Decisions 406/2015/PN.Jkt.Pst, 488/2014/PN.Jkt.Pst, 1291/2015/PN.Bdg, 647/2014/PN.Tng and 244/2015/PN.Bdg.

[506] Decisions 730/2015/PN.Bdg, 551/2015/PN.Bdg, 1044/2015/PN.Bdg, 212/2013/PN.Jkt.Pst and 1467/2014/PN.Jkt.Pst.

[507] Decision 687/2015/PN.Bdg.

[508] Decision 1630/1951, in Saleh, *Keputusan-keputusan tentang Perkara Pidana* (n 414) 224. Interestingly, the judges in this case returned the tools used to commit the offence, a set of scales, to the defendant (and ordered him to re-calibrate them), something that you would never find in newer decisions. As mentioned before, in most, if not all, cases nowadays, judges would confiscate the tools used to commit an offence.

offender, referring to an expert's opinion.[509] Also in the 1950s, if no mitigating or aggravating conditions were found, the judges simply said so,[510] instead of 'inventing' unreasonable ones. From at least the mid-1970s, judges started to use less substantial or irrelevant considerations, such as the defendant's attitude or politeness (courteous) during trial (*terdakwa bersikap sopan dalam persidangan*).[511] Decisions have become less convincing from the 1980s until today, with the practice now established of citing mitigating or aggravating factors (even when there are none worth mentioning) very briefly and using a template model.[512]

During the interviews, several judges and prosecutors admitted that some mitigating and aggravating factors cited in today's decisions were merely a pro forma. As expressed by one judge 'I do not want to be a hypocrite, the truth is, [considerations such as] the offender being honest or polite, or conduct being against or contrary to government programs, are kind of templates'.[513] The fact that some judges interviewed could not convincingly defend the ratio behind some of the mitigating or aggravating considerations also confirms this.[514]

To some extent, poor practices in the application of mitigating and aggravating considerations relate to the limited meaningful information provided by prosecutors and the defence about the offence and the offender. In the majority of cases, information provided in the indictments is relatively general. They seldom mention, for instance, the motive or the level of planning for the offences, or the impact of the offence on victims. Most theft and embezzlement-related offenders were also not assisted by lawyers and did not understand how the court operated, so that they could not present strong arguments, including ones that might mitigate their sentences. As some judges said in interviews, *de charge* witnesses (witness for the defence), particularly who can speak to the defendant's character or conditions, are seldom called, unless the offender is represented by

[509] Decision 1357/1955 in Saleh, *Keputusan-keputusan tentang Perkara Pidana* (n 414) 223. During the criminal process, the mental health of the offender was assessed because there were indications that he was mentally ill. The expert found him mentally sound but reported that the criminal proceeding had caused distress to the offender.

[510] See, e.g., Decision 1357/1955 in Saleh, *Keputusan-keputusan tentang Perkara Pidana* (n 414) 223.

[511] There is no legal or doctrinal justification to mitigate a sentence simply due to offender's polite attitude during trial. Some judges, for example, over-generalize this attitude as an indication of the offender's (general) positive character. Even if it is true, according to all punishment goals (except rehabilitation) such character *per se* should not influence sentencing outcome. In another study, a judge, implicitly said that since he has the legal authority to expel a defendant who misbehaves during a trial for contempt of court, this means that he can also acknowledge well-mannered behaviour in court as a mitigating consideration. See Suci Kurnia Ramadhani, 'Dasar Pertimbangan Hakim dalam Menjatuhkan Sanksi Pidana Penjara terhadap Pelaku Tindak Pidana Pencurian dengan Kekerasan: Studi di Pengadilan Negeri Sidoarjo' (2013) 1(6) *Kumpulan Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya* 1, 12. See also Davis' argument in rejecting (im)politeness as mitigation or aggravating consideration in Michael Davis, 'Sentencing: Must Justice be Even-Handed?' (1982) 1(1) *Law and Philosophy* 77, 94.

[512] To some extent, this practice is influenced by Article 197(1)(f) of the Criminal Procedural Law, which states that judges must assess mitigating and aggravating considerations of each case.

[513] Interview with Judge #11 (Jakarta, 19 January 2017).

[514] See footnote 510 concerning lack of doctrinal justification for mitigating a sentence simply due to the offender's polite attitude during trial.

lawyers.[515] Therefore, it is up to the judges to dig for material evidence themselves to get relevant information that might justify reducing or increasing sentences.[516]

2. Detailed Analysis of Common Mitigating and Aggravating Considerations

2.1. First Time Offending and Recidivism

Interestingly, the mitigating consideration most commonly referred to was that the offender was a 'first-timer', despite the fact that the KUHP, following a deterrence philosophy, considers reoffending (recidivism) an aggravating factor that will increase a penalty, and not the other way around. This practice is praiseworthy and in line with desert theorists' argument that when an offender commits an offence for the first time, we may 'tolerate' his or her wrongdoing as we understand human fallibility and vulnerability to temptation or pressure.[517] Nonetheless, judges seem to apply this consideration inconsistently. Of 847 theft and embezzlement-related cases where the offenders were not recidivists, 200 of them did not receive 'first-time offender' mitigation. Some of those cases were tried by the same panel of judges.[518] Furthermore, judges tended to use this mitigating consideration more in corruption cases (87 per cent) than in theft or embezzlement-related cases (72 and 79 per cent respectively), which might indicate unfair treatment.[519]

Moreover, in most cases, judges did not significantly increase sentence severity based on recidivism. Of a total of 44 reoffending cases (39 theft and five embezzlement-related offences), most of the offenders were sentenced to just two years of imprisonment or less. The average sentence imposed on reoffenders for theft-related offences compared to first-time offenders in theft cases was only 6.5 months longer. Severe punishments for reoffenders (between 36 and 72 months) mostly occurred in robbery or aggravated robbery cases,[520] meaning none received the maximum penalty for the offence. In fact, recidivism did not affect the sentencing outcome in embezzlement-related cases, while there were no cases of recidivism in corruption. This contrasts with the practice in some jurisdictions of severely increasing sentences imposed on reoffenders as discussed in Chapter 3.

2.2. Remorse or Promise Not to Reoffend

Remorse (*menyesali perbuatan*) and a 'promise not to reoffend' *(janji tidak akan mengulangi perbuatan)* comprised 68 per cent of mitigating considerations across all

[515] Interviews with Judge #11 (Jakarta, 19 January 2017) and Judge #7 (Tangerang, 10 January 2017).
[516] Interview with Judge #5 (Jakarta, 6 January 2017).
[517] Von Hirsch, *Past or Future Crime* (n 91) 84-85.
[518] For example, a panel of judges in the Tangerang District Court (Rehmalem Perangin, Abner Situmorang and Asiadi Sembiring) used 'first-time offender' mitigation in 20 cases but not in the other three cases (see Decision 1887/2014/PN.Tng and 1755/2014/PN.Tng).
[519] Besides, there is a good chance that some, if not many, corruption offenders have long histories of offending but have never been caught before, so that they were treated as first time offenders. See a similar argument in Freiberg (n 168).
[520] See, e.g., Decisions 515/2015/PN.Bdg, 1183/2015/PN.Bdg and 212/2013/PN.Jkt.Pst.

cases.[521] The overuse of these considerations is problematic, both in theory and practice. Theoretically, they have very little correlation with various justifications of punishment, except rehabilitation and, to a much lesser degree, retribution.[522] More importantly, in practice, it is very difficult to objectively verify these considerations,[523] particularly without any material evidence, such as a defendants' confession of wrongdoing prior to or at an early stage of, the criminal process, their cooperation during investigation and trial, or the making of reparations,[524] which are separate mitigating factors in their own right. In the cases that were studied, such material evidence was rarely relied upon. Of 653 cases where judges mitigated sentences based on remorse, defendants returned, or promised to return, the profit/loss in only 57 cases. Furthermore, some corruption decisions relied on remorse as a mitigating factor, yet the defendants or their lawyers claimed the defendant was innocent and sought acquittal (which is not necessarily consistent with remorse), or the decisions showed no evidence that the offender was remorseful.[525]

2.3. Admission (or Disavowal) of an Offence

The KUHP and the Indonesian Criminal Procedural Code (KUHAP) do not recognise a guilty plea as a mitigating factor. In practice, however, judges often consider an offender's admission of guilt as a mitigating consideration because they perceive it as a sign of remorse, being honest and responsible (which shows good character), and because it speeds up the trial process.[526]. However, because admission of guilt does not significantly lessen the sentence imposed, it therefore does not encourages innocent defendants to plead guilty (thus undermining the presumption of innocence and discouraging defendants from exercising their right to trial), as it often does in other jurisdictions such as the UK, Australia, or the US. [527]

What is troubling is the 21 cases where judges explicitly relied on findings that the offender 'did not admit the offence' (*tidak mengakui kesalahannya*), or 'was not straightforward in giving a statement' (*tidak terus terang atau berbelit-belit dalam memberikan keterangan*), to increase sentences. These statements are in conflict with the non-self-incrimination principle,[528] as well as firm jurisprudence (Decision 451 K/Kr/1981), in which the Supreme Court held that the court cannot increase a sentence because of an offender's denial of the offence or his or her lack of straightforwardness when giving evidence at the trial. Some

[521] Approximately 653 cases were based on remorse and only 110 cases were based on a promise not to reoffend. In many cases, both factors were used in the same case.
[522] See, for example, Mirko Bagaric and Kumar Amarasekara, 'Feeling Sorry?–Tell Someone Who Cares: the Irrelevance of Remorse in Sentencing' (2001) 40(4) *Howard Journal of Crime and Justice* 364; Ward (n 325).
[523] See e.g., Bagaric and Amarasekara (n 521); Ward (n 325).
[524] See arguments and examples of these practices in other jurisdictions in, e.g., Hessick and Berman (n 66) 199; Bagaric and Amarasekara (n 521) 366.
[525] See, e.g., Decisions 06/2014/PN.Bdg, 16/2014/PN.Bdg, 26/2014/PN.Bdg, 07/2014/PN.Bdg, 131/2014/PN.Bdg and 107/2015/PN.Bdg.
[526] Interviews with Judge #4 (Jakarta, 14 December 2016, Judge #8 (Jakarta, 12 January 2017) and Judge #11 (Jakarta, 19 January 2017).
[527] See, generally, Ashworth, *Sentencing and Criminal Justice* (n 6) 170-71; Blume and Helm (n 325); Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle' (2007) 11 *Southern Cross University Law Review* 205; Julian V. Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends' (2015) 12(2) *Journal of Empirical Legal Studies* 187.
[528] See, for example, Ward (n 325) 157-64; Ashworth, *Sentencing and Criminal Justice* (n 6) 170-171.

judges justified these aggravating considerations, by arguing, unconvincingly, that such attitudes indicate a lack of remorse, which makes the offender potentially likely to re-offend,[529] or are a sign of bad character, including cowardice.[530] Commenting specifically on defendants who avoid giving straight answers, another judge simply said that such an attitude is annoying and wastes the court's time, and so deserves a more severe penalty.[531]

2.4. Have Profited (or Not Yet Received Profit) from an Offence

The justification for reducing or increasing sentences based on the fact that the offenders have profited, or not yet profited, from the offence is unclear. Some judges, for example, argue that when a defendant has not received the benefit of an offence (because, for instance, it is just an attempt, or the investigator arrested the offender before he or she used or sold the stolen goods), the goods 'survive'. This can mitigate the sentence because the goods can be used as evidence in court[532] (which makes the trial process much easier) and can be returned to the victim (thus decreasing the level of harm).[533] These arguments, however, do not explain why sentences for offenders who have profited should be aggravated. Furthermore, many offenders who have not profited from the offence also received aggravated sentences based on 'harm to the victim', which is incoherent (discussed further below).

2.5. Breadwinner of the Family (Effect of a Sentence)

Another consideration frequently used to mitigate sentences is that the offender is the 'breadwinner of the family' (*terdakwa adalah tulang punggung keluarga*).[534] The reason for giving this mitigation is to lessen the effect of the punishment with respect to the economic hardship on the offenders' families, which is justified according to desert proponents when offenders are living in subsistence conditions. In all theft-related cases, most of the offenders were of productive age (between 22 and 65 years old) and from lower economic backgrounds (such as unemployed, full-time or part-time labourer, cleaner, driver or peasant), however, only 42 persons (or six per cent) benefitted from the 'breadwinner of the family' consideration. On the other hand, approximately 151 offenders (74 per cent) charged with corruption received a sentence reduction on this basis. Of these offenders, at least 34 per cent were high-ranking officials or executives, and 42 per cent were mid-level executives or bureaucrats, whose families, presumably, were in much better financial conditions than the majority of the families of theft-related

[529] Interview with Judge #5 (Jakarta, 6 January 2017). Another judge, a firm believer in the non-consequential aims of punishment, rejects the idea that judges should consider the possibility of reoffending in determining a sentence. For him, a punishment should only be imposed for an offence that has already been committed: Interview with Judge #14 (Jakarta, 24 January 2017).

[530] Interview with Judge #11 (Jakarta, 19 January 2017).

[531] Interview with Judge #7 (Tangerang, 10 January 2017).

[532] Ramadhani (n 510) 8.

[533] Interview with Judge #4 (Jakarta, 14 December 2016). See also Decision 1357/1955 in Saleh, *Keputusan-keputusan tentang Perkara Pidana* (n 414) 223; Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 341.

[534] In some cases, judges used the term that 'the offender has family that financially relies on him or her' ('*Terdakwa mempunyai tanggungan keluarga yang membutuhkan nafkah dari terdakwa*', e.g., Decision 14/2014/PN.Bdg), or that ' the offender has wife and children that need financial support from him or her' ('*Terdakwa mempunyai isteri dan anak-anak yang memerlukan nafkah hidup*', e.g., Decision 104/2013/PN.Bdg).

offenders. This clearly demonstrates that the application of this mitigating consideration is biased against poorer offenders.

2.6. Voluntary Restitution (Returning the Stolen Assets)

Voluntary restitution (returning the stolen assets or promising to do so) are sound mitigation factors, recognised in many jurisdictions and in line with, particularly, restorative justice, because it lessens the harm of the offence on the victim. Without such mitigation, a victim must bring a civil proceeding for compensation or rely on a court restitution order or a state restitution fund, none of which are easy to obtain in Indonesia. However, giving too much importance to this mitigating factor, as many judges do,[535] can be unfair to offenders from low socio-economic backgrounds, who may not have the economic means to compensate the victim or to return or replace the stolen goods.[536] It may also be perceived as if justice can be bought.[537]

This study finds some indications that the application of this consideration results in unfairness. The percentage of defendants who received mitigation for voluntarily restitution and returning stolen assets/goods was much smaller in theft-related cases (only 2.8 per cent or 20 defendants) compared to embezzlement-related offences and corruption cases (approximately 24 per cent and 38 per cent respectively). This is, perhaps, mainly because of their lack of financial capacity, or because they did not know of the importance of doing so in order to mitigate their sentence (because almost all theft offenders were not represented by lawyers). Furthermore, the sentencing discount for corruption offenders who returned illicit profits or losses were, in many cases very generous. As an illustration, 45 defendants who received illegal gains between Rp50 million and Rp5.5 billion (with the average illicit profit of Rp326 million or A$32,600) and returned them entirely were only sentenced to, on average, 14.6 months in prison.[538] More than half of them (26 defendants), who also repaid all state losses (with an average loss of Rp1.34 billion or A$134,000), received a few days' additional reduction of their prison sentence.[539] This is quite surprising because some judges said that they were more concerned with the amount of state loss that was repaid when mitigating sentences than to the illegal gains that were returned.[540]

Also, most, if not all, defendants who receive the sentencing discount only returned the stolen asset/goods after the criminal process began or when were caught. More troubling, there were indications that some judges did not consider whether the recovery of loss was

[535] See discussion of this issue in Chapter 7.
[536] Ashworth, *Sentencing and Criminal Justice* (n 6) 173-4; Zedner (n 79) 245-7.
[537] To minimise this perception, in some countries, such as the United States of America and England, compensation must be paid by the offender prior to the detection of the crime to be acknowledged as a mitigating factor. See, e.g., Hessick and Berman (n 66) 194; Ashworth, *Sentencing and Criminal Justice* (n 6) 172.
[538] The person who obtained the biggest illegal profit, Rp5.5 billion, and returned it entirely, only received 18 months' imprisonment (Decision 85/2014/PN.Jkt.Pst).
[539] The total amount of state loss that was recovered here is an estimate, because there is the possibility that other offenders had already returned the losses in separate trials but these decisions were not published on the website, and so could not be assessed.
[540] Interviews with Justice #2 (Jakarta, 13 December 2016); Judge #9 (Jakarta, 15 January 2017), and Judge #11 (Jakarta, 19 Jan 2017).

the result of voluntary payment by the defendant, or due to confiscation. In a number of cases, judges imposed light punishments (between 12 to 16 months' imprisonment) where the state losses (ranging from Rp250 million to Rp10 billion or A$25,000 to A$1 million) were recovered, chiefly or entirely, due to confiscation by the investigators.[541] In fact, in justifying a one-year imprisonment sentence and Rp100 million fine (A$10,000) for offenders who caused approximately Rp9.5 billion state loss (A$950,000), the judges in one case explicitly stated that the reason they mitigated the sentence was that the loss had already been recovered by the law enforcers through confiscation.[542]

2.7. Victim's Forgiveness

Most judges stated that, when sentencing, they gave serious weight to a victim's forgiveness of the offender. Some attributed the significance of this mitigating factor to conceptions in *adat* (traditional customary law) that reconciliation between defendant and victim restores the cosmic and social equilibrium disturbed by the offence.[543] One judge further mentioned that when forgiveness is given, punishment is, in essence, unnecessary, and he would sentence the defendant according to the period that he or she has already spent in pre-trial detention (meaning the offender will be automatically released when the sentence is announced).[544] As discussed in the next chapter, this study shows that, on average, the sentences imposed on defendants who received forgiveness from victims were lighter than those who did not. There are, however, incongruencies. For example, an offender who stole Rp12 million (A$1,200) worth of motorcycles was sentenced to three years' imprisonment (which was far above the 17.3 month average sentence for similar offences), although the victim forgave him and withdrew the police report.[545]

Like compensation or restitution, mitigation based on a victim's forgiveness is common in other jurisdictions, in agreement with public moral intuition, as well as being advocated by, mainly, restorative justice proponents. This is because it brings the interests of the victim into the sentencing calculation (by helping the victims meet their psychological needs).[546] It also potentially reduces the possibility of reoffending.[547] Some scholars also

[541] See, e.g., Decision 19/2015/PN.Bdg, 39/2015/PN.Bdg, 50/2014/PN.Bdg, 136/2014/PN.Bdg, and 26/2014/PN.Bdg.
[542] Decision 72 to 76/2015/PN.Bdg.
[543] Interviews with Judge #6 (Tangerang, 10 January 2017), Judge #9 (Jakarta, 15 Jan 2017) and Judge #8 (Jakarta, 12 Jan 2017). It is argued that in the *adat* conception of justice, the main purpose of punishment is to restore the cosmic and social equilibrium disturbed by the offence. See, e.g., Bernard ter Haar, *Adat law in Indonesia* (E. Adamson Hoebel and A. Arthur Schiller trans, Institute of Pacific Relations, 1948) 214. Lesquiller distinguishes four main groups of offence in *adat* law: behaviour which upsets universal harmony; disturbance of emotional equanimity; transgressions against the authority of custom; and behaviour resulting in injury or damage. Lesquiller, *The Adat Law of Transgressions in Magical World View* (1934) in Peter Burn, 'The Myth of Adat' (1989) 21(28) *Journal of Legal Pluralism and Unofficial Law* 1, 58.
[544] Interview with Judge #9 (Jakarta, 15 January 2017).
[545] Decision 579/2015/PN.Bdg.
[546] Bibas (n 67) 338.
[547] This is because victim's forgiveness indicates goodwill, which is usually valued by offenders and more likely to encourage them to remorse. Bibas (n 67) 334-5. For this reason, Walker, for instance, states that a victim's forgiveness as mitigation is consistent with special deterrence or rehabilitation punishment philosophy. See Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (n 67) 210.

argue, without much evidence, that the victim's forgiveness indicates that the harm of the offence is not as great as might be thought.[548]

Although this mitigating consideration, unlike compensation and reparation, is not class biased, critics argue that it may conflict with the objectives of criminal law, as well as equality of treatment and proportionality principles, especially if it significantly influences the sentencing outcome. The purpose of criminal law, unlike civil law, is to protect the interests of the public, in this case, by punishing whoever commits a wrongdoing. Giving too much weight to the victim's voice in determining a sentencing outcome, some scholars argue, weakens the broader society's interest *vis a vis* the victim.[549] Furthermore, it also jeopardises the equality of treatment and proportionality principles because some victims may be forgiving and others may be vindictive.[550]

Examples found in this study seem to bear out these concerns. Seven defendants charged with serious aggravated robbery, involving hitting and threatening the victim with sharp weapons, but who were forgiven by the victims, received between five and 24 months of imprisonment (with an average sentence just slightly above 12 months).[551] These sentences were much lighter than those imposed in a number of (simple) theft cases, where offenders received no forgiveness from the victim. Nonetheless, there is always a possibility that these lenient sentences were actually driven by other factors, which will be discussed in Chapter 7.

2.8. Age of the Offender

Although there is a doctrinal justification for sentence reduction based on the offender's age, Indonesian judges often use this mitigating factor in an arbitrary and inconsistent manner. Offenders who received a mitigated sentence for 'youthfulness' ranged in age between 16 and 46 years old. In fact, the majority of these offenders (34 out of 57 or 60 per cent) were above 21 years old, the maximum age limit that, in some jurisdictions, warrants the 'young age' mitigating consideration.[552] On the contrary, of 183 young offenders (between 16 and 21 years old), the majority (87.5 per cent, 160 offenders) *did not* receive 'young age' mitigation. If we only include the 40 offenders between 16 and 18 years of age, the number of offenders who received this mitigation increases to just 30 per cent, which means that 28 young offenders received full sentences, like adult offenders.[553]

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[548] Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (n 67) 125-6.

[549] Ashworth (n 112). As mentioned before, he is of the opinion that the main legitimate interest of the victim in criminal proceeding should be compensation or reparation, not the form or quantum of the punishment to be imposed on the offender.

[550] Ibid 586.

[551] Decisions 2255/2014/PN.Tng, 960/2015/PN.Bdg, 368/2015/PN.Bdg, 1089/2015/PN.Bdg and 05/2015/PN.Bdg.

[552] Warner (n 532) 93. Since the data on offender's age in this study is based on the offenders' age as shown in the decision - which refers to their age when they were tried (not when they committed the offence) -the data shown above includes offenders who were already 21 years old when they were tried (assuming that there was at least a one year gap between when they committed the offence and when they were tried by the court).

[553] Of these 40 young offenders, nine are considered minors according to the law (aged between 16 and 17), and so deserve half the maximum penalty as a sentencing discount. Nonetheless, only five received the 'young age' mitigation. Furthermore, the majority of these minors were not tried in a juvenile court, as required by Law 11 of 2012. See, e.g., Decisions 1216/2014/PN.Jkt.Pst, 1152/2014/PN.Tng, and 1585/2013/PN.Jkt.Sel. As noted above, the age referred to here is the age of the offenders on the day the case was brought to trial, not the age of the offender

There were also two cases where judges mitigated sentences based on 'old age' ("*tua*" or "*berusia lanjut*") for offenders who were 59 and 63 years old.[554] In fact, in another case outside the sample of this study, judges mitigated the sentence for a 46-year old offender on this basis,[555] which, according to some other judges, is considered 'very young'.[556] Further, in one case, the Supreme Court mitigated a sentence for a 50-year old offender using the old age justification.[557] As in the case of youthfulness, this is unjustified, given that the average life expectancy in Indonesia is roughly 70 years.[558]

2.9. Meritorious Past History: Serving the Government

In several countries, factors related to an offender's meritorious past history or conduct, such as charity work, heroic acts or serving their country, can also mitigate a sentence. Use of these factors is not without criticism, due to their lack of connection to punishment rationales.[559] This study shows that in a number of cases in Indonesia judges have awarded this type of mitigation mainly to public servants charged for corruption for their previous 'service' to the government (*pengabdian sebagai Pegawai Negeri Sipil*).[560] Furthermore, in most cases, no evidence was offered of their actual positive contribution or service record. Only a few cases mentioned further justifications. In one case, the judges took into account that the offender received a medal of honour from the government; in another case, the judge claimed the offenders contributed to the expansion of the state-owned companies they worked for, without providing any supporting evidence.[561]

In two cases, similar mitigation was awarded to defendants who worked in the private sectors. One case concerned corruption and the other aggravated embezzlement. In the former case, the defendant, a consultant for a company receiving a power plant construction project from the government, was sentenced to just the minimum mandatory prison sentence under Article 3 of the Corruption Eradication Law (one year, and a fine of Rp50 million) for an illegal mark-up that enriched her by about Rp1.5 billion (A$150,000). The judges reasoned that a lenient sentence was justified because the accused's role in the project benefitted the public, even though the project was state-funded. The judges stated that:

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when they committed the offence (which is the relevant age as defined by law – Article 20 of Law 11 of 2012 on the Juvenile Criminal Justice System). As a consequence, it is possible that more young age offenders were not tried according to the law or did not receive 'young age' mitigation.

[554] Decisions 014/2014/PN.Bdg and 04/2014/PN.Jkt.Pst. There were two defendants who were above 70 years old but did not receive similar mitigation.

[555] Decision 106/2015/PN.Sky.

[556] Decision 006/2015/PN.Bdg. The judges stated 'the offender is still very young (*masih sangat muda*) so that it is expected that he can amend his behaviour in the future' [14].

[557] Supreme Court Decision 186 K/Pid.Sus/2013.

[558] Soewarta Kosen, Andi Nafsiah Mboi, Christopher J.L. Murray, and Simon I. Hay, 'Riset Terbesar Usia Harapan Hidup Orang Indonesia Naik, Beban Penyakit Tidak Menular Meningkat', Conversation (online), 12 July 2018 <http://theconversation.com/riset-terbesar-usia-harapan-hidup-orang-indonesia-naik-beban-penyakit-tidak-menular-meningkat-96901>.

[559] Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing' (n 47) 1179.

[560] There was only one case where the court mitigated a sentence by reason of the offender's charitable activities. This involved an offender who gave his land to be used by the community (Decision 24/2014/PN.Bdg).

[561] See Decisions 59/2012/PN.Jkt.Pst, 62/2014/PN.Jkt.Pst and 01/2014/PN.Bdg.

> Due to the role of the accused … in constructing a diesel power plan in Raja Ampat District, the public in general and the local government of Waisai in Raja Ampat District in particular can still today enjoy the results of this project.[562]

Equally unusually, in the second case, the judges referred to the defendant's being recognised as one of the best employees in the company he worked for. Even though the achievement had nothing to do with the public or community interest, the judges used it to justify the sentencing discount.[563]

Unlike in corruption, none of the theft-related defendants received 'meritorious past history' mitigation. Part of the reason for this was, perhaps, because of narrow interpretation of this mitigation (which is mainly concerned with an offender's status as public servant). Another reason is because judges view theft-related offences as more harmful than corruption. This might explain why 'meritorious past history' mitigation was not awarded to civil servants, teachers and police officers who committed theft-related offences.[564]

2.10. Public Disturbance (Prevalence of Crimes)

The most common aggravating consideration used in sentencing of theft-related cases was that the act created a disturbance or trouble for the public (*meresahkan masyarakat*), found in 90 per cent of cases. This consideration was usually associated with the perceived prevalence of the crime in society, and thus justified, from a general deterrence perspective, a more severe punishment.[565] As mentioned in Chapter 2, to increase a punishment's severity based on the deterrence objective is problematic. Besides, the courts have given no explanation why they did not apply this aggravating factor to the other 10 per cent of theft-related cases, which were concerned with relatively similar types of conduct and goods. This indicates that, to some extent, judges apply this mitigating factor in an inconsistent way.

2.11. Harm to the Victim

The second most common aggravating consideration in the studied decisions is that 'the offences harmed the victim' (*perbuatan terdakwa merugikan korban*). While all scholars and judges agree that the level of harm caused by an offence should be assessed and considered in determining a proportionate sentence, in other jurisdictions, a penalty increase related to this factor is usually only applied in cases where the offender targets vulnerable groups of victims, such as the elderly, children or persons with disabilities, or causes substantial loss to the victim.[566] In the cases studied, however, there was no clear pattern to how judges used this aggravating consideration. For example, it was used in cases with small losses or where the victims did not seem vulnerable. Out of 555 theft and

[562] Decision 32/2013/PN.Jkt.Pst.
[563] Decision 398/2014/PN.Bdg.
[564] Decisions 1177/2014/PN.Tng, 1434/2014/PN.Jkt.Sel and 667/2015/PN.Tng.
[565] Interview with Judge #12 (Bandung, 20 January 2017).
[566] See, e.g., Sentencing Council for England and Wales, *Theft Offences Definitive Guideline* (2015), 4-5 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Theft-offences-definitive-guideline-Web.pdf>; Bagaric, 'A Rational Theory of Mitigation and Aggravation in Sentencing' (n 47) 1176.

embezzlement-related cases where this aggravating consideration was used, most of the victims (157 cases or 28 per cent) were businesses or the state, and of these, 44 per cent concerned petty or small offences (with Rp25 million or A$2,500 losses or less).

Interestingly, judges also used the 'harm to the victim' consideration to aggravate sentences for 72 defendants who had either returned the stolen goods to the victims or had not received any profit from the offence (e.g. because they were caught during the act), so that, presumably, no monetary harm had been done.[567] Moreover, this aggravation was more often used in embezzlement cases compared to theft and corruption cases, perhaps because judges feel the need to cite at least one aggravating factor in each case, and this is the factor which judges think is the most appropriate 'generic' when taking a 'pro forma' approach.[568] As mentioned earlier, for other types of offences, judges already have at least one generic aggravating consideration: public disturbance (for theft-related cases) or actions contrary to government programs to combat corruption (for corruption cases).

2.12. Multiple Offending, Assisting and Attempt

In only 10 cases did courts explicitly aggravate sentences based on the offender having performed multiple crimes, and no sentence was mitigated based on the fact that the offender had only attempted the crime (that is, had not completed it) or had merely assisted in the commission of an offence (*perbantuan*).[569] Nonetheless, if we look closely at the full decisions (and not only at the section that elaborates mitigating and aggravating considerations), there were at least 148 decisions that cited both multiple offending and attempt provisions in the KUHP, as broken down below.

Table 6.16: Total Number of Cases Involving Multiple Offending, Assisting Offences and Attempts

Type of Offence	Multi-offending		Attempt	Assisting
	Art. 64 (1)	Art. 65 (1)		
Theft	12	25	25	-
Embezzlement	13	-	-	-
Corruption	62	8	-	-

[567] There were two cases with five offenders where the courts aggravated the sentences because of harm to the victim, despite the fact that the cases involved attempts or the offenders were caught before taking the stolen goods. See Decisions 893/2015/PN.Bdg and 611/2014/PN.Jkt.Pst.

[568] As mentioned earlier, because the criminal procedural code states that court decisions should mention mitigating and aggravating considerations, judges seem to interpret this as meaning that they have to cite at least one factor to meet this requirement. For other types of offences, judges already have at least one generic aggravating consideration: public disturbance (for theft-related cases), and contrary to government programs to combat corruption (for corruption cases). It seems that this is the factor that judges think is the most appropriate 'generic' aggravation to be used on embezzlement-related offences.

[569] As discussed earlier, the mitigating and aggravating considerations are usually written in a specific part of the decision.

There are, however, indications that judges, to some degree, did indeed take into account multi-offending and attempt in determining the sentences' severity, but perhaps did not write this down or identify them in the judgment as mitigating or aggravating factors. As will be discussed in more detail in Chapter 7, bivariate and path analysis show that there was correlation, although weak, between multiple offending in theft-related offences and the severity of the sentence imposed. But this was not true for other offences. Further, no judge has used the multiple offence aggravation in Article 65(1) or Article 64 of the KUHP to their 'full effect', by explicitly increasing the maximum penalties by one-third or even by imposing maximum penalty for that offence. The most severe punishment imposed was in an aggravated robbery case where the judges sentenced the offender to six years' imprisonment,[570] which is shorter than the (normal) maximum penalty for this offence of nine years. Further, there were inconsistencies in sentencing multiple offences cases. As an illustration, in four similar small aggravated theft cases where multiple offending occurred, the judges imposed between 28 and 42 months' imprisonment, far above the 14 month median sentence for similar offences.[571] However, in similar offences –with much bigger losses (between Rp95 million and Rp525 million, or A$9,500 and A$52,500) – the judges imposed lighter sentences of 20 and 18 months' imprisonment respectively.[572] There were even cases of small or medium aggravated theft in which judges imposed between six and 12 months' imprisonment, below the median sentence for similar offences.[573]

Offenders who committed attempts also appeared to receive marginally lighter sentences. For example, the average imprisonment sentence for offenders charged with attempt of similar small aggravated theft (4 cases) was 12.5 months, approximately one month less than the average sentence for offenders committing similar offences. However, again, the sample size is too small to reach a firm conclusion on this point.

D. Conclusion

This chapter shows that judges overwhelmingly prefer imprisonment over other types of punishment, including for less serious offences. It also shows that unwarranted disparity and disproportionality in sentencing exists, particularly in, but not limited to, cases involving large losses, as summarised in Table 6.17 below. This chapter also supports the public perception that punishments imposed on corruptors are disproportionally lighter than those imposed on thieves and fraudsters, for two reasons. First, although corruptors received more severe average prison sentences compared to thieves and fraudsters, this was mainly driven by a small percentage of large and grand corruption cases. Second, unlike theft and embezzlement-related cases, the level of punishment imposed in

[570] Decision 660/2015/PN.Bdg.
[571] Decisions 994/2015/PN.Bdg, 1063/2012/PN.Tng, 783/2015/PN.Bdg and 603/2014/PN.Tng.
[572] Decisions 201/2014/PN.Tng and 1088/2012/PN.Tng.
[573] See, e.g., Decisions 2009/2012/PN.Tng, 363/2014/PN.Tng or 380/2015/PN.Bdg.

corruption cases was disproportionally light compared to the seriousness of their offences, as evidenced by the severe minimum and maximum penalties.

This chapter also shows that judges consider many mitigating and aggravating factors outside those acknowledged in the law. While some of these factors are justified – acknowledged in other jurisdictions and in sentencing theory – others are not, or were referred to in decision-making only as a formality. Further, this research proves that many judges tend to use mitigating or aggravating considerations in a biased or arbitrary manner, particularly to justify lenient sentences for offenders from middle or upper socio-economic backgrounds. This translates to a bias against offenders from lower socio-economic background in sentencing.

The next chapter explains why judges employ the sentencing practices that cause disparity and disproportionality, as just described in this chapter.

Table 6.17: Summary of Degrees of Sentencing Disparity Across All Offences

Category of Loss	Theft		Aggravated Theft		Aggravated Robbery		Embezzlement		Aggravated Embezzlement		Corruption*		Corruption**	
	Intensity	N	Intensity	N	Intensity	N	Intensity	N	Intensity	N	Intensity	N	Intensity	N
≤ 2.5 million	0%	20	12%	60	30%***	20	-	-	-	-	-	-	-	-
> 2.5-25 million	17.5%	40	30%	148			10%	20	5%	21	-	-	-	-
> 25-100 million	-	-	36%	14	-	-	16%	19	29%	17	-	-	-	-
> 100-500 million	-	-	53%	15	-	-	58 %	24	29%	21	46%****	30	-	-
> 500 million-1 billion	-	-	-	-	-	-	-	-	60%	5			26%	23
> 1-10 billion	-	-	-	-	-	-	-	-	-	-	61%	18	-	-
>10 billion	-	-	-	-	-	-	-	-	-	-	66%	9	75%	8

* Corruption cases where the defendants did not gain profit and did not repay the losses

** Corruption cases where the defendants received Rp100 million profit or above and did not repay losses, or only repaid 20 per cent or less of state losses

*** This figure comprises cases with losses between ≤ Rp2.5 million and Rp25 million

**** This figure comprises cases with losses between > Rp100 million and Rp1 billion

CHAPTER 7
EXPLAINING THE GENERAL FINDINGS: LEGAL AND EXTRA-LEGAL FACTORS INFLUENCING SENTENCING

Chapter 6 demonstrated sentencing disparity across all three groups of offences selected for study, as well as disproportionality in the sentencing of similar offences, particularly in theft-related and corruption cases. It also illustrated unjustified, arbitrary, and biased use of mitigating and aggravating considerations, particularly against offenders from lower socio-economic backgrounds. This chapter investigates the legal and extra-legal factors that influence sentencing practices and outcomes, including those that contribute to these problems. First, it sets out the results of the statistical analysis, mainly concerning legal factors influencing sentencing. It then discusses interview findings and relevant scholarship to further understand the statistical analysis results, and to illuminate other factors that influence sentencing outcomes, in particular, extra-legal ones. The last part locates the findings of this thesis in terms of different perspectives on sentencing.

A. Factors which Influence Sentencing: Statistical Findings

Before discussing the results of the statistical analysis, it is important to reiterate the two types of analysis used in this study – bivariate and multiple regression analyses, as discussed in Chapter 5. Bivariate analysis is used to assess "relationships" ("associations" or "correlations") between two variables: one dependent variable (in this case, the length of imprisonment sentence imposed by judges); and one independent variable (there were 20 independent variables in total, such as the amount of loss caused by the offence, the type of victim, or the offender's criminal history). On the other hand, multiple regression analysis (in this case, path analysis), assesses correlation between several independent variables and a dependent variable to provide evidence that helps to draw causal inferences on the predicted influence of independent variable(s) on the dependent variable. While the purpose of this chapter is to predict factors that influence sentencing outcomes (which will be done by path analysis), it is necessary to conduct bivariate analysis first in order to screen relevant variables to be assessed by path analysis.

1. Bivariate Analysis Results

1.1. General Findings

Overall, the bivariate analysis shows that many variables are statistically significant and associated with, or related to, the length of imprisonment sentences imposed by judges, although their levels of significance[574] and association or correlation are varied, as summarised in Table 7.1 below (for detail results of the bivariate analysis, see Appendix 1).[575]

[574] The term "significant" means that the association or correlation of that variable to another variable has not happened by chance.

[575] The relationship between the role of the offenders' variables and their sentencing outcome is not assessed because all cases in all types of offences involved an "offender" with no "assisting offender". Further, the relationship because there were not found to be relevant or because no case involved such a variable.

Table 7.1: Significance and Relationship Between Independent Variables and the Dependent Variable in Different Groups of Offences

	Independent Variable	Significance & Relationship with Lengths of Imprisonment (Dependent Variable)			Meaning
		Theft-related	Embezzlement-related	Corruption	
Harm	Type of Offence	**Significant & Associated** (F: 35.910)	**Significant & Associated** (Z: -3.093)	**Significant & Associated** (Z: -9.142)	On average, offenders who committed more serious offences (e.g. robbery) received longer imprisonment than those charged for less serious offences (e.g., theft), with some exceptions.
	Amount of Loss	**Significant & Moderately Correlated** (38,2%)	**Significant & Moderately Correlated** (30,9%)	**Significant & Moderately Correlated** (37.9%)	Across all offences, offenders who caused larger losses received longer imprisonment than those who caused smaller losses.
Culpability	Type of Victim	**Significant & Associated** (t: -4.659)	**Significant & Associated** (t: -3.691)	N/A	Theft and embezzlement offenders who caused losses to individual victims received longer prison terms than those who caused losses to businesses or the state.
	Multiple Offences	**Significant & Associated** (t: 2.942)	**Not Significant & Not Associated**	Not Assessed	Offenders who committed multiple theft offenders received longer imprisonments than those who committed single offences.
	Recidivism	**Significant & Associated** (t: 3.907)	**Not Significant & Not Associated**	Not Assessed	Recidivist offenders who committed theft received longer prison terms than first-time offenders.
	Amount of illicit gain received	**N/A**	**N/A**	**Significant & Moderately Correlated** (28.7%)	In corruption cases, individual offenders who obtained larger amounts of illicit gain received longer prison terms.
Mitigation & Aggravation	Total Number of Mitigating Considerations	**Not Significant & Not Associated**	**Not Significant & Not Associated**	**Significant & Weakly Correlated** (20%)	Corruption cases where more mitigating factors were considered by judges resulted in shorter periods of imprisonment.
	Total Number of Aggravating Considerations	**Significant & Moderately Correlated** (26.1%)	**Significant & Weakly Correlated** (21.5%)	**Significant & Moderately Correlated** (29.7%)	Across all offences, the more aggravating factors considered by judges, the longer the imprisonment sentence received by the offender.
	Forgiveness from Victim	**Significant & Associated** (t: -2.389)	**Not Significant & Not Associated**	N/A	In theft cases where offenders were forgiven by the victims, offenders received shorter prison terms than otherwise.
	Loss Recovered	Not Assessed	Not Assessed	**Significant & Moderately Correlated**	Corruption offenders who recovered part/all of the state loss received shorter sentences than otherwise.

	Independent Variable	Significance & Relationship with Lengths of Imprisonment (Dependent Variable)			Meaning
		Theft-related	Embezzlement-related	Corruption	
				(40.6%)	
	Repaying Illicit Gain	Not Assessed	Not Assessed	**Significant & Moderately Correlated** (38.6%)	Corruption offenders who returned part/all of the illicit gain received shorter sentences than otherwise.
Offender Characteristics	Gender	**Not Significant & Not Associated**	**Significant & Associated** (t: 2.441)	**Not Significant & Not Associated**	Female offenders who committed embezzlement received shorter imprisonment periods than male offenders.
	Age	**Not Significant & Not Associated**	**Significant & Associated** (t: -2.734)	**Not Significant & Not Associated**	Young offenders (16-21 y/o) who committed embezzlement received shorter jail terms than their older counterparts (22-65 y/o).
	Occupation	**Significant & Associated** (F: 2.611)	**Significant & Associated** (F: 4.391)	**Not Significant & Not Associated**	In sentencing of theft and embezzlement cases the offenders' occupation correlated with sentence severity.
Other	Length of Prosecutor's Recommended Sentence	**Significant & Very Strongly Correlated** (93.6%)	**Significant & Very Strongly Correlated** (84.7%)	**Significant & Very Strongly Correlated** (87.5%)	Across all offences, when prosecutors recommended severe sentences, judges also imposed severe sentences (and vice versa).
	Number of Offenders	**Not Significant & Not Associated**	**Significant & Weakly Correlated** (-24.8%)	Not Assessed	In embezzlement cases, the larger the number of offenders committing the acts, the shorter the imprisonment sentences imposed on each.
	Duration of Pre-trial Detention	**Significant & Moderately Correlated** (34.2%)	**Significant & Weakly Correlated** (23.1%)	Not Assessed	Theft and embezzlement offenders who spent longer in pre-trial detention received longer sentences than those who were detained for a shorter time.
	Type of Stolen/Embezzled Goods	**Significant & Associated** (t: 5,779)	**Not Significant & Not Associated**	Not Assessed	Motorbike thieves received harsher sentences than those who stole other goods. Such a difference was not found in the sentencing of embezzlement cases.
	Court Location	**Significant & Associated** (F: 21.346)	**Not Significant & Not Associated**	**Significant & Associated** (Z: -3.951)	Some courts imposed more severe sentences on corruption and theft cases than other courts.

As shown above, many of the independent variables that were associated or correlated with the length of sentences imposed by judges were almost identical to the factors that were considered by the judges in mitigating and aggravating sentences discussed in Chapter 6. I now turn to discuss the bivariate analysis results, highlighting the independent variables or factors that were not discussed in Chapter 6.

1.2. Prosecutor's Sentence Recommendation

Across all offences, the length of the sentence imposed by the judges was strongly correlated to the length of the sentence recommended by prosecutors. In the sentencing of theft-related cases, the degree of correlation between these variables was 93.6 per cent, and slightly less, 87.5 per cent and 84.7 per cent, in corruption and embezzlement-related cases respectively. This very strong relationship is not surprising. As shown by all the charts in Chapter 6, the sentences imposed by judges largely mirrored the prosecutor's recommended sentences. Furthermore, the result of the path analysis discussed in the next part also shows that the main factor that influenced judges in sentencing was the prosecutors' sentencing recommendations.

1.3. Type of Offences and Amount of Loss

There were also strong associations between the severity of the sentence imposed and the type of offence committed as well as the amount of loss caused by the offence. On average, offenders who committed more serious offences received longer periods of imprisonment than the reverse. For example, aggravated robberies received the longest average imprisonment, while simple theft offences received the shortest ones. In the case of corruption, the average sentence imposed on offenders who were charged under Article 2(1) of the Corruption Eradication Law was more severe than those charged under Article 3 of the Law. There are minor exceptions. For example, aggravated burglary offenders received a lighter average sentence than aggravated theft offenders, despite both facing similar maximum penalties. Also, offenders who were charged with simple embezzlement received longer average sentence than aggravated embezzlement offenders. Similarly, across all offences, offenders who caused larger amounts of loss received longer sentences than those causing smaller losses, although, as shown in Chapter 6, there are some paradoxes. For example, the average sentence for large embezzlement cases was lighter than for medium-large ones.

1.4. Type of Victim

The type of victim also matters for judges. Overall, judges imposed shorter periods of imprisonment for theft and embezzlement-related offenders harming business or government than those harming individual victims.[576] The disparities were wider as the losses increased, as shown in the sentencing of similar cases with different levels of losses, below.

[576] There were 213 business entities (including stores, workshops, or companies) and three government institutions as victims of theft and embezzlement-related offences. No assessment is made for corruption cases because corruption under Article 2(1) and 3 of Corruption Eradication Law is concerned only with offences that harm the government (including state-owned companies).

Table 7.2: Sentencing Difference Between Offences that Harm an Individual Victim and Business or Government

Types of Offence	Types of the Victim	Average Charge (months)	Average Sentence (months)	Average Losses (Rp)	Total Cases
Aggravated Theft (Rp2.5-25 million)	Business/Gov	15.18	**10.90**	10,098,115	44
	Individual	18.32	**14.62**	9,722,600	218
Aggravated Theft (Rp100-500 million)	Business/Gov	19.28	**12.86**	345,418,857	14
	Individual	31.65	**23.475**	211,948,500	20
Embezzlement (Rp100-500 million)	Business/Gov	23.5	**16.25**	186,770,000	4
	Individual	25.6	**22.04**	164,296,000	25
Aggravated Embezzlement (Rp2.5-25 million)	Business/Gov	13.45	**10.93**	13,554,007	22
	Individual	15.8	**12.2**	11,463,000	5

1.5. Multiple Offences and Recidivism

The length of the sentence imposed by judges is also correlated to the numbers of offences committed by the offenders, but only in theft-related offences. On average, offenders who committed multiple theft-related offences received a sentence of approximately 5 months longer in prison than those who committed single offences, although there was some inconsistency, as discussed in Chapter 6.[577] It is unclear why judges did not consider multiple offending, which warrants an additional one-third of the maximum penalties, in sentencing embezzlement-related cases. Perhaps the reason is that the majority of the cases involved small or medium losses.[578]

Similarly, the correlation between the offender's criminal history and sentence severity only appeared in the sentencing of theft-related cases where reoffenders received longer sentences than first-time offenders. Nonetheless, the increase in sentence was relatively small compared to what is allowed by law (which is an additional one-third of the maximum penalty). On average, a reoffender received approximately 6.5 months longer imprisonment than a first-time offender. Further, the sentence difference dropped to just 3.5 months in small aggravated theft cases.[579] No correlation was found in embezzlement-related cases (and there were no cases of recidivism in corruption). One explanation for

[577] As an example, there were several cases where offenders committed multiple offences and received shorter imprisonment periods than the average sentence imposed for similar offences committed by a single offender.

[578] As mentioned in Chapter 6, there were 13 multi-offending cases (Article 64(1) of the KUHP) concerning embezzlement-related offences. Six cases concerned a loss between Rp2.6-24 million, and four cases involved a loss between Rp26-66 million.

[579] In fact, the difference was caused by a small number of outliers. Of 12 similar aggravated theft cases, two reoffenders received 36 months of imprisonment, far above the average sentence. If these cases were not included in the equation, there would be no sentence difference between that imposed on first-time offenders and on reoffenders who committed small aggravated thefts.

this is that the sample was only five cases, with four of them involving small losses (between Rp9-25 million).[580]

1.6. Total Number of Mitigating and Aggravating Factors Considered[581]

The total number of mitigating factors considered by judges did not correlate with the length of sentences imposed for theft and embezzlement. A correlation appeared in the sentencing of corruption, where offenders were likely to receive shorter imprisonment when more mitigating circumstances were considered by the judges. In contrast, for all offences, the more aggravating factors that were taken into account, the longer the sentence. This can be interpreted in two ways: because there were more (justified) aggravating factors in a case, judges imposed more severe sentences; alternatively, if judges want to impose a harsher punishment, for whatever reasons, they justified this by adding aggravating factors. The latter reading, if correct, might explain the use of weak, or even unjustified, aggravating considerations, discussed in Chapter 6.

1.7. Victim's Forgiveness

As mentioned in Chapter 6, judges consider forgiveness by the victim as an important mitigating factor. The bivariate analysis result confirmed the relationship between this factor and the length of sentence imposed, but only in theft-related cases. On average, theft-related offenders who received forgiveness from the victims were sentenced to four months less than otherwise, despite 37 per cent of the offenders who received forgiveness (15 of 41 persons) being charged with robbery or aggravated robbery. A possible explanation for this mitigating factor having no relation to the sentencing in embezzlement-related cases is that relatively large losses were involved in most cases where forgiveness was present.[582]

1.8. Amount of Illicit Profit Obtained

In sentencing corruption cases, judges also took into account the amount of illicit profit obtained personally by an offender. The bigger the amount, the longer the sentence imposed. This relationship is reasonable because it means the overall loss is also larger. Besides, as discussed in Chapter 6, the level of the illicit gain obtained may indicate the offenders' role in the offence, as well as their motivation in committing the offence. The problem is that there was an indication that law enforcers did not always seriously trace how much money each offender obtained from an offence. As will be shown in Chapter 9,

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[580] Nevertheless, the data shows that in the case of small embezzlement-related offences, reoffenders received harsher sentences, an average of 16.5 months of imprisonment, as opposed to 12.36 months for first-time offenders.

[581] As mentioned in Chapter 5, because it is difficult to assess the relationship between individual mitigating and aggravating considerations (due to relatively small samples, or because not all of them have equal weight), this study only assesses the link between the total use of mitigating and aggravating consideration and the length of the imprisonment sentence imposed. Important mitigating and aggravating considerations, such as recidivism, victim's forgiveness or multi offending, were assessed separately since they may have significant influences in sentencing.

[582] Out of seven embezzlement-related offences where the victim forgave the offenders, in five cases the amount of loss was between approximately Rp50 million and Rp300 million. In one case, the judges imposed a suspended sentence, which is not included in the analysis.

in 60 cases offenders were found not to have gained any profit, so they received lenient sentences, despite indications that they had in fact profited from the offences.[583]

1.9. Recovering Losses and Returning Illicit Profits

There was a moderate correlation between the amount of loss recovered and the length of sentences imposed in corruption cases. On average, offenders who voluntarily returned part or the entire amount received shorter sentences than those who did not. Further, the bigger the losses recovered, the bigger the "sentence discount" they received. Similarly, offenders who returned the illicit profits gained from their offence generally received shorter sentences than otherwise, although not as significant as those who repaid the state losses.

As shown in Chapter 6, the sentencing discount for corruption offenders who returned state losses or their illicit profits can be very generous. Offenders who received illegal profits between Rp50 million and Rp5.5 billion or A$5,000 and A$550,000 (with an average of Rp326 million or A$32,600) and returned them entirely were only sentenced to, on average, 14.6 months imprisonment. Those who also repaid all state losses (with an average loss of Rp1.34 billion or A$134,000) received several days of additional sentence reductions.[584] Further, comparing similar cases involving different levels of loss reveals a relatively sharp disparity. The average sentence imposed on 32 offenders who illicitly received above Rp50 million (A$5,000) and caused between Rp100 million and Rp1 billion in state loss (A$10,000 and A$100,000) but returned between 50 per cent and 100 per cent of the loss, was just 13.40 months.[585] If we only include the 19 offenders who returned all state loss, the average sentence imposed was a few days shorter, 13.10 months.[586] On the other hand, 29 offenders who were convicted of committing similar offences but did not return state loss, or only returned less than 10 per cent of it, received an average of 36.17 months.[587]

1.10. Offender's Gender, Age and Occupation

An offender's gender was weakly associated with the severity of sentences imposed, but only in embezzlement-related cases. Female embezzlers (35 persons) received, on average, shorter imprisonment terms than male embezzlers, despite having caused larger average losses.[588] The lighter sentences, however, can be explained by the fact that the

[583] See Chapter 9 for discussion of this issue.
[584] As discussed in Chapter 5, the data concerning the total amount of state loss recovered used in this study is an estimation. There is the possibility that other offenders already returned the losses in separate trials and that such decisions were not published on the website, so this cannot be assessed.
[585] The average loss was Rp422 million.
[586] The average loss was Rp403 million.
[587] The average loss was Rp360 million.
[588] The average loss for embezzlement-related offences committed by female offenders was more than three times that caused by male offenders, between approximately Rp640 million and Rp189 million.

majority of the victims were businesses (28 cases),[589] and because almost one-third of the cases involved notable mitigating circumstances.[590]

Similarly, the age of the offender was only weakly associated with the length of imprisonment in embezzlement-related cases. On average, young embezzlers (between 16 and 21 years old) received shorter sentences than adults (aged between 22 and 65 years), although the sample of cases with young offenders was small, only ten.[591] On the other hand, in theft-related cases, the age variable did not correlate with sentence severity, which is not surprising. As discussed in Chapter 6, in the majority of cases involving young offenders, judges did not consider age to be a mitigating factor. In fact, some young offenders were not even tried according to the Child Protection Law. The correlation between age and sentencing in corruption cases was not assessed because all the offenders were adult.

Lastly, there was association between the offender's occupation and the length of sentence in theft and embezzlement-related cases, but not in corruption, as shown below.

Table 7.3: Lengths of Imprisonment Sentence Imposed on Offenders with Different Occupations

Occupation/Position	Av. Theft-related		Av. Embezzlement-related	
	Sentence (months)	Total Case	Sentence (months)	Total Case
Not Working	13.85	179	16.14	7
Student	9.16	6	N/A	N/A
Labourer/equivalent	15.20	237	15.47	30
Private/government employee	12.51	99	13.44	105
Mid-level bureaucrat/executive	N/A	N/A	15.60	5
High-ranking official/executive	N/A	N/A	26.80	5
Private[592]	16.02	155	17.76	38

Students charged with theft-related offences (only six offenders), for example, received shorter average terms of imprisonment than offenders with other occupations. However, this might have been influenced, at least partly, by the minimal harm caused by the

[589] As mentioned before, the sentences imposed on offenders who harmed this type of victim were generally more lenient than to those who harmed individual victims.
[590] Some of the offenders were pregnant, single parents or cared for minors (see, for example, Decisions 955/2015/PN.Bdg and 409/2012/PN.Jkt.Sel) and one offender had a serious health problem (Decision 1000/2011/PN.Jkt.Pst). In only a few cases were all losses recovered (Decisions 998/2014/PN.Jkt.Sel and 1367/2012/PN.Jkt.Sel).
[591] Interestingly, of these cases, only one offender in this age group received mitigation based on youth. On the other hand, twelve offenders who received this mitigating consideration were between 22 and 46 years old.
[592] As mentioned in Chapter 5, 'private' can mean self-employed, labourer or even unemployed.

offences perpetrated by students.[593] For embezzlement-related offences, offenders with high-ranking official/executive positions (only five persons) were punished significantly more severely than other professions. Again, this association seems to be linked to other factors, in particular, the level of harm caused, rather than occupation. The average value of goods embezzled by this group of offenders was much larger, Rp1.7 billion (A$170,000), in comparison to the Rp233 million (A$23,300) misappropriated by offenders from other professions. To sum up, the link between these variables was driven by the gravity of the offence, not the occupation of the offenders.

1.11. Number of Offenders Committing an Offence

The total number of offenders committing an offence had a negative correlation with the length of sentence imposed by judges, but only in embezzlement-related cases,[594] which is odd.[595] This correlation, however, seems to be more influenced by the type of the victim and the type of offences. The majority of cases where offences were committed by more than one offender (14 of 16 cases) concerned aggravated embezzlement and harm to businesses. As mentioned, judges tended to impose relatively low sentences in such cases.

1.12. Duration of Pre-trial Detention

Statistically, there was a relationship between the duration of pre-trial detention and the length of sentence imposed in theft and embezzlement-related offences. By and large, offenders who served longer pre-trial detention received longer periods of imprisonment than otherwise. Nevertheless, if we look more closely at the data, the actual relationship is between the seriousness of the offence and the length of imprisonment. The logic is as follows. Serious offences, including those punishable by more severe maximum penalties or those that caused large losses, are generally more complex, and thus require longer investigations and hearings. Since almost all offenders were detained during these processes, when the link between the length of pre-trial detention and the length of imprisonment sentence was assessed, a positive relation is shown. The data confirmed this proposition. Of 112 theft-related cases where the offenders were detained for a relatively long period (4.5 months or above), the majority (53.6 per cent) were concerned with aggravated theft with large losses (an average of Rp249 million or A$24,900), and 37.5 per cent were concerned with aggravated robbery that caused an average of Rp310 million in loss (A$31,000). On the other hand, of 140 cases where the offenders were detained for just three months or less prior to and during trial, the majority (65 per cent) involved aggravated theft with smaller losses (an average of Rp37.5 million or A$3,750), and only nine per cent (13 cases) were concerned with medium aggravated robbery (with an average loss of Rp63.3 million or A$6,330).

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[593] Half the offences concerned aggravated theft caused losses of Rp5 million or less.

[594] No assessment was done of corruption cases because these were all committed by multiple offenders.

[595] This is the reason why theft by multiple offenders is considered aggravated theft in the KUHP. On the other hand, judges might perceive that when a single person (or smaller numbers of offenders) commit an offence, he or she is more blameworthy because it indicates his or her bad character or intention in committing the offence, more so than if it was done by an individual in a group because in the latter case some of the offenders may simply be following others. See similar findings that show how judges in other jurisdictions also follow the latter reasoning in sentencing multiple offenders, in Daniel Mcgillis, 'Convergences Between Legal and Psychological Concepts: Attribution and the Law' (1978) 2(4) *Law and Human Behavior* 289, 294.

1.13. Type of Goods Stolen

The type of good stolen also had an association with the severity of the sentence. The average length of prison sentences imposed on offenders who stole a motorbike or charity funds[596] was longer than for those who committed the same offence but stole a different item of similar value.

Table 7.4: Punishment Severity in Aggravated Theft Cases with Different Types of Stolen Goods but Similar Amount of Losses

Stolen Goods	Average Recommended Sentence	Average Sentence	Average Losses	Total Cases
Motorbike (Rp5 million to Rp35 million losses)	21.29	17.3	13,338,000	131
Non-motorbike (Rp5 million to Rp35 million losses)	15.65	11.82	11,635,000	88
Charity Money (Rp250,000 to Rp1 million losses)	15	11.83	559,000	6
Non-charity Money (Rp250,000 to Rp1 million losses)	11	7.96	560,000	52

As discussed in more detail in the next part, the tougher sentence recommendations and punishments for motorbike thefts seem to be linked to how prosecutors and judges view the seriousness of the harm created by this type of offence and the punishment goal they want to achieve. In the majority of cases (97 per cent), the judges increase the sentences on the basis that this offence was considered as "troubling the public" (*meresahkan masyarakat*). The same justification was used in 81 per cent of non-motorbike thefts. Motorbike theft is also very common (comprising approximately 42 per cent of all theft and aggravated theft cases)[597] and attracts massive media coverage. Accordingly, as one prosecutor said, those who commit this offence should be punished severely so that 'the (deterrent) message is delivered (to potential offenders)'.[598] A similar comment was made by a judge.[599] Besides, as noted by another judge, harsher punishments are responses to public demands for justice, and prevent public lynching of the offenders,[600] which has occurred in a number of instances.[601] In the case of theft of charity funds, it seems that harsher sentence recommendations and punishments were related to judges' and

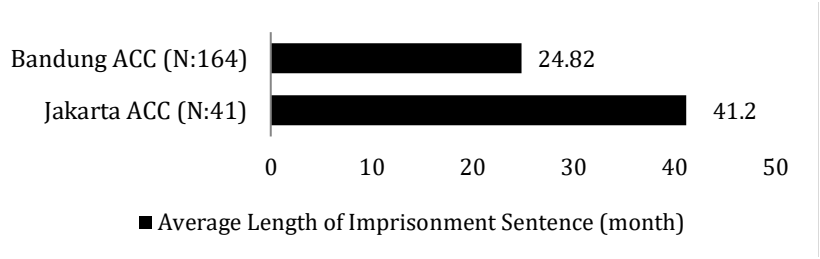
[596] The sample for charity money theft was very small (only six cases), thus this bivariate analysis only compares the length of sentences imposed for motorcycle theft or embezzlement and other types of goods.
[597] Badan Pusat Statistik, *Statistik Kriminal 2017* (BPS, 2017), 41.
[598] Interview with Prosecutor #15 (Jakarta, 5 January 2017).
[599] Interviews with Judge #10 (Jakarta, 12 January 2017) and Judge #12 (Bandung, 20 January 2017).
[600] Interview with Judge #12 (Bandung, 20 January 2017).
[601] '2 Pencuri Motor Kritis Dihajar Massa', *Detik* (online), 15 December 2014 <https://news.detik.com/berita/d-2777507/2-pencuri-motor-kritis-dihajar-massa-di-medan>; 'Jatuh ke Kali, Satu Pencuri Motor Tewas Dihakimi Massa', *Kompas* (online), 12 January 2018 <https://regional.kompas.com/read/2018/01/12/19582491/jatuh-ke-kali-satu-pelaku-pencurian-motor-tewas-dihakimi-massa>; 'Alasan 2 Tersangka Ikut Bakar Hidup-hidup Zoya', *Tempo* (online), 8 August 2017 <https://metro.tempo.co/read/897964/alasan-2-tersangka-ikut-membakar-hidup-hidup-zoya >.

prosecutors' perceptions that stealing such goods indicates a greater moral deficiency, increasing the offender's culpability.

1.14. Geographical Location of the Court

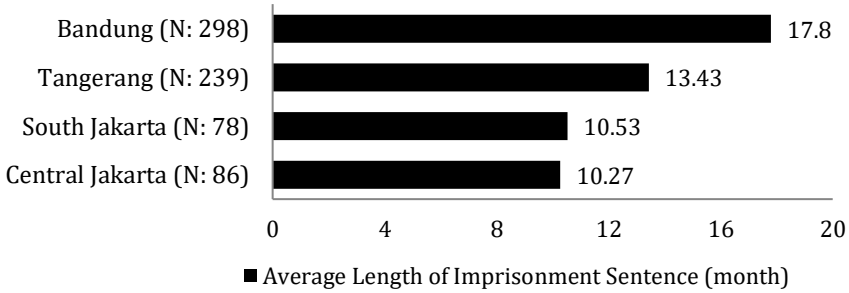
Lastly, the length of prison sentences imposed in theft-related and corruption cases correlated with the location of the relevant court. As shown in Chart 7.1 below, the average sentence imposed in corruption cases by the Jakarta Anti-Corruption Court was much harsher than of the Bandung Anti-Corruption Court, 41.20 months for the former and 24.82 months for the latter. These differences appear to be due to differences in the severity of the offences that tried in these courts. The Jakarta Anti-Corruption Court dealt with cases involving losses worth five times more than Bandung Anti-Corruption Court.[602]

Chart 7.1: Average Imprisonment Sentence Imposed in Corruption Cases based on Court's Location



On the other hand, among the four district courts in the case study that tried theft-related cases, the Central Jakarta District Court was the most lenient, while the Bandung District Court was the harshest.

Chart 7.2: Average Imprisonment Sentence Imposed in Theft-related Cases based on Court's Location



The data suggest that the correlation was caused by differences in the severity of sentence recommendations proposed by the prosecutor, not other factors, such as case seriousness (as in the case of corruption)[603] or characteristics of the judges. Overall, Bandung's

[602] The average of state losses in cases tried by the Jakarta and Bandung Anti-Corruption Courts were Rp56.9 million and Rp11.87 million consecutively.

[603] While, on average, the Bandung District Court tried 12 per cent more robbery-related cases (more serious than other types of theft-related offences) than Central Jakarta District Court, it also heard more theft-related cases, with smaller amounts of loss.

prosecutors proposed much longer average sentence recommendations (10.5 months more than those proposed by prosecutors in Central Jakarta).[604]

Moreover, to a certain degree, the differences in the courts' sentencing attitudes can be attributed to the overall sentencing disparity and disproportionality discussed in Chapter 6. For example, around 30 per cent of small aggravated theft sentences were outside the margin of tolerance. The main 'contributor' to this disparity was the Bandung District Court (39 per cent), while the Tangerang District Court only added a small number (12 per cent).

2. Path Analysis Results

As mentioned, the purpose of path analysis is to examine the correlation of several independent variables and the dependent variable (the length of imprisonment sentences imposed by judges). Unlike other forms of multiple regression, path analysis assesses direct and indirect relationships between those variables. Indirect relations occur when one or more independent variables influence the dependent variable through or via one or more independent variables as an intermediary or intermediaries.

In the model used for this study, the intermediary variable is the sentence recommendation proposed by the prosecutor.[605] Other independent variables included are as follows. For theft-related offences: type of offence; amount of loss; type of victim; multiple offences; recidivism; and the prosecutor's sentence recommendation (the latter as the intermediary). For embezzlement-related offences: type of offence; amount of loss; type of victim; and the prosecutor's sentence recommendation. As for corruption offences: the amount of loss; the amount of illicit gain received; the amount of illicit gain returned; the amount of state loss recovered; and the prosecutor's sentence recommendation.

These independent variables were selected based on the following criteria: (a) the size and the significance of correlations or association between those variables and the sentencing outcomes as indicated by the above bivariate analysis results; and (b) specific reasons, for example, because path analysis cannot measure nominal data,[606] or because the type of stolen goods variable (in theft-related offences), and court locations (in all types of cases) could not be included in the analysis although these also, according to bivariate analyses, influenced sentencing outcomes. Nevertheless, it is predicted that the influence of court location is already represented by the sentence recommendation variable.[607] Also, in corruption cases, the type of offence committed (either a violation of

[604] The average length of sentencing recommendations proposed by prosecutors of the Bandung Prosecutor's Office was 23.10 months while the average sentencing recommendation proposed by the prosecutors of the Central Jakarta Prosecutor's Office was only 14.86 months.
[605] As mentioned in Chapter 5, the reason path analysis is used for this research is because it is predicted that the prosecutors' sentence recommendation variable will influence the sentencing outcome but this variable cannot be considered purely as an independent variable because, in determining the recommended sentence, prosecutors have to consider other independent variables, such as the type of offence and the amount of loss.
[606] See discussion on this issue in Chapter 5.
[607] As discussed before, the sentence difference in different courts were mainly triggered by the difference in the severity of sentence recommendations proposed by prosecutors.

Article 2(1) or 3 of the Corruption Eradication Law) was not included in the path analysis, despite it having a strong correlation with the sentencing outcomes because, as discussed in Chapter 5 and later in Chapter 9, these two provisions concern almost identical elements.

The path analysis results show that across all offences, there is only one variable (extra-legal factor) that significantly, directly and strongly correlates to, or influences, the length of imprisonment sentences imposed by judges: the length (severity) of prosecutors' recommended sentences. This is interesting because, as discussed in Chapter 3, there is no legal obligation for judges to follow a prosecutors' sentence recommendation. Other variables that relate to legal aspects of the cases (legal factors), such as the type of offence or the amount of loss, only moderately and indirectly influence the sentencing outcomes through the sentence recommendation. Below is the summary of the path analysis results for each offence, starting with theft-related offences (for detailed results of the bivariate analysis, see Appendix 2).

Table 7.5: Correlation Between Independent Variables and the Length Imprisonment Sentence Imposed in Theft-related Offences

Independent Variable	Length of Sentence Recommendation	Length of Imprisonment Sentence	
		Direct	Indirect*
Type of Offence	**Significant and Moderately Correlated** (t:13.67 & Coefficient: 0.42)	**Not significant** (t: 1.13)	**Moderately Correlated** (coefficient: 0.38)
Amount of Loss	**Significant and Moderately Correlated** (t: 12 & Coefficient: 0.37)	**Significant and Weakly Correlated** (t: 3.48 & coefficient: 0.05)	**Moderately Correlated** (coefficient: 0.34)
Type of Victim	**Significant and Weakly Correlated** (t: 4.66 & Coefficient: 0.14)	**Significant and Weakly Correlated** (t: 4.59 & coefficient: 0.06)	**Weakly Correlated** (coefficient: 0.13)
Multiple Offences	**Significant and Weakly Correlated** (t: 2.73 & Coefficient: 0.08)	**Not significant** (t: -0.28)	**Weakly Correlated** (coefficient: 0.06)
Recidivism	**Significant and Weakly Correlated** (t: 5.84 & Coefficient: 0.18)	**Not significant** (t: -0.01)	**Weakly Correlated** (coefficient: 0.16)
Length of Sentence Recommendation	**NA**	**Significant and Very Strongly Correlated** (t: 55.29 & coefficient:0.91)	**NA**

* Indirect means that the independent variable(s) influence or effect the sentence via the sentence recommendation variable as an intermediary

As shown above, there was a very strong and direct causal relation (with a coefficient value of 0.91 or 91 per cent) between the length of sentence recommendations proposed by prosecutors and the length of sentences imposed by judges in theft-related cases. Because the length of sentence recommendations proposed by prosecutors were also

influenced by other independent variables, mainly the type of offence (coefficient value 0.42 or 42 per cent) and the amount of loss caused by the offence (coefficient value 0.37 or 37 per cent), indirectly, these legal factors also affected the sentencing outcomes. To a lesser degree, the imposed sentences were also, indirectly, influenced by the factors of reoffending (coefficient value 0.18 or 18 per cent), type of victim (coefficient value 0.41 or 14 per cent), and multiple offences (eight per cent). This means that reoffenders, offenders who harmed individual victims (as opposed to businesses or government), or who committed more than one offence were sentenced more severely than otherwise. It is also predicted that the type of goods stolen (as between motorbikes and other goods) also influenced sentencing outcomes, although this could not be measured by path analysis. To conclude, judges seriously considered, and generally followed, the sentence recommendations proposed by prosecutors but, at the same time, also considered, albeit to a lesser degree, legal factors specific to each case.

In the sentencing of embezzlement-related cases, the only variable that directly influenced the length of imprisonment imposed by judges was the length of prosecutors' sentence recommendations, as shown below.

Table 7.6: Correlation Between Independent Variables and the Length Imprisonment Sentence Imposed in Embezzlement-related Offences

Independent Variable	Lengths of Sentence Recommendation	Lengths of Imprisonment Sentence	
		Direct	Indirect
Type of Offence	**Not Significant** (t: -1.17)	**Not Significant** (t: 0.95)	**Not assessed**
Amount of Loss	**Significant** and **Moderately Correlated** (t: 7.18 & coefficient: 0.45)	**Not Significant** (t: 0.21)	**Moderately Correlated** (coefficient: 0.37)
Type of Victim	**Significant** and **Weakly Correlated** (t: 2.08 & coefficient: 0.19)	**Not Significant** (t: 1.47)	**Weakly Correlated** (coefficient: 0.16)
The severity of Sentence Recommendation	**NA**	**Significant** and **Very Strongly Correlated** (t: -18.36 & coefficient: 0.83)	**NA**

The correlation between these two variables was marked at 83 per cent, which is very strong. Other variables (the legal aspect of the cases), namely the amount of loss and type of victim, [608] indirectly affected sentencing via the prosecutor's sentence recommendations, although this correlation was not too strong (with coefficient values of 37 per cent and 19 per cent respectively). Meanwhile, the type of offence (as between embezzlement and aggravated embezzlement), which in theory indicates a difference in the offences' seriousness, did not affect the severity of sentences. This shows that judges were as strongly influenced by prosecutors' recommendations in sentencing embezzlement-related cases as they were in theft cases. Further, the relevant legal factors'

[608] To give the benefit of a doubt to judges, I consider the type of victim as a legal factor because, as discussed, judges might consider this factor in relation to the level of harm caused to the victim.

level of influence here was much lower than the influence of legal factors in the sentencing of theft-related offences.

Similarly, in the sentencing of corruption cases, the only variable that correlated directly with the sentencing outcomes was the prosecutor's sentencing recommendation. The degree of correlation was also very strong, 93 per cent, as shown below.

Table 7.7: Correlation Between Independent Variables and the Length Imprisonment Sentence Imposed in Corruption Offences

Independent Variable	Lengths of Sentence Recommendation	Lengths of Imprisonment Sentence	
		Direct	Indirect
Amount of Loss	**Significant** and **Moderately Correlated** (t: 5.40 & coefficient: 0.31)	**Not Significant** (t:1.27)	**Moderately Correlated** (coefficient: 0.29)
Amount of Illicit Gain Received	**Significant** and **Moderately Correlated** (t: 4.59 & coefficient: 0.27)	**Not Significant** (t:1.11)	**Weakly Correlated** (coefficient: 0.25)
Recovery of All Losses	**Significant** and **Weakly Correlated** (t: 2.23 & coefficient: 0.16)	**Not Significant** (t: -1.04)	**Weakly Correlated** (coefficient: 0.15)
Return of All Illicit Gains	**Significant** and **Moderately Correlated** (t: 3.40 & coefficient: 0.24)	**Not Significant** (t:0.53)	**Weakly Correlated** (coefficient: 0.22)
Sentence Recommendation	NA	**Significant** and **Very Strongly Correlated** (t:18.36 & coefficient: 0.93)	**NA**

Other variables that influenced the sentencing outcomes in corruption cases, albeit indirectly, were the amount of losses (29 per cent) and the amount of illicit gain received (25 per cent). To lesser degrees, both the recovery of all state loss and the return of all illicit gain also indirectly influenced sentencing. The correlation of return of illicit gain with the sentencing outcome was stronger than recovery of state loss, which is surprising, because, as will be discussed in the next part, most judges said that they were more willing to give sentencing discounts to offenders who returned state losses, compared to those who only returned illicit profits. This is perhaps because of all the offenders who returned state losses (102 persons), only 40 per cent returned all the losses. The other 60 per cent only returned parts of the losses, which was not included in this assessment. On the other hand, the majority of offenders (63 per cent) returned all illicit profits from the crimes.

It is important to note that the standard error (the residual) of this path model concerning the relationship between independent variables and the dependent variable (the sentences imposed) was low, only 12 per cent and 13 per cent (in theft and corruption cases respectively) and, relatively higher, although still tolerable, in embezzlement-related cases (28 per cent). This means that only a small number of independent variables that

were not included in the model also correlated to, or influenced, sentencing.[609] In other words, the model is valid and the results, overall, accurately represent the main factors that influenced the sentencing outcomes. On the other hand, the standard error in regards to the relationship between the independent variables and the intermediary variable (sentencing recommendation) was very high, between 64 per cent to 73 per cent.[610] This means there is (or are) (an)other variable(s), most likely extra-legal, that influenced prosecutors in proposing sentencing recommendations that were not included in the model. Because the imposed sentences closely followed the recommended sentences, this means that the unidentified variable(s) that influenced prosecutors in recommending sentences also (indirectly) influenced the judges in sentencing.

To conclude, path analysis results confirmed that judges were influenced by legal and, more importantly, extra-legal factors in determining the sentences. The main legal factors that influenced the sentencing outcomes were the type of offence (except in embezzlement-related cases), the amount of loss caused by the offence, and in corruption, the amount of illicit gain received and returned by the offenders. The extra-legal factor that most significantly influenced the sentencing outcomes, based on statistical analysis alone, was the recommended sentences proposed by prosecutors.

However, these statistical findings alone cannot explain why, for example, sentence recommendations have such a strong influence on sentencing outcomes. More importantly, they cannot inform other variables or factors, mainly the extra-legal ones, that might also influence sentencing outcomes but cannot be measured by statistical analysis. These include factors which explain the unwarranted disparity, disproportionality and biases in sentencing as shown in Chapter 6. More in-depth analysis is needed.

B. Behind and Beyond the Numbers: The Legal and Extra-Legal Factors Influencing Sentencing

This part examines other factors that may influence sentencing outcomes. It further interprets the statistical findings, and bring together materials from interviews with legal actors involved in the sentencing process and the relevant literature. I argue that, aside from the contribution of the legal factors of the cases and prosecutorial sentencing recommendations, the judges (and, in many cases, also other law enforcers) were influenced by various extra-legal factors, including: minimising their workloads; corruption; views on offences' seriousness and punishment philosophies; bias against offenders' socio-economic backgrounds; and various structural problems. These factors caused unwarranted sentencing disparity and disproportionality and led judges to be lenient in sentencing offenders from middle and upper socio-economic backgrounds, who were mainly convicted of corruption, and harsh in sentencing offenders from lower socio-economic backgrounds, who predominantly committed theft-related offences.

[609] Residuals (standard error) represent the effects of variables not included in the model. Jeon (n 397) 1638.
[610] The standard error in theft-related cases model was 64 per cent, and 73 per cent and 65 per cent respectively in embezzlement-related cases and corruption cases.

1. Role of Prosecutor's Sentence Recommendation

As discussed, judges were very much influenced by the prosecutor's sentence recommendation in sentencing all types of offences, despite there being no legal obligation to do so. This is partly because the prosecutors had already taken into account legal factors in each case when proposing sentences, and also, as will be discussed later, because judges generally shared similar views to prosecutors when assessing offences' seriousness as well as the goals of sentencing for different types of offences. There were, however, extra-legal considerations that also motivated judges to rely on sentence recommendations.

Studies in other countries show that people, including judges, are fallible and subject to cognitive biases in making judgments. One of the biases is called the "anchoring effect", a tendency to heavily rely on the first piece of information offered (the "anchor") in making subsequent judgments. In the words of Guthrie et al:

> Anchors induce people to consider seriously the possibility that the real value is similar to the anchor, thereby leading them to envision circumstances under which the anchor would be correct. Even when people conclude that an anchor provides no useful information, mentally testing the validity of the anchor causes people to adjust their estimates upward or downward toward that anchor.[611]

In the context of sentencing, it is argued that the prosecutor's recommended sentence commonly becomes the anchor, leading judges to impose the same, or a similar, punishment.[612]

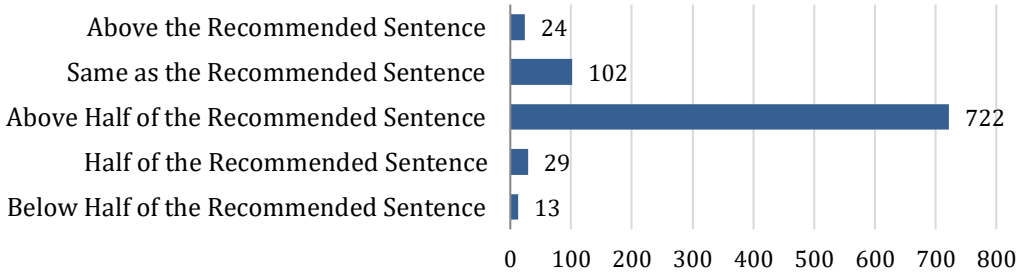
There is more to this phenomenon than just the anchoring effect thesis, however. Judges in Indonesia also give serious weight to prosecutors' sentence recommendations to prevent appeals. Judges are fully aware that, according to the Attorney General Office's internal guidelines, prosecutors must appeal any sentence imposed in "general crimes" cases, such as theft or embezzlement, that is less than half of what prosecutors recommended.[613] For "special crimes", like corruption, the appeal threshold is below two-thirds of the recommended sentence.[614] The only exception to these "threshold rules" is if part or whole of the legal arguments provided by the prosecutor are accepted by the judges, although the logic of this exemption is unclear. Nevertheless, most prosecutors would still appeal if the sentence imposed was at or below the appeal thresholds, regardless of the extent to which the judges considered their legal arguments, unless there are very strong reasons for not doing so.[615] This is the common practice and prosecutors are aware that failure to appeal in these circumstances may create suspicion (that they received a bribe in return

[611] Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, 'Inside the Judicial Mind' (2000) 86 *Cornell Law Review* 777, 787.
[612] Englich et al (n 5) 192-3.
[613] Attorney General Circular Letter 001/JA/4/1995 and 013/A/JA/12/2011. These guidelines only apply to cases that are considered 'general offences', such as theft, murder and the like.
[614] Attorney General Circular Letter 003/A/JA/05/2002.
[615] Interview with Prosecutor #16 (Bandung, 20 January 2017).

for not appealing), which could result in disciplinary sanctions.[616] Besides, prosecutors know that judges are "afraid" of appeal[617] for reasons that will be elaborated shortly. This, arguably, gives prosecutors stronger bargaining positions in the sentencing process than judges.

The strong link between the appeal thresholds and the sentence imposed by judges are clearly exhibited in Charts 7.3 and 7.4 below.

Chart 7.3: The Level of Sentence Imposed by Judges *vis a vis* Prosecutor's Recommended Sentences in Theft and Embezzlement-related Cases



Of 890 theft and embezzlement-related cases,[618] in only 13 cases (1.5 per cent of offenders) did judges impose a penalty below half of the sentence recommendations – the threshold of appeal for these offences. In the majority of cases (84.4 per cent), they handed out sentences identical to, or above half of, the prosecutor's appeal threshold but below the recommended sentence, arguably to "please" both the prosecutors and the offenders. One can also argue that the latter practice is "role differentiation" between prosecutors and judges: the prosecutors, as government officials, are responsible for enforcing the law and are expected to represent the interests of the victim(s) and the public at large (interpreted as recommending a relatively severe sentence), while judges, as the symbol of justice, are expected to balance those interests with the interests of offenders.[619] Judges pragmatically interpreted this "role" as requiring them to impose sentences that are lighter than what was recommended by the prosecutor, sometimes regardless of the merits of the case. As one judge said in an interview conducted by Asmara:

> … it is clear that the prosecutor always insists that any offender be imprisoned. An offender's lawyer also always insists that his or her client (is innocent, thus) should be acquitted. So (if the offender is guilty) I will sentence him or her in the middle (meaning around half of the prosecutor's sentence recommendation).[620]

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[616] 'Sanksi untuk Jaksa yang Tidak Mengajukan Banding', *Hukumonline* (online), 13 May 2011 <https://www.hukumonline.com/berita/baca/lt4dcd3aebea695/sanksi-untuk-jaksa-yang-tak-mengajukan-banding/>.

[617] Interview with Prosecutor #15 (Jakarta, 5 January 2017).

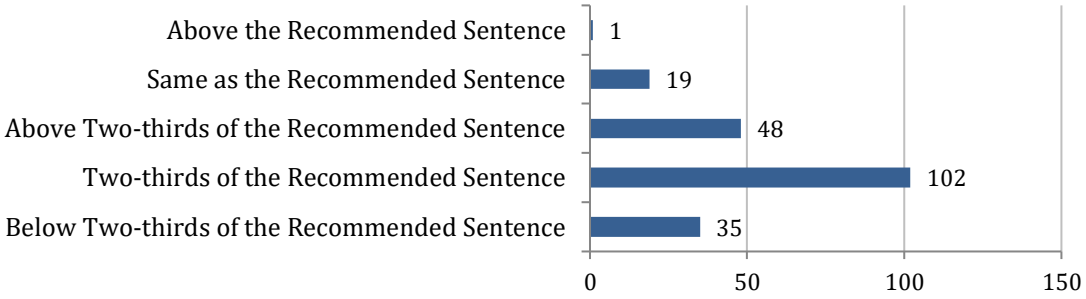
[618] Of 891 theft and embezzlement related cases in total, one sentence recommendation could not be clearly read.

[619] Asmara (n 17) 371-4. A similar argument is asserted by Edi Wibobo, a district court judge, in Edy Wibowo, 'Mengapa Putusan Pemidanaan Hakim Cenderung Lebih Rendah dari pada Tuntutan?' (2007) XXII(257) *Varia Peradilan*, 46.

[620] Asmara (n 17) 426.

Similarly, the majority of sentences imposed on offenders charged with corruption (73 per cent of cases) were the same as, or just above, the two-thirds appeal threshold for this offence, but below the sentence recommendations, as shown in Chart 7.4 below.

Chart 7.4: The Level of Sentence Imposed by Judges *vis a vis* Prosecutor's Recommended Sentence in Corruption Cases



Unlike in theft and embezzlement-related cases, however, judges were more likely to overlook the appeal thresholds when sentencing in corruption cases. In approximately 17 per cent of cases (35 offenders), they sentenced the offenders to below two-third of the prosecutors' recommended sentence.

There are two main reasons why judges try to avoid an appeal: to ease their workload and, to a lesser extent, to minimise harm to the defendant. An appeal means additional work because judges have to spend more time preparing their decisions in a way to make them presentable for evaluation by the higher courts, as well as to ensure all relevant evidence is included and accurately cited in the minutes of the court session (*Berita Acara Persidangan*).[621] Due to poor support provided by court clerks, however, sometimes judges need to basically rewrite the minutes of the court session if the decisions are appealed.[622] With such burdens and limited resources, as one judge notes, 'Why should judges bear the burden of departing from the prosecutors' sentence recommendation unless there is a very strong reason to do so, when they also have other important tasks to attend to?'[623] Nevertheless, the same judge also admitted that some of her colleagues avoid appeals at any cost, simply because of 'laziness'.[624] This was implicitly confirmed by another judge who said that appeal avoidance practices also occur in courts with smaller workloads.[625] Further, as discussed in Chapter 3, some judges tend to take the sentencing deliberation process lightly. Instead of discussing the most appropriate sentence by giving supporting arguments and evidence, particularly when different views were expressed during the deliberation process, they simply totalled the sentences proposed by all judges, and divided it by the number of judges.[626]

[621] Interview with Judge #5 (Jakarta, 6 January 2017).
[622] Interview with Judge #5 (Jakarta, 6 January 2017).
[623] Interview with Judge #5 (Jakarta, 6 January 2017).
[624] Interview with Judge #5 (Jakarta, 6 January 2017).
[625] Wibowo (n 618) 46.
[626] Interviews with Judge #9 (Jakarta, 15 January 2017) and Judge #4 (Jakarta 14 December 2016).

Judges also assert that offenders are, generally, better off if the decision is not appealed by the prosecutor, unless they receive long sentences. This is because the appeal process could take months, or even longer if the prosecutor challenges the appellate court decision to the Supreme Court. Meanwhile, as shown in Chapter 6, almost all offenders (99.5 per cent) were detained pending and during their trials. Consequently, offenders might spend a longer time behind bars than if the decision(s) were appealed.[627] Besides, there is no guarantee that offenders will receive more favourable sentences on appeal.[628] If most offenders were not detained prior to, and during, trial, perhaps some judges would be more relaxed in imposing a sentence far below the recommended sentence. It is true that there is no legal requirement for judges to detain offenders while they are on trial or during appeal. However, because offenders are usually detained prior to trial, if judges do not continue to detain them, those judges might be accused of taking bribes from the offenders. Besides, if offenders are not detained, prosecutors may find it difficult to have them present at trial.[629]

These reasons explain the sentences imposed, particularly in theft and embezzlement-related cases, *vis a vis* the recommended sentences. In approximately 76 per cent of cases (22 of 29 cases) the judges imposed sentences representing the appeal threshold. This can be interpreted as the judges' strategy to avoid appeal while minimising the impact of a severe sentence on the offenders, with the length of the sentences imposed being relatively short, 12 months or less.[630] Taking into account that all these offenders had been detained for between approximately one and four months before the sentencing stage, avoiding an appeal or cassation was safer for the offenders. On the other hand, in most cases where judges imposed sentences below the appeal thresholds, the difference between the length of imprisonment imposed and the recommended sentence was relatively big, around one year or more,[631] or was a suspended sentence rather than the recommended prison sentence.[632] This indicates that in these cases the judges considered the cost of avoiding an appeal to be too high and imposed what they thought to be an appropriate sentence.[633]

Judges rarely need to worry that decisions would be appealed by offenders for the reasons mentioned before – minimising the time they have to spend in detention, and because the

[627] Interviews with Chief Judge #9 (Jakarta, 15 January 2017), Judge #10 (Jakarta, 12 January 2017) and Judge #13 (Bandung, 20 January 2017). The maximum detention period, from the investigation stage until cassation to the Supreme Court, is 400 days. In certain conditions, including where offences are punishable by nine years of imprisonment and above, the detention period can be added to by another 60 days at a maximum: see Articles 24 to 29 of the Criminal Procedural Code.

[628] Interviews with Judge #13 (Bandung, 20 January 2017) and Judge #10 (Jakarta, 12 January 2017).

[629] See discussion on the issue to bring an offender for investigation and trials in Chapter 8.

[630] The rest of the cases mainly concern aggravated robbery (6 cases), where the judges imposed sentences between 24 and 30 months of imprisonment. In one case of aggravated theft, which had a significant loss (Rp500 million), the offenders received 24 months of jail time.

[631] See, e.g., Decisions 1193/2013/PN.Jkt.Sel, 409/2013/PN.Jkt.Sel and 634/2015/PN.Bdg.

[632] See, e.g., Decisions 992/2012/PN.Jkt.Sel, or 1469/2011/PN.Jkt.Pst.

[633] They were also, perhaps, driven by other motives, including corruption. In some of these cases, the sentences imposed were disproportionally light (between a suspended sentence and 12 months of imprisonment) considering the large amount of losses involved, which range from approximately Rp140 million to Rp7.9 billion (A$ 14,000 to 790,000). See, for instance, Decisions 1395/2014/PN.Bdg, 409/2013/PN.Jkt.Sel, 1099/2009/PN.Jkt.Sel, or 1469/2011/PN.Jkt.Pst.

imposed sentences are usually lower than the proposed sentences. Besides, most offenders (aside from those charged with corruption) were neither aware of the law nor represented by lawyers to help them evaluate the fairness of the judgments or to navigate the appeal process.[634] In some cases, judges also tried to persuade offenders, or their family, to accept the judgment.[635] It is also not uncommon for judges, when they are inclined to impose lenient sentences, to negotiate, informally, with prosecutors so the latter do not recommend harsh sentences.[636]

In addition, the Supreme Court views fewer appeals as positive because this is taken to indicate court users' satisfaction with lower court decisions. In fact, since 2016, a low appeal rate has become one of the court's performance indicators.[637] Fewer appeals also mean fewer cases to be heard by the Supreme Court (because the majority of cases appealed to the higher courts are also appealed to the Supreme Court), which struggles to clear its own case backlog.[638] However, the extent to which this factor contributed to lower court judges' sentencing attitudes, particularly pre- 2016, is not clear.

These arguments do not, however, fully address why judges take prosecutors' sentence recommendations seriously in sentencing corruption cases. The likelihood of appeal in corruption cases – either from prosecutors or offenders – is much higher than in theft or embezzlement cases.[639] As will be discussed below, other extra-legal factors influence judges in sentencing, including: judicial corruption; common views between judges and prosecutors regarding the perceived seriousness of offences; the offender's character and blameworthiness; and goals in sentencing different types of offences.

2. Judicial Corruption and Other Improper Influences

Discussion of sentencing disparity and disproportionality in Indonesia cannot be separated from the issue of endemic corruption in the criminal justice system, which has been shown by numerous studies.[640] In fact between 2012-19, at least 20 judges, and several court clerks have been imprisoned for taking bribes or extorting defendants.[641]

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[634] There was only one offender represented by a lawyer in all the Bandung, Tangerang, Central Jakarta and South Jakarta District Court non-corruption cases referred to in this study. In contrast, most corruption offenders were represented by lawyers.

[635] A few judges informed the writer that they occasionally informally advised offenders or their family (before or right after verdict) not to appeal the decision, reasoning that the decisions have already taken into account the offenders' interests (usually by comparing the sentences with the recommended sentences) and the possible negative results of an appeal, as discussed before.

[636] Interview with Judge #5 (Jakarta, 6 January 2017).

[637] Chief Justice Decree No.192/KMA/SK/XI/2016.

[638] Assegaf, 'The Supreme Court' (n 357).

[639] The rate of appeal of theft-related, embezzlement-related and corruption decisions are approximately 1 per cent, 4 per cent and 25 per cent consecutively. Compare the total cases registered in the lower courts in 2018 and the total cases registered in the court of appeal in 2019 in the Supreme Court annual reports (See Mahkamah Agung, *Laporan Tahunan 2018* (MARI, 2018) 107-8 and Mahkamah Agung, *Laporan Tahunan 2019* (MARI, 2019) 101-2.

[640] See, generally, e.g., Butt and Lindsey, 'Judicial Mafia' (n 22); Pompe (n 301); Asmara (n 17); *Menyingkap Tabir Mafia Peradilan* (n 16); Rifqi S. Assegaf, 'Judicial Reform in Indonesia, 1998-2006' in Sakumoto, Naoyki and Juwana, Hikmawanto (eds), *Reforming Laws and Institutions in Indonesia: an Assessment* (Institute of Developing Economies (IDE)/Japan External Trade Organization (JETRO), 2007); *Mafia Hukum* (n 16).

[641] 'Sejak 2012, Ada 20 Hakim Tersangkut Kasus Korupsi', *Kompas* (online), 7 May 2019 <https://nasional.kompas.com/read/2019/05/07/10483411/sejak-2012-ada-20-hakim-tersangkut-kasus-korupsi>.

Seven of these judges served in the Central and South Jakarta District Courts, the Tangerang District Court and the Bandung Anti-Corruption Court.[642] Some judges also received disciplinary measures for bribery.[643] A number of police officers and prosecutors have also been convicted of corruption or extortion.[644] More importantly, it is commonly assumed that there are many more corrupt law enforcers and judges who never face any disciplinary measures or criminal charges.[645]

Judicial corruption takes various forms, as shown in Table 7.8 below.

Table 7.8: Common Modus Operandi of Judicial Corruption in Processing and Sentencing Corruption and Theft and Embezzlement-related Offences[646]

Stage & Main Actor	Modus Operandi
Investigation (Police officers)	• Detain offender (or not detain, or postpone detention) prior to trial • Stop a case • Charge with an offence with a harsher or lighter sanction • Fabricate evidence or other relevant facts (such as the role of the offender in the offence(s), the amount of illicit gain received, mitigating or aggravating factors, etc.) • Not trace or confiscate stolen asset (in corruption cases)
Prosecution (Prosecutors)	Same with above modus operandi plus: • Recommend a severe or lenient sentence • Recommend or reject (more) aggravating or mitigating considerations • Request a favourable panel of judges to hear a case • Not appeal a decision

[642] 'Deretan Hakim yang Kena OTT KPK', *Detik* (online), 29 November 2018 <https://news.detik.com/berita/4322524/deretan-hakim-yang-kena-ott-kpk., Deretan Hakim yang Kena OTT KPK>.

[643] 'ICW: Hakim Terima Suap Harus Diproses Hukum', *Hukumonline* (online), 5 March 2014 <https://www.hukumonline.com/berita/baca/lt531754de70973/icw--hakim-terima-suap-harus-diproses-hukum>.

[644] 'Ini Daftar Panjang Jaksa Ditangkat KPK, Termasuk Kajari Pamekasan', *Detik* (online), 2 August 2017 <https://news.detik.com/berita/3583794/ini-daftar-panjang-jaksa-ditangkap-kpk-termasuk-kajari-pamekasan>.
There have been relatively small numbers of police and prosecutors prosecuted and convicted for bribery or extortion – however this is not because they have more integrity. Most corruption cases against law enforcers and, in particular, judges were brought by the Anti-Corruption Commission. The commission is more hesitant (or less successful) in processing cases against prosecutors and, particularly, the police, because the commission has received serious retaliation when it has targeted the police, or because some of its undercover investigations have been leaked, presumably by police or prosecutor's agents working in the commission itself. See, e.g., 'OTT KPK: Bau Busuk Jaksa Jelang Hari Bakti Adhyaksa', *Tirto* (online), 12 July 2019 <https://tirto.id/ott-kpk-bau-busuk-jaksa-jelang-hari-bakti-adhyaksa-ed7z>.

[645] Former Supreme Court Justices and lawyers estimated that between 50 to 90 per cent of judges are corrupt. See Butt and Lindsey, 'Judicial Mafia' (n 22) 189-9; Pompe (n 301) 414.

[646] See, e.g., *Menyingkap Tabir Mafia Peradilan* (n 16); *Mafia Hukum* (n 16) 13-19; Asmara (n 17) 123-186. Much of the above-mentioned modus operandi was also admitted by some judges, prosecutors and lawyers interviewed in this study.

Stage & Main Actor	Modus Operandi
Trial and Sentencing (Head of Courts and Judges)	• Detain offender (or not detain, or postpone detention) during trial and appeal, if any • Choose a favourable panel of judges to hear a case (Head of Court) • Fabricate evidence or other relevant facts (as above) • Convict of an offence with a harsher or lighter sanction, or even acquit him or her • Impose more severe or lighter sentences (e.g., suspended sentence instead of imprisonment, shorter or longer imprisonment or substitute imprisonments) • Accept or reject (more) aggravating or mitigating considerations • Accept or reject appeal (higher courts' judges)
All stages (Offenders, lawyers, case brokers or victims)	• Offering money or other incentives to get the favourable treatment and outcomes mentioned above

The initiative for the above practices can come from anyone. Police, prosecutors and judges, for example, can directly or indirectly threaten to detain offenders, or can recommend or impose severe sentences unless offenders give them some benefit. On the other hand, it may be offenders, their lawyers or families that more actively try to unduly influence law enforcers and judges. The victim too could offer money so that an offender is detained, is charged with a more severe offence, or receives a harsher punishment, as is shown in Chapter 9.

In the context of sentencing, offenders might aim to receive a lower punishment than their offence deserves. This means that both the prosecutors and judges would have to work together: prosecutors need to recommend a relatively light sentence, and judges need to give a further sentencing discount, or at least impose a sentence lighter than the recommended sentences (but still the same as, or above, the appeal threshold). This drives the close correlation between the sentence recommendation and the length of the sentences ultimately imposed discussed earlier. Even in cases where no money is involved, a dishonest judge may have a vested interest in not imposing sentences far below the recommended sentence, simply to maintain good relations with prosecutors for future "cooperation".

The amount of money involved in bribery varies, depending on, among other factors, the seriousness of the offence (generally, the amount of loss or the profit gained by the offenders), the type of 'service' being offered and/or requested, or the economic condition of the offenders. Bandung Anti-Corruption Court Judges Setyabudi and Ramlan Comel, for example, were convicted of receiving a bribe in the amount of Rp4 billion (A$400,000) plus spa and karaoke vouchers, in exchange for changing the offender's detention status,[647] imposing a more lenient sentence (one year imprisonment), and not mentioning

[647] From being detained in the detention centre to city arrest.

the involvement of another potential suspect in the judgement.[648] Merry Purba, an *ad hoc* judge of the Medan Anti-Corruption Court, requested, and received, approximately Rp1.5 billion (A$150,000) to acquit an offender.[649] Other judges were convicted of receiving smaller amounts of money, ranging from Rp150 million to Rp500 million (A$15,000-50,000).[650] Supposedly, the more money paid or received, the better the 'service' the briber can receive. Perhaps this explains why disparity and disproportionality in sentencing was more acute in cases with larger losses or involving well-off offenders as shown in Chapter 6. Offenders who caused larger losses may be more willing to pay (to avoid long imprisonment sentences considering the gravity of the offence) and presumably have more resources to pay-off law enforcers and judges. Similarly, wealthy offenders are more likely to receive better sentencing outcomes because they can offer better 'rewards' (sometimes enough to even stop the case before it goes to court). The greediness of judges (or other law enforcers) also matters. A *hakim hitam* ('black judge'), an Indonesian term used to label a greedy judge, will do almost anything for offenders who offer attractive payments. This type of judge is usually the one who initiates the bribery process, asking for money from offenders, or even threatening to impose a more severe punishment if the accused refuses to pay. Another type, a *hakim abu-abu* ('grey judge'), might ask for money or receive a bribe, for example to reduce a sentence, but will stick to the legal facts of a case. Unlike black judges, this type of judge usually does not set a price for doing so. On the other hand, a *hakim putih* ('white judge'), or idealistic judge, will refuse any efforts to unduly influence their judicial work.[651]

Several judges, prosecutors and lawyers interviewed also admitted that such corrupt practices continued to exist in the Courts. Such practices, according to them, can be easily spotted.[652] One judge, for example, said that when prosecutors have taken money from offenders, they will act as if they were the defence lawyers representing a client.[653] Further, it is not uncommon for judges to, subtly, request money from offenders, during a trial, usually before the sentencing stage. One lawyer said that sometimes judges send signals to an offender or his or her lawyer that they are willing to impose a lenient sentence or acquit by saying something along the lines of 'We can easily resolve this [legal] issue' ([*Perkara*] *ini bisa kita bereskan)*.[654] They may also delay reaching a verdict, and ask offenders or their legal representation 'Don't you want the case to be decided?' (*Ini mau diputus gak sih?*), indicating that they are waiting to be approached and offered money.[655]

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[648] Anti-Corruption Clearing House, Komisi Pemberatasan Korupsi, *Ramlan Comel* (21 August 2019) <https://acch.kpk.go.id/id/jejak-kasus/305-ramlan-comel>.

[649]'Penyuap hakim Tipikor Medan dan Dua Perantaranya Divonis Bersalah', *Hukumonline* (online), 5 April 2019 <https://www.hukumonline.com/berita/baca/lt5ca72daca3452/penyuap-hakim-tipikor-medan-dan-dua-perantaranya-divonis-bersalah?&utm_source=dable>.

[650] 'Bandung Judge Get 12 Years Prison', *Jakartapost* (online), 18 December 2013 <https://www.thejakartapost.com/news/2013/12/18/bandung-judge-gets-12-years-prison.html>.

[651] There are different terms used. Some use the terms "judge type A, B, or C" (see 'Suap Hakim Masih Marak, Salah Siapa?', *Hukumonline* (online), 15 March 2018 <https://www.hukumonline.com/berita/baca/lt5aaa9f87ec045/suap-hakim-masih-marak--salah-siapa/>), other use "straight [idealistic), greedy (materialistic) or tolerant (idealistic-realistic)" as in Asmara (n 17) Part 2.B.1.

[652] For detail discussion on this issue, see Asmara (n 17).

[653] Interview with Judge #5 (Jakarta, 6 January 2017).

[654] Interview with Lawyer #19 (Jakarta, 9 January 2017).

[655] Interview with Lawyer #19 (Jakarta, 9 January 2017).

Some judges also seek financial reward when requested to sign documents, such as a letter to extend pre-trial detention, by asking staff, '*Teken aja nih kita?* (So, [you want me] just to sign it [without reward]?), or '*Kerja bakti ajanya kita ini, Dek*?' (Do we just do charitable work, do we?).[656]

Indications of corruption in this study can be found, for example, in cases where judges imposed extremely disproportionate sentences, far below or above the median sentence for similar offences, or the recommended sentences. Other signs of judicial corruption include when judges use unjustified mitigating considerations or when the same panel of judges imposes inconsistent sentences as a substitution for an unpaid restitution order, as shown in Chapter 6, or inconsistently interpret a particular element of the crime in corruption cases, as will be discussed in Chapter 9.

Judicial corruption, however, does not always result in sentencing disparity or disproportionality. When an offender gives money to judges, his or her expectation is not necessarily to receive a sentence that is lighter than the average sentence imposed for similar offences (which nobody would know anyway), but may be only to avoid the maximum penalty for the offence, or to seek a lighter sentence than the prosecutor recommends. Judges may also receive money from an offender and impose a much lighter sentence than the recommended sentence – not because of bribe, but because the sentence recommendation is disproportional or too harsh, considering the nature of the case. For instance, there were 23 cases where prosecutors recommended sentences of between 30 and 48 months for offenders who committed less serious crimes (theft, aggravated theft, and embezzlement-related offences with an average loss of Rp10 million or A$1,000). This was far above the average sentencing recommendation for similar offences. In such cases, even if judges took money from the offenders and sentenced them far below the recommended sentence, the sentences imposed would still be consistent and proportional.

3. Perceptions of Offence Seriousness, Offender's Blameworthiness and Punishment Goals

As discussed in Chapter 2, studies in other jurisdictions show that judges' perceptions of an offence's seriousness, the offender's blameworthiness, and punishment goals can influence sentences in ways that usually disfavour offenders from lower socio-economic backgrounds. This is also the case in Indonesia, based on evidence from the different sentencing approaches taken in theft-related offences (which are usually committed by offenders from lower socio-economic background) and corruption (which is usually committed by middle and upper-class offenders).

A number of judges, for example, confessed that they perceived theft as more serious than corruption, at least when the state loss was not too big, because the first-mentioned

[656] See the testimony of a court clerk in a trial of a judge charged for bribery in 'Teken Aja Kita ini, Kalimat Hakim yang Membuka Peluang Korupsi', *Hukumonline* (online), 15 January 2019) <https://www.hukumonline.com/berita/baca/lt5c3d8effb72d8/teken-aja-kita-ini--kalimat-hakim-yang-membuka-peluang-korupsi >.

offence harms individual victims, while the latter offence (only) harms state finances,[657] although a few judges also strongly opposed this view.[658] These views seem to influence how judges sentence similar offences with different types of victims. As shown in the path analysis results, offenders who committed theft and embezzlement-related offences against individual victims received longer average sentences than those who harmed businesses or government.

The assumption that individual victims are harmed more than businesses or the state *per se* is an oversimplification. As correctly argued by a number of judges, different victims might suffer differently from the exact same harms, due to, among other things, dissimilarity in their economic conditions. Nonetheless, perhaps because judges do not have accurate information regarding the economic conditions of, or the impact of offences on, victims,[659] particularly in theft and embezzlement offences, they categorically assume that all individual victims are more financially vulnerable than businesses or the state, which is not always true. As discussed in Chapter 5, businesses in this study included small or medium-sized stores, workshops, offices and companies, that were, presumably, owned by small or middle-income individuals. On the other hand, some of the individual victims were people who had higher incomes. For example, of 30 theft and embezzlement-related cases where the victims were individuals, the level of loss ranged from Rp250 million to Rp7.9 billion (A$25,000-790,000). This indicates that the victims were relatively well-off, or at least not financially vulnerable. The numbers increase to 76 if cases with smaller losses (between Rp100 million and Rp250 million or A$10,000 and A$25,000) are included. More importantly, significantly reducing sentences based on harm consideration (unlike the practice of increasing sentences for offenders who target vulnerable victims) undermines the importance of considering culpability more broadly, which is the main difference between civil and criminal wrongdoing.

Beside monetary harm, judges (and law enforcers) generally view theft as an offence that seriously disturbs the public order and peace. As a consequence, they believe it is appropriate to process every theft case, including minor ones. On the other hand, many judges believe that only corruption cases that cause large losses to the state should be processed, partly because of the high cost to investigate and prosecute them.[660] As one of the judges put it: 'unlike in theft cases, processing small corruption [cases], particularly [cases] that do not cause serious social distress, only wastes resources and contradicts the intent of the lawmakers when categorising corruption as an extraordinary crime in the Corruption Eradication Law'.[661]

[657] Interviews with Judge #14 (20 January 2017) and Judges #11 (Jakarta, 19 January 2017).
[658] Interviews with Judge #13 (Bandung, 20 January 2017) and Judge #14 (Jakarta, 4 January 2017). Similar perceptions are held by judges in other jurisdictions. See Wheeler et al (152) 646.
[659] Prosecutors seldom provide detailed information concerning the impact of an offence on a victim, nor his or her economic conditions. As a consequence, judges have to extract the information themselves from the victim during trial, which is seldom done. Interview with Judge #9 (Jakarta, 15 January 2017).
[660] Interviews with Judges #11 (Jakarta, 19 January 2017) and Judge #12 (Bandung, 20 January 2017).
[661] Interview with Judges #11 (Jakarta, 19 January 2017).

The view that only 'big' corruption cases should be processed is supported by other factors. Some judges expressed frustration with the fact that many cases brought to court only concern relatively small losses,[662] or, in cases that involve large losses, usually only implicate lower level administrators.[663] More importantly, many judges seemed to tolerate 'not so big corruption' on the basis that 'many people do it', and also because they believe that many officials commit this type of corruption due to economic necessity (because the government fails to provide adequate remuneration),[664] because they were pressured by their superior,[665] or in order to support the running of their office, rather than for personal gain.[666] Further, as mentioned, persons who are not officials who commit 'not so big' corruption are likely to be viewed as 'victims of the system'.[667] Such 'external attribution' excuses or lessen the judges' perceptions of offenders' blameworthiness.

As an illustration, a judge in an interview stated that he once sentenced a public school teacher for corruption that caused Rp30 million in state loss (A$3,000) to six months of imprisonment (below the one-year minimum sentence), reasoning that 'the offender had sacrificed himself working in a remote area, he used the [stolen] money to fix his motorbike and to buy gasoline, which was expensive in that area, to serve [his students]'.[668] Another judge said he was sometimes troubled applying the mandatory minimum sentence in small corruption cases, particularly when an offender committed the act 'because of the offender's loyalty to his or her boss'.[669] Similar reasoning was also expressed in written judgements. In one case, the judges mitigated an offender's sentence (charged with taking 30 per cent of a project budget allocation in his office that caused almost Rp40 million in state loss or A$4,000) because, among other factors, most of that money was used for 'official purposes', including official trips, lunches for his staff and so forth, that were not covered by the office budget.[670] In another case, the judges stated that the offence was caused because 'the offender did not dare to oppose an illegitimate direction from his superior'.[671]

Some of these arguments may well have merit, particularly concerning blameworthiness (motive or cause of corruption), but such considerations were not relied upon by judges to

[662] Interviews with Judge #11 (Jakarta, 19 January 2017) and Judge #13 (Bandung, 20 January 2017).
[663] Interviews with Judge #11 (Jakarta, 19 January 2017) and Judge #13 (Bandung, 20 January 2017).
[664] It is common in Indonesia to associate, or even justify, corruption with small remuneration, including in the judicial community. Therefore, it is not surprising that Justice Djoko Sarwoto, who was also the Supreme Court spokesperson, said, after the government announced a plan to increase the judges' remuneration, that "We expect that if the judges already received a higher salary, no judges will ask for a bribe again". 'MA Minta Kenaikan Gaji Dibarengi Perbaikan Kinerja', *Hukumonline* (online), 26 July 2012 <https://www.hukumonline.com/berita/baca/lt50113dfc666ef/ma-minta-kenaikan-gaji-dibarengi-perbaikan-kinerja>.
[665] Interview with Judge #4 (Jakarta 14 December 2016).
[666] Interview with Judge #11 (Jakarta, 19 January 2017).
[667] The term 'victim of the system' can encompass different types of offenders. A judge may, for example, view a businessperson who voluntarily gives a bribe to win a government project tender to be a victim of a corrupt system because otherwise they would not get the project, even if they offered the best proposal (cheaper budget, better products, etc), which is true in many cases.
[668] Interview with Judge #12 (Bandung, 20 January 2017).
[669] Interview with Judge #4 (Jakarta 14 December 2016).
[670] Decision 38/2014/PN.Jkt.Pst [59 and 72].
[671] Decision 59/2012/PN.Jkt.Pst [901].

mitigate sentences for those charged for theft, even though many theft offenders committed the acts due to financial difficulty.[672] In a broader sense, many theft offenders are also victims of an unjust socio-economic system. Judges, however, seemed to apply a much higher standard when mitigating sentences based on the economic necessity justification in theft cases. One judge, for example, said that:

> Let us assume an offender is poor, but [he or she] steals, for example, a cow. This means that the act is not done for survival, [such as] to have something to eat, but because of other motives … It is different if he or she only steals rice, a fish or a chicken.[673]

How judges perceive offenders' blameworthiness is also illustrated in the sentencing in embezzlement cases. One judge, for example, claimed that it is just and proportional to impose a lighter sentence in embezzlement-related cases compared to theft because the former offence usually involves the negligence of the property owner (the victim), for example, by not properly supervising the person to whom he or she gave their trust. The judge argued 'Should there be no negligence (to supervise), the evil intent to embezzle may not have emerged'.[674] In other words, the judge suggested that a victim of embezzlement provoked the offender simply by trusting his or her employee, despite the fact that embezzlement, by definition, always involve is criminalised precisely because it represents a breach of trust.[675] This partly explains why judges generally impose longer average imprisonment sentences for simple theft offences compared to aggravated embezzlement with similar losses, even though both have the same maximum penalties.[676] This is also, perhaps, the reason for the longer average sentences imposed in (simple) embezzlement cases compared with aggravated embezzlement. For the latter offence, the judges might expect property owners (the victims), who have a formal working relationship with the offenders, to have better mechanisms in place to supervise the conduct of their employees (the offenders), unlike in simple embezzlement offences, where the relationship between the two is based purely on trust.

Interestingly, many judges did not perceive reoffending to significantly increase an offender's blameworthiness. As shown in the path analysis results, the role of recidivism in influencing the sentencing outcome, although a factor, is not substantial. Instead, judges tend to mitigate sentences for first-time offenders, as shown in Chapter 6. Further, only a few judges considered increasing a sentence for an offender deemed likely to reoffend (a predictive sentence), as practiced in some countries.[677] A judge and a prosecutor

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[672] As discussed in Chapter 6, only six per cent of theft-related offenders received mitigated sentences based on the impact of a punishment on an offender's family income. On the other hand, 78 per cent of middle and high-ranking officials or executives who committed corruption offences benefitted from this mitigating consideration.

[673] Interview with Judge #4 (Jakarta 14 December 2016).

[674] Interview with Judge #6 (10 January 2017). This might be the reason why the average sentence for similar medium and medium-large (simple) theft cases was harsher than that of aggravated embezzlement cases, despite both offences being punishable by the same maximum sentence.

[675] Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *UNSW Law Journal* 712, 727.

[676] See Tables 6.2 and 6.5 in Chapter 6.

[677] Interviews with Judge #5 (Jakarta, 6 January 2017) and Judge #8 (12 January 2017). They said that they rely on intuition in predicting reoffending, such as by considering an offenders' gestures, their facial expressions or

interviewed strongly opposed this practice. They argued that it is unjust to consider the likelihood of reoffending because it is 'beyond the facts', suggesting their inclination towards desert philosophy, which holds that an offender should only be liable for acts he or she did (past offences).[678]

Lastly, judges' perceptions of the goals of punishment for different offences also influenced disproportionality in sentencing, particularly between theft and corruption offences. As discussed in Chapter 3, the KUHP does not endorse specific punishment goals, unlike, for example, the Corruption Eradication Law, which emphasises deterrence. Nevertheless, as discussed before, many judges seemed to agree that a goal of sentencing theft offences was also to deter crimes. Deterrence, according to them, can only be achieved through imprisonment, not fines or suspended sentences, which are considered to be 'too soft' as a type of punishment.[679] On the other hand, almost all judges interviewed believed that the goal of sentencing corruption offences should be to recover state losses (restitution), not deterrence, as expected by the law.[680] Some referred to Posner's economic approach to law thesis.[681] As a result, the loss recovered, either by being repaid voluntarily or being confiscated,[682] has become one of the decisive factors in corruption sentencing. Two judges even claimed that as long as the loss is fully recovered, there is no need to impose a prison sentence.[683] One of them reasoned that voluntary payback of loss is a sign of remorse, and further said:

> It is not fair, actually, to imprison [the offender]. If the law permits [judges] not to impose the criminal penalty for those who already return the state loss, I will not do so, or at least I will sentence the offender lightly or for the same duration of his or her pre-trial detention.[684]

Moreover, another judge claimed that when a person is suspected of corruption, evidenced by, for example, a financial audit, he or she should be given an opportunity to pay back the state loss before the state begins processing the case or even after prosecution has commenced but before it is submitted to the court.[685]

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attitudes during the trial, not other factors such as an offender's employment history or socio-economic status, as in some jurisdictions mentioned in Chapter 2.

[678] Interviews with Judge #14 (Jakarta, 4 January 2017) and Prosecutor #16 (Bandung, 20 January 2017). For a discussion of desert theorist arguments on this matter, see Chapter 2.

[679] In the Indonesian context, when a law enforcer, judge or legal scholar says 'there is a need to create deterrence', what he or she means is a severe or long imprisonment sentence. This is because, as discussed in Chapters 3 and 6, other types of punishment are seen as too soft to deter crimes.

[680] Interviews with Justice #2 (23 December 2016), Judge #11 (Jakarta, 19 January 2017), Judge #12 (Bandung, 20 January 2017), Judge #4 (Jakarta 14 December 2016), Judge #9 (Jakarta, 15 January 2017), Judge #13 (Bandung, 20 January 2017), Prosecutor #15 (Jakarta, 5 January 2017), and Prosecutor #16 (Bandung, 20 January 2017).

[681] Interviews with Justice #2 (23 December 2016), Judge #11 (Jakarta, 19 January 2017), Judge #12 (Bandung, 20 January 2017), Prosecutor #15 (Jakarta, 5 January 2017), and Prosecutor #16 (Bandung, 20 January 2017).

[682] As mentioned in Chapter 6, in a number of cases, judges mitigate sentence for offenders on the basis that the 'the state loss was recovered' despite the fact that it was recovered, chiefly or entirely, as a result of confiscation by the investigators.

[683] Interviews with Judge #14 (20 January 2017) and Judge #10 (15 January 2017).

[684] Interview with Judge #10 (15 January 2017).

[685] Interview with Judge #12 (Bandung, 20 January 2017).

Like judges, a number of prosecutors also held the view that the objective of sentencing corruption offences should be to recover state loss. Therefore, smaller cases are better resolved through non-criminal proceedings to ensure justice, overcome overcrowding in prison populations, and to save case processing budgets.[686] In fact, in 2010, the Attorney General's Office issued internal guidance which, among other things, instructs prosecutors that:

> The investigation and prosecution of corruption cases should be prioritized in cases with big losses...and should consider the public sense of justice and restorative justice, so that in cases where offenders voluntarily [refunded] state losses, particularly if the state losses are relatively small, [prosecutors] should consider not processing them.[687]

The guideline does not define what is considered a 'relatively small' case. Some prosecutors, including the leadership of the agency, gave diverse interpretations, from cases that cause Rp25 million to Rp300 million in state loss (A$2,500-30,000).[688] Interestingly, as discussed in Chapter 8, several other prosecutors objected to the Supreme Court Circular Letter 2 of 2012. This Letter encourages law enforcers and judges to impose fines or suspended sentences on offenders charged with minor property offences, including theft and embezzlement, that caused Rp2.5 million or less in loss (A$250), with the aim of promoting restorative justice and reducing prison overcrowding.

Judges' and prosecutors' different views on offence seriousness, offenders' blameworthiness, and punishment goals, particularly as between theft and corruption, are problematic, for at least three reasons. First, legally, corruption is seen as more serious than theft, indicated by the significant differences in their minimum and maximum penalties. The Elucidation to the Corruption Eradication Law also maintains that offenders should be brought to trial, even if they voluntarily return state losses,[689] which is in line with the law's deterrence goals mentioned before. Further, the Law also explicitly states that 'the corruption practice in Indonesia is systematic and widespread so that it not only harms state finance, but also violates socio-economic rights', and therefore should be considered an extraordinary crime.[690] This is not an exaggeration. There is strong evidence concerning the severe effects of corruption, for example, in licencing, procurement, and also the allocation of the social safety net programs as well as in economic development and poverty eradication programs.[691] Also, as rightly stated in a

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[686] 'Korupsi di Bawah Rp 25 Juta Tak Dipidanakan, Penghuni Lapas Bisa Berkurang', *Detik* (online), 8 April 2011 <https://news.detik.com/berita/1612038/korupsi-di-bawah-rp-25-juta-tak-dipidanakan-penghuni-lapas-bisa-berkurang/2>; 'Korupsi Sekecil Apapun Harus Dipidana', *Kompas* (online), 12 April 2011 <https://nasional.kompas.com/read/2011/04/12/02321116/korupsi.sekecil.apa.pun.harus.dipidanakan>.

[687] Deputy Attorney General for Specific Crimes Circular Letter B-1113/F/Fd.1/05/2010, 2.

[688] 'Korupsi di Bawah Rp 25 Juta Tak Dipidanakan, Penghuni Lapas Bisa Berkurang', *Detik* (online), 8 April 2011 <https://news.detik.com/berita/1612038/korupsi-di-bawah-rp-25-juta-tak-dipidanakan-penghuni-lapas-bisa-berkurang/2>; Onggala R. Siahaam, *Penyelesaian Tindak Pidana Korupsi Yang Nilai Kerugian Keuangan Negaranya Kecil* (Pusat Litbang Kejaksaan Agung RI, 2014) in Ahmad Muchlis, 'Penegakan Hukum Terhadap Tindak Pidana Korupsi dengan Kerugian Negara yang Kecil dalam Mewujudkan Keadilan' (2016) 10(2) *Fiat Justicia* 221, 365;

[689] Article 4 Law 31 of 1999 on Corruption Eradication.

[690] Paragraph 2 of the Elucidation of Law 20 of 2001 on Corruption Eradication.

[691] Daniel Suryadarma, 'How Corruption Diminishes the Effectiveness of Public Spending on Education in Indonesia' (2012) 48(1) *Bulletin of Indonesian Economic Studies* 85; David U. Enweremadu, 'The impact of Corruption on Economic Development: Comparing the Experience of Nigeria and Indonesia (1967–1998)' in Bernard Berendsen,

number of decisions, corruption has weakened public trust and faith in the government and state institutions.[692]

Second, as correctly pointed out by a judge, if the maximum risk for committing corruption is just being required to return the state loss, or a light punishment, more people may well be encouraged to commit the act because of its huge potential benefit. Worse, the probability of detection or prosecution for corruption in Indonesia is very low.[693] Further, the reference to favouring restitution based on Posner's 'economic approach to law' thesis is also false. He never advocated 'pure restitution' as a punishment goal. Laws or courts in other jurisdictions presumably do not use such goals in sentencing serious offences.[694] Posner does not advocate restitution as the goal of sentencing white-collar crimes, but rather the use of monetary penalties, such as fines or (civil) treble-damage (if adequate or appropriate), as opposed to imprisonment.[695] This is not happening in Indonesia. As previously shown, the average fines imposed by judges are lenient, just below Rp70 million (A$7,000). Besides, the Corruption Eradication Law is not designed for that purpose, considering its relatively low minimum and maximum fines. Further, restitution orders (*uang pengganti*) are not equivalent to 'treble-damage' – the monetary penalty in the US system that Posner mentioned. A restitution order is an order for an offender to repay the illicit profits they obtained from the offence, and no more.[696] Aside from this

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Ton Dietz, Schulte Nordholt and Roel van der Veen (eds.) *Asian Tigers, African Lions: Comparing the Development Performance of Southeast Asia and Africa* (Brill, 2013) 197; Fiona Downs and Luca Tacconi, 'Corruption, Deforestation and Environmental Injustice: The Case of Indonesia' in Karen Druffel (ed), *Looking Within: Finding an Environmental Justice and Global Citizenship Lens (*Brill, 2013) 155; Andrew Rosser,' Realising Free Health Care for the Poor in Indonesia: The Politics of Illegal Fees' (2012) 42(2) *Journal of Contemporary Asia* 255.

[692] As mentioned in Chapter 6, a number of judges aggravated sentences on this basis.

[693] As stated by the former Head of KPK, 'if KPK has enough resources, we can conduct red-handed catches [of corruptors) every day. Almost all regents and many public officials commit corruption'. 'Ketua KPK: Kalau Tenaga Kita Cukup, Tiap Hari Ada OTT', *Detik* (online), 27 November 2018 <https://news.detik.com/berita/d-4318928/ketua-kpk-kalau-tenaga-kita-cukup-tiap-hari-ada-ott>.

[694] The only serious scholar who advocates 'pure restitution' – orders for offenders to repay only the amount of material loss to the victim – as the goal of punishment is, perhaps, Barnett (see Randy E. Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87(4) *Ethics* 279). What is usually advocated is restitution as part of the restorative justice process, which aims to restore the victim and the community as well as rebuild ruptured relationships in a process that allows three parties (offender, victim and members of the community) to participate. For further discussion about the problem of pure restitution as a goal of punishment, see, e.g., Franklin G Miller, 'Restitution and Punishment: A Reply to Barnett' (1978) 88(4) *Ethics* 358; Zedner (n 79) and R. Dagger, 'Restitution, Punishment, and Debts to Society' in Joe Hudson and Burt Galaway (eds) *Victims, Offenders, and Alternative Sanctions* (Lexington, 1980) 3-13.

[695] In his 1980 article on "Optimal Sentences for White-Collar Criminals," Posner argues for the adequacy of optimal monetary penalties, particularly fines, as an alternative to imprisonment to sentence offenders who have the financial ability to pay. See Richard Posner, 'Optimal Sentences for White-collar Criminals' (1979) 19 *American Criminal Law Review* 409, 410-6). According to Posner, a fine is considered optimal if it creates a relatively similar deterrent to imprisonment. Similarly, he maintained that where the statute recognises the concept of 'treble-damage' (that an offender can be ordered to pay more than the actual damage or losses, usually tripled), it is sufficient to impose such a penalty [417]. See also William Landes and Richard Posner, 'The Private Enforcement of Law' (1975) 4(1) *Journal of Legal Studies* 1.

[696] In addition to imprisonment and fines, courts should order offenders to pay restitution (*uang pengganti*) to the value of the amount of illicit profits they received (Article 18(1) b of Law 31 of 1999 on Corruption Eradication). In some cases, however, judges wrongly interpret this as repayment of the state loss. Even on this interpretation, however, it is not considered to be a monetary penalty, but merely compensation or 'simple damage' of the losses.

argument, the philosophical basis of Posner's thesis is not without problems.[697] Third, there is a strong indication that judges' perceptions of offence seriousness, offender's blameworthiness, and punishment goals are influenced by biases, as discussed next.

4. Perception of the Character of Offenders from Different Socioeconomic Backgrounds and Impacts on Punishment

As mentioned, judges and prosecutors studied suffered from class and status bias against offenders from lower socio-economic backgrounds. One of the sources of bias is their perception of, borrowing Bentham's words, 'individual sensitivity of punishment', meaning the different effect of punishment on offenders from different socio-economic backgrounds. A number of judges asserted, for example, that corruptors would suffer more than, for instance, thieves, if both were to receive the same level of imprisonment.[698] One judge gave an analogy that 'One year in prison for a corruptor (who used to have a pleasant life) might be harsher than five years imprisonment for an ordinary thief'.[699] Another judge said 'Is there a case where a thief has become skinnier after being released from the correctional facilities? Corruptors (become) skinny.'[700]

In a similar tone, several judges reasoned that those who are convicted of corruption have to pay an 'additional price' for their offence on top of imprisonment, such as shame and reputational damage, having to pay fines, or being ordered to return the profit of the offence, in contrast to 'street crime' offenders.[701] On the issue of the effect of punishment on an offender's reputation and honour, a judge said 'There is no case where a thief feels his or her reputation is damaged. Almost never! Corruption offenders (will) feel such damage, not only for him or herself, but also his or her family'.[702]

Bias also occurs in sentencing offenders from different socio-economic statuses who commit similar offences. Commenting on the effect of punishment on college students and bicycle rickshaw drivers being charged for theft, a judge asserted:

> [If] a college student is charged (and it is published) in a newspaper and he is sent to trial, (he will) surely feel very ashamed (but) when a *becak* [bicycle rickshaw] driver's name is published in the newspaper, (he) will think that he has become famous.[703]

Further, as indicated above and in Chapter 6, some judges also implicitly perceived offenders charged with corruption as generally persons with good records and character. A number of corruptors, particularly government officials, received sentencing discounts

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[697] For a discussion of this issue, see, e.g., Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55; Robin Paul Malloy, 'Is Law and Economics Moral-Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis' (1989) 24 *Valparaiso University Law Review* 147.

[698] Interviews with Judges #12 (Bandung, 20 January 2017) and Judge #11 (19 January 2017). One judge explicitly disagreed with the above view. See also Bentham, *An Introduction to the Principles of Morals and Legislation* (n 109) 51-62 and 182. For a revival of Bentham's argument, see Kolber (n 109).

[699] Interview with Judge #6 (10 January 2017).

[700] Interview with Judge #11 (19 January 2017).

[701] Interviews with Judge #6 (10 January 2017) and Judge #12 (19 January 2017).

[702] Interview with Judge #11 (19 January 2017).

[703] Interview with Judges #12 (Bandung, 20 January 2017).

on the basis of 'meritorious past history' or 'their long service to the government'. There were also more corruption offenders who received the 'first-time offender' mitigation than theft or embezzlement offenders.[704] Some judges also justified lighter sentences for corruptors reasoning that they had made 'sacrifices working in remote areas', or that they committed the act due to external conditions, not because of their criminal nature.

There is also a view that corruption offenders, perhaps because many of them are public officials or business persons, are of more benefit to the public outside a prison cell. One judge, for example, said:

> What is the point of imposing a long imprisonment sentence (on corruption offenders) without allowing them probation? …these people have good skills and talents … don't you think it is a waste? It is indeed … what they actually need is rehabilitation.[705]

On the other hand, there is no proof that judges generally view blue-collar offenders, such as thieves, as persons of bad character. Judges' 'lack of tolerance' in sentencing theft seems to be more influenced by other factors (mentioned before), such as their view that theft is, generally, more harmful and distressing to the public than corruption, or that theft offenders are more resilient to accepting harsher punishments. This explains why government officials, including teachers, who were convicted of theft, for example, did not receive mitigation for their sacrifices or past service to the government, as did their colleagues who were convicted of corruption.[706]

5. Other Indirect and Structural Problems Influencing Sentencing

The analysis above mainly covers the immediate and direct factors that influence sentencing outcomes. There are other, more indirect factors and structural conditions that also play a role in sentencing, such as: the minimal and ineffective role of the Supreme Court in ensuring legal certainty and compliance with the law in lower courts; the lack of seriousness of police and prosecutors in investigating and proving cases, particularly corruption offences; the excessive use of pre-trial detention; weak support from court staff; a lack of access to legal representation for offenders; and insufficient sentencing guidance in the law, as well as unclear or poorly drafted statutes (as discussed in Chapters 3 and 4). I will briefly discuss some of these issues here to give a fuller account of factors influencing sentencing, and leave further elaboration to Chapters 8 and 9, where I discuss judges' non-compliance with laws in sentencing minor theft and corruption.

Legal uncertainty and non-compliance with the law, like judicial corruption, are crucial problems in Indonesian legal practice, and they also relate to issues concerning sentencing. Part of the reason for this is that the Supreme Court does not provide sufficient sentencing guidelines, as discussed in Chapter 4. More importantly, the Supreme Court fails to enforce its policies in lower courts and does not itself issue consistent

[704] As mentioned in Chapter 6, this mitigating factor is used in 87 per cent of corruption cases, compared to only 72 and 79 per cent respectively in theft or embezzlement-related cases.
[705] Interview with Judge #4 (Jakarta 14 December 2016).
[706] See, e.g., Decisions 1177/2014/PN.Tng, 1434/2014, PN.Jkt.Sel, 150/2015/PN.Tng and 1399/2011/PN.Jkt.Pst

decisions, therefore setting a poor example.[707] As will be explained in Chapters 8 and 9, many lower court judges, including Supreme Court Judges, disregarded Supreme Court Circular Letter 7 of 2012 on the application of Articles 2(1) and 3 of the Corruption Eradication Law, and Supreme Court Regulation 2 of 2012 on minor property offences.

Further, as will be shown in Chapter 9, in many corruption cases, the police and prosecutors failed to convincingly prove the culpability of offenders and the harms caused by the offences, which left little room for judges to impose harsher sentences. Police and prosecutors also excessively use pre-trial detention, including for less serious offences, which limits judges' options in imposing non-prison sentences, as discussed in Chapter 6, and causes them to disregard Supreme Court Regulation 2012, as will be discussed in Chapter 8. The excessive use of pre-trial detention, as well as poor support from court staff in providing reliable minutes of the court's sessions, also influences judges to follow prosecutors' recommended sentences to prevent appeal, as discussed. The fact that almost all theft-related offenders were not represented by lawyers might have also contributed to disproportionate sentencing. As mentioned in Chapter 6, a lack of representation causes judges to engage less with mitigating factors, as well as making the offenders less likely to appeal unduly harsh sentences.

C. Locating the Findings in Sentencing Scholarship

Overall, most of the findings of this study correspond with the focal concerns perspective discussed in Chapter 2, which is not surprising because this perspective incorporates, to various degrees, different theories or perspectives on sentencing – substantive political perspective, attribution theory, and the organisational efficiency perspective, as well as the court community perspective. According to the focal concerns perspective, sentencing outcomes are a result of judges' subjective definitions of offenders and offences based on three concerns: *blameworthiness* (referring to the offender's culpability and harms caused by the offence); *protection of the community* (referring to the need to incapacitate dangerous offenders, or their reoffending potential - estimated by stereotyping, as argued by attribution theory - and to deter the public from offending); and *the practical constraints and consequences of judicial decisions* (which encompass the concerns for organisational efficiency and resources - e.g., the need to process cases in an efficient manner to avoid case backlogs, and to consider prison capacity and other resources- as well as the impact of punishment on the individual offender).

As shown in the bivariate and path analysis results, judges (and prosecutors) attributed importance to the type of offence committed by the offender and the amount of loss (harm) caused by the offence (*blameworthiness*). To a lesser degree, they also considered other factors, such as the amount of state loss recovered, which reduced the harm of the offence, and the characteristics of the victim (individual or business/state), which linked

[707] Many factors contribute to this, such as judicial corruption, political interference in the judiciary (particularly before the 1998 judicial Independence reforms), poor qualities of judges and other legal professionals, and so forth. For detailed discussion of these matters, see, e.g., Pompe (n 301); Adrian Bedner, 'Indonesian Legal Scholarship and Jurisprudence as an Obstacle for Transplanting Legal Institutions' (2013) 5 *Hague Journal on the Rule of Law* 253; Assegaf, 'The Supreme Court' (n 357).

to their perception of different victims' vulnerability to harm. Recidivism and multiple offending were also considered in sentencing of theft-related offences. Further, judges attributed lesser responsibility to offenders charged with aggravated embezzlement because they perceived that the victim's failure to properly supervise an offender's conduct contributed to the commission of the offence. Similarly, judges downplayed corruption by government officials to external environmental factors, such as that they received only small remuneration for serving the public, or that illicit funds were used for office purposes, so they viewed offenders as less blameworthy.

Judges were also concerned with the *protection of the community*, particularly in sentencing theft-related offences, evidenced by the (excessive) use of imprisonment, even for minor offences. This was not necessarily because they believed that offenders who committed this type of offence were generally dangerous, or were likely to reoffend (incapacitation, or specific deterrence considerations), as many focal concerns theorists argue. This was evidenced by, among other things, the relatively limited influence of recidivism in increasing sentence severity, and the small numbers of theft-related cases that involved violence or threats of violence. The main reasons for imposing imprisonment punishments was to deter potential offenders (general deterrence goals), or to satisfy victims or the public's sense of justice (desert or vindictive satisfaction goals).[708] In sentencing corruption offences, however, most judges were not concerned with community protection because they did not consider this type of offence to be a threat to the public. The fact that all corruption convictions included jail time is because the law requires it.

More importantly, all judges were deeply concerned with *the practical constraints,* and, to a lesser degree, the *consequences of their decisions.* The first-mentioned concern was shown by the judges generally following the prosecutors' sentence recommendations to minimise their workloads (mainly because the prosecutor would appeal any decision below a certain threshold and judges do not receive sufficient support from court clerks in preparing decisions for the appeal process). At the same time, by following prosecutorial sentence recommendations, judges could minimise negative consequences of punishment for offenders, because they did not have to spend longer behind bars while waiting for an appeal without the guarantee of a better outcome (the second-mentioned concern).

Judges' concern with the consequences of punishment for offenders was also shown, for example, when giving sentencing discounts to offenders who are their family's breadwinner, had small children, or were ill (see Chapter 6). Several judges also considered the different effects of imprisonment on offenders from different socio-economic backgrounds, which made them more relaxed in imposing longer sentences on theft-related offenders compared to corruptors. This was because they believed theft offenders to be generally more resilient to prison conditions and because most corruptors (because of their relatively higher status) were believed to have already suffered other 'types' of punishment (besides imprisonment), such as public shame for being charged and convicted, as well as paying fines and restitution.

[708] As mentioned in Chapter 6, most judges believed these goals could only be attained through imprisonment.

This study also confirmed that, as expected by the focal concerns perspective, the meaning and relative importance of different focal concerns are likely to be different between judges in different courts (let alone in different countries). In Indonesia, for example, the role of a prior criminal record in increasing a judge's assessment of an offenders' blameworthiness or potential for reoffending was minimal, which is different from the common focal concerns perspective and sentencing practices in other jurisdictions. Further, judges did not seem concerned about overcrowding of prisons.[709] Also, pleading guilty had no effect on sentencing outcomes, which is understandable because Indonesian criminal law always requires a full court trial even if an offender pleads guilty, as discussed in Chapter 2. The meaning of 'community protection', particularly in sentencing theft and embezzlement-related offences, was also different, as it did not primarily aim to protect the public from dangerous offenders or reoffending, as mentioned. Moreover, the judges' perceptions of the relative importance of different focal concerns were dissimilar.

A number of focal concerns perspective proponents, for example, argue that the role of legal factors in sentencing is greater than extra-legal factors.[710] This is not entirely supported by the findings in this study. As discussed, judges were more concerned with practical constraints (i.e. the effect of not following prosecutors' sentence recommendations and changes to their workload) than with legal factors. Worse, to prevent appeal, judges were ready to ignore Supreme Court Regulation 2 of 2012 by sentencing minor theft offenders under provisions attracting heavier penalties in line with the demands of prosecutors (this will be discussed more in Chapter 8). Further, the influence of judges' prejudices and biases were significant, particularly regarding how they attribute offender blameworthiness and assess the impact of punishment on offenders from different socio-economic backgrounds.

This study, however, found that other extra-legal factors influenced sentencing outcomes that have not been considered by the focal concerns perspective (or other common perspectives that try to explain sentencing outcomes) – namely, judicial corruption and judges' personal (not organisational) interest in reducing their workload.[711] As discussed before, some judges used their discretion to gain illegal bribes from offenders or victims. Further, some judges followed prosecutors' sentence recommendations simply because they were 'lazy', not because they had heavy workloads or were concerned with the impact of punishment on the offenders. The focal concerns perspective actually already considers one aspect of judges' personal interests or motives, that is to save their careers,

[709] In late 2019, prison populations across Indonesia doubled the available prison capacity. 'Over Kapasitas Lapas Capai 107 Persen', *Beritasatu* (online), 27 December 2019 <https://www.beritasatu.com/nasional/592646/over-kapasitas-lapas-capai-107-persen>.

[710] Ulmer (n 31) 10-11; Steffensmeier et al 'The Interaction of Race, Gender, and Age in Criminal Sentencing' (n 147) 766; Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 921.

[711] Some scholars, such as Forst and Bushway, advocate the use of rational choice approach in studying criminal justice process, including sentencing. They encourage researchers to identify the formal and informal incentives of different court actors to make theoretical predictions about sentencing outcomes. However, none came up with a specific theory or perspective. See, e.g., Brian Forst, and Shawn Bushway, 'Discretion, Rule of Law, and Rationality' (Paper presented at Conference on The Past and Future of Empirical Sentencing Research, Albany, 2010); Ulmer (n 31) 11.

particularly if they are elected. Kramer and Ulmer, for example, argue that Pennsylvania's partisan judicial elections meant judges were reluctant to depart downwards from the sentencing guidelines to avoid 'criticisms of being soft on crime and failing to protect the community'.[712] A similar argument can be made in cases where judges are politically 'pressured' to support a government crime control agenda in countries with a lack of judicial independence.[713] Kramer and Ulmer categorised this concern as a 'practical constraint', which is accurate because of the nature of the concern. However, other personal interests or motives, discovered in this study, do not fit within the existing categorisation of concerns. Having identified this gap in the literature, I argue that the focal concerns perspective should add, at least, one more concern – a judges' personal interests or motivations, including to receive illicit financial benefit, and to reduce personal workload (laziness). By including these concerns, the focal concerns perspective could be applied more widely, including in contexts where judicial accountability is still an issue.[714]

Further, not all these concerns were considered by judges in sentencing corruption cases. As discussed, judges did not consider the 'community protection' concern (which is rooted mainly in deterrence and incapacitation punishment goals) [715] in sentencing this type of offence because they did not view corruption as threatening the public, and relied more on restitution goals. This means the focal concerns perspective, even with the additional concern of personal motives added, does not fully explain sentencing in corruption cases in Indonesia.

D. Conclusion

This chapter has shown that, overall, judges are influenced by both legal, and, more importantly, extra-legal, factors in sentencing. The main legal factors that affect sentencing outcomes are the: type of offence (except in embezzlement-related cases), the level of harm caused by the offence, and also, in the case of corruption, the amount of illicit gain received by the offender, as well as the level of illicit gain or state loss returned. The extra-legal factors that significantly influenced sentencing outcomes include the sentences proposed by prosecutors, judicial prejudice, bias, views or punishment goals, and judicial

[712] Kramer and Ulmer, 'Downward Departures for Serious Violent Offenders' (n 160) 904.

[713] Hong Lu and Bridget Kelly, 'Courts and Sentencing Research on Contemporary China' (2008) 50(5) *Crime, Law and Social Change* 229; M. Nurul Houqe, M. Kaleem Zahir-ul Hassan, M. Arif Idrus, and Tony van Zijl, 'Bribery and Corruption: Assessing the Fairness of the Malaysian Judicial System' (2020) *Crime, Law and Social Change* 1.

[714] See the influence of judicial corruption on sentencing in other countries, such as China or Ghana in Wisdom Akpalu and Anatu Mohammed, 'Socioeconomics of Crime and Discretionary Punishment: the Case of Ghana' (2013) 40(2) *International Journal of Social Economics* 116; Lu and Kelly (n 712); Qingting Hu, 'Corruption and Criminal Sentencing Dispositions in China' (MA Thesis, University of Nevada, 2015).

[715] As mentioned in Chapter 2, the retributive goal is reflected in the 'blameworthiness' concern, while incapacitation and deterrence (also rehabilitation, to a lesser degree) are reflected in the 'community protection' concern. Arguably, the focal concerns perspective can accommodate certain forms of the restorative justice goal. When an offender is willing to return the loss or compensate the victim, feels remorse and asks forgiveness from, and is accepted by, the victim (as well as the community), a restorative justice judge may significantly reduce both the offender's culpability and the harms of the offence, as well as perceiving that the community protection concern is already served (or at least, no longer pressing). Such judges may also expand the meaning of the 'consequence of punishment' to include 'impact of punishment on the victim', in this case, the impact of the punishment on the offender's ability to make restitution and compensate the victim.

corruption. These factors, I argue, cause disproportionality in sentencing, particularly between theft-related cases and corruption. As mentioned, offenders convicted of the latter are usually from middle and higher-socio-economic backgrounds and receive disproportionally lighter sentences relative to the minimum and maximum sentences given to those charged with theft, who were mostly from lower socio-economic backgrounds.

CHAPTER 8
INJUSTICE, INCONSISTENCY AND NON-COMPLIANCE: THE SENTENCING OF MINOR THEFT AND EMBEZZLEMENT

The Criminal Code (the KUHP) establishes different types and levels of punishment for property offences depending on their seriousness. As discussed in Chapter 3, before 2012, simple theft and simple embezzlement were punishable by a maximum of five and four years of imprisonment respectively or, alternatively, a very low fine, Rp900 (A$0.09). If the offences were classified as minor, the penalties were very light, no more than three months of imprisonment or a Rp250 fine (A$0.025). However, the amount of loss necessary for theft or embezzlement to be classified as minor itself was very low, Rp250 (A$0.025) or less. With such low thresholds of loss and small fines, judges never convicted offenders of these minor property offences and were very reluctant to impose fines, preferring imprisonment.[716] This practice was widely seen as unjust and attracted significant public criticism.[717]

In 2012, the Supreme Court passed Regulation No. 2 of 2012 on Adjustment of Standards for Minor Offences and Value of Fines in the KUHP (Supreme Court Regulation No. 2 of 2012), which basically altered the amount of loss necessary for an offence to constitute a minor property offence under the KUHP by increasing it to Rp2.5 million (A$250), as well as increasing the maximum fine for almost all offences. The objectives of the enactment of this Regulation were to deliver justice for petty offenders and restore the public image of the judiciary, as well as to improve efficiency in law enforcement, including responding to prison overcrowding.[718]

This chapter examines the implementation of the Supreme Court Regulation No. 2 of 2012 in the sentencing of minor theft and embezzlement, focusing on the district courts in the

[716] Suhariyono (n 219) 225; Suparni (n 219) 65.

[717] In 2012, for example, the Supreme Court of Indonesia sentenced Rasminah, a housemaid, for stealing a few plates and soup ingredients from her employer to four months and ten days of imprisonment (although her sentence was identical to the length of her pre-trial detention) ('Tidak Layak Pencuri 6 Piring dihukum 130 Hari Penjara', *Solopos* (online), 1 February 2012 <https://www.solopos.com/tidak-layak-pencuri-6-piring-dihukum-130-hari-penjara-268158>). This decision was heavily criticised. See, e.g., 'Yani: Hukum Rasminah, Hakim MA Tak Bernurani', *Viva* (online), 1 February 2012 <https://www.viva.co.id/berita/nasional/284691-yani-hukum-rasminah-hakim-ma-tak-bernurani>; 'Ketua MA Pertanyakan Rencana DPR Bentuk Panja', *Tempo* (online), 2 February 2012 <https://pemilu.tempo.co/read/news/2012/02/02/078381393/Ketua-MA-Pertanyakan-Rencana-DPR-Bentuk-Panja>. In the same month as the Rasminah decision, the Palu District Court convicted a minor, 'AAL', for stealing a pair of sandals belonging to a police officer, before releasing him into his parents' custody without any other penalty. A few years earlier Minah, who stole three cacao fruits, and Basar and Kholil, convicted of stealing a watermelon, were sentenced to 1.5 month and 15 day suspended sentences, respectively. In 2010, a married couple, Supriyono and Sulastri, were both sentenced to 3.5 months of imprisonment for stealing a cluster of bananas, while Manisih, charged with theft of two kilograms of cotton, received a twenty-four-day prison sentence. Some of them had been detained prior to and during the trial. The list could go on, but see 'Terdakwa Anak Pencuri Sandal Divonis Bersalah', *Hukumonline* (online), 5 January 2012 <https://www.hukumonline.com/berita/baca/lt4f0486c16639d/terdakwa-anak-pencuri-sandaldivonis-bersalah/>; 'Pencuri Pisang Divonis 3,5 Bulan Penjara', *Okezone* (online), 28 October 2010 <https://news.okezone.com/read/2010/01/28/340/298687/pencuri-pisang-divonis-3-5-bulan-penjara>; 'Kasus Pencurian Buah Randu, Hakim Jatuhi Vonis Hukuman 24 Hari Penjara', *Solopos* (online), 2 February 2010 <https://www.solopos.com/kasus-pencurian-buah-randu-hakim-jatuhi-vonis-hukuman-24-hari-penjara-13765>.

[718] Elucidation of the Supreme Court Regulation No. 2 of 2012.

case study. To provide a clearer picture about the practices of these courts, examples of decisions in other district courts will also be discussed. This chapter demonstrates that, in many cases, law enforcers and judges still fail to consistently implement the regulation, or wrongly interpret it.

A. Overview of Provisions on Minor Property Offences and Supreme Court Regulation No. 2 of 2012

Supreme Court Regulation No. 2 of 2012 contains only four articles. As mentioned, Article 1 directly alters the amount of loss necessary for offences to constitute minor property offences in the KUHP, such as petty theft and embezzlement,[719] by increasing it from Rp250 (A$0.025) to Rp2.5 million (A$250), while Article 3 adjusts the maximum fines for all offences, other than gambling,[720] by increasing them a thousand-fold. The maximum fine for any minor property offence is now Rp250,000 (A$250). The remaining provisions provide guidance to judges about how to apply these new thresholds and fines. Article 2(1) and (2) requires the chief judge of every court to closely examine the amount of loss in a case filed by the prosecutor and, if considered minor, to assign cases to a single judge to be tried under the '*hukum acara cepat*' or 'fast procedure'. If the defendant is detained prior to the trial, he or she must immediately be released (Article 2(3)). It also advises judges to impose fines rather than imprisonment (Article 4).[721]

To strengthen the legal basis of the regulation, encourage compliance by other law enforcement agencies and respond to police concerns,[722] the Supreme Court, Ministry of Law and Human Rights, Attorney General Office and National Police signed a Joint Agreement (*Nota Kesepahaman Bersama*) in October 2012. In principle, the Joint Agreement adopts all provisions of Supreme Court Regulation No. 2 of 2012, and adds two more: first, law enforcers and judges can settle minor property offence cases through restorative justice by mediating between offender and victim (Article 4); and second, minor offence provisions cannot be used in cases involving reoffenders or recidivists (Article 5(4), a provision that is, in fact, inconsistent with the KUHP.[723] This chapter will use the terms "Supreme Court Regulation No. 2 of 2012" or "the Regulation" to cover both the Regulation and the Joint Agreement.

With the issuance of the Supreme Court Regulation No. 2 of 2012, the minor theft provision in Article 364 of the KUHP should be read as follows:

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[719] Other offences that are included in this category are certain types of minor frauds (Articles 379 and 384), damaging property (Article 407) and minor fencing, receiving stolen property (Article 482).

[720] The fine for gambling was increased earlier by the Law 7 of 1974.

[721] Paragraph 9 of the Elucidation to Supreme Court Regulation No. 2 of 2012.

[722] The Chief of National Police, while claiming to support the regulation, was concerned with its potential to increase the number of offences, particularly if the regulation was applied to repeated offenders. 'Respon Kejaksaan dan Polri atas Perma Tipiring', *Hukumonline* (online), 4 March 2012 <https://www.hukumonline.com/berita/baca/lt4f5342a22d42e/respon-kejaksaan-dan-polri-atas-perma-tipiring/>.

[723] Although the KUHP acknowledges additional, heavier, maximum penalties for reoffenders, they are only applicable to particular offences that do not include minor property offences (Articles. 486, 487 and 489 of the KUHP). Thus, if judges were to properly apply the KUHP, a recidivist committing minor offences would also be tried under Article 364.

> Offences in Article 362 as well as Article 363(1) 4 and 5, if not committed inside a dwelling or in an enclosed yard where a dwelling stands and the amount of the stolen goods is not more than Rp2.5 million, are considered minor theft and punishable by a maximum of three months of imprisonment or a maximum of Rp250,000 fine.

As discussed in Chapter 5, Article 362 is concerned with simple theft and stealing property, while Article 363(1) 4 and 5 concern some types of aggravated theft, which are theft by more than one offender and theft involving use of force, either to get to the place of the crime or to obtain the property that is stolen (for example, breaking, entering, climbing, damaging or using counterfeit keys, false orders or a disguise). This means that an offence is considered minor theft if it fulfils these elements: (a) theft of someone's property; (b) one or more offenders who are not reoffenders; (c) done with or without force to get into the place of the crime or to get the property; (d) not done in a dwelling or an enclosed yard where a dwelling stands (the main distinguishing element for a "burglary"); and (e) the value of the property is not more than Rp2.5 million. On the other hand, "day or night burglary" (e.g., Article 363(1) 3), robbery (Article 365), or certain types of aggravated theft, such as theft of livestock or theft during natural disasters, riot or war (Article 363(1) 1 and 2), regardless of the value of the stolen goods, fall outside the scope of the Regulation.

The Regulation also alters the definition of minor embezzlement (Article 373) to cover simple embezzlement of a goods valued at Rp2.5 million or less. Embezzlement related to the offender's employment (aggravated embezzlement), irrespective of its value of the funds stolen, is not covered by the Regulation.

B. Four Years of Implementation

1. Evidence from Four District Courts in the Case Study: Lack of Compliance

To have a regulation is one thing but to implement it effectively is another. Of 701 theft and 190 embezzlement cases in the four district courts in this study, 45 cases (with 58 defendants) involved facts that met the new definition of minor theft and embezzlement. However, none were dealt with the new minor offence provisions.[724] None of the decisions even mentioned Supreme Court Regulation No. 2 of 2012, as if it did not exist. [725]

In general, the sentences imposed on the 58 defendants were relatively harsh. All received imprisonment, with an average sentence of 7.6 months. Just three defendants were sentenced to three months or less, in accordance with the maximum penalty for minor offences (although the decisions did not refer to the Regulation). Others received just over

[724] This study only assesses decisions that can clearly be categorised as minor theft or minor embezzlement.

[725] Nevertheless, according to the courts' (irregular) yearly reports, there were around 30 minor offence cases decided each year in some of these courts, none of which have been published and therefore cannot be assessed. The only data available are in the yearly reports of the Central Jakarta District Court (year 2016) and Bandung District Court (year 2015). According to these reports, Jakarta District Court decided 29 minor offence cases in 2016, while the Bandung District Court decided 22, 43 and 24 cases in 2013, 2014 and 2015 respectively. See *Laporan Akuntabilitas Kinerja Pemerintah Pengadilan Negeri Bandung Kelas 1A Khusus 2015 (*Pengadilan Negeri Bandung, 2015); *Laporan Tahunan 2016* (Pengadilan Negeri Jakarta Pusat, 2016).

three to twelve months (50 defendants) or over one year (five defendants). Below are examples of the most severe and most lenient punishments imposed by these courts.

Table 8.1: Top Five Most Severe and Most Lenient Punishments

Sentence (months)	Recommended Sentence (months)	Pretrial Detention (months)	Crime	Details of Stolen Goods	
				Value (Rp)	Goods
18	18	4.2	Aggravated Theft (Article 363(1) 5)	1,500,000	Bags, etc.
18	16	3.9	Embezzlement (Article 372)	750,000	Bed covers
14	12	3.2	Aggravated Theft (Article 363(1) 4 and 5)	300,000	Gas Tanks
14	16	3.4	Aggravated Theft (Article 363(1) 5)	500,000	Cell phone and money
12	18	4.1	Aggravated Theft (Article 363(1) 4)	2,000,000	Bags, etc.
2	4	1.9	Aggravated Theft (Article 363(1) 4)	1,100,000	Cell Phone
3	5	2.8	Aggravated Theft (Article 363(1) 4)	1,000,000	Chickens
3.1	4	3.1	Aggravated Theft (Article 363(1) 4)	0	Money
4	6	2.5	Theft (Article 362)	200,000	Money
4	6	3.5	Theft (Article 362)	300,000	Tyres

While the overall data show no nexus between the punishment severity and the amount of losses or type of the goods stolen, it does demonstrate a strong correlation between the punishment and the sentence recommendation filed by the prosecutor. The average length of prison sentences imposed by judges was almost four-fifths of the prosecutors' recommendation.[726]

Anecdotal evidence also indicated that punishment severity was not necessarily influenced by differences between individual judges.[727] The same panel of judges in Bandung District Court that sentenced a person who stole a Rp300,000 (A$30) gas tank to fourteen months in prison, which was two months above the prosecutor's recommendation,[728] meted out the exact same punishment to a man who stole a car worth Rp170 million (A$17,000).[729] Another panel of judges in Tangerang District Court sentenced a person stealing half a million rupiah (about A$50) of goods to fourteen

[726] The average length of imprisonment recommended by the prosecutors was 10.5 months, while the average length of imprisonment imposed by the judges was 7.6 months.
[727] Due to limited information on the background and personal values or views of the judges, as well as the fact that all the cases were tried by panel of three judges, it is difficult to assess individual judges' sentencing patterns.
[728] Decision No. 1059/Pid.B/2015/PN.Bdg.
[729] Decision No. 1330/Pid.B/2015/PN.Bdg.

months of imprisonment[730] while only imposing a fifteen months prison sentence for the theft of a motorbike worth almost Rp15 million (A$1,500).[731] In all these cases, there were no noticeable mitigating or aggravating factors that might have contributed to the vast disparity in sentences.

2. Examples from Other Jurisdictions Outside the Case Study

Although none of the published decisions from the four courts studied applied the Regulation, that does not mean that Supreme Court Regulation No. 2 of 2012 is, overall, ineffective. As mentioned, data from the annual reports of some of these courts show that they decided a number of minor theft cases using the regulation each year. A search for 'Supreme Court Regulation No. 2 of 2012' in the Supreme Court database or media reports reveals that many other courts have applied the regulation. However, cases where the regulation was deliberately not applied, or was misinterpreted or inconsistently applied, are also encountered.

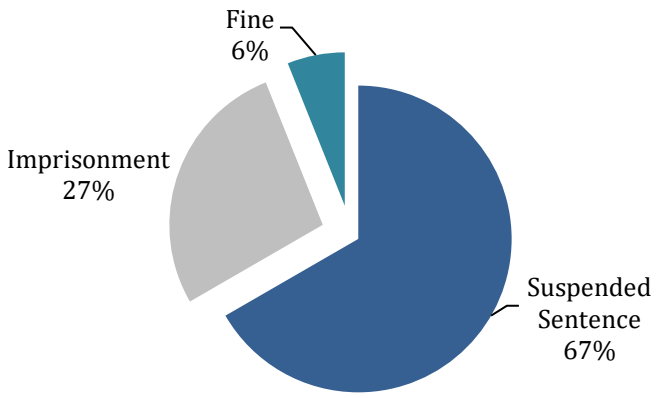
2.1. Decisions in Other Jurisdictions that Applied or Mentioned the Regulation: General

A purposive sampling of 40 decisions from different district courts in the Supreme Court database that mention the word 'Supreme Court Regulation No. 2 of 2012' shows that in a majority of cases the regulation was applied mostly to convict (30 decisions), but also in a few cases to dismiss charges, such as where minor theft was wrongly dealt with as ordinary theft. Some judges even used the regulation to lower penalties in cases involving thefts that were not minor. However, there were also cases where the regulation was mentioned, usually in defence arguments, but ignored by the court.

Of the 30 decisions (with 33 defendants) in which the regulation was used to convict, all defendants were sentenced under the minor-theft or minor-embezzlement provisions, even though some had been charged under other provisions (see Table 8.2). In cases where the defendants were detained prior to trial, the courts released them from the detention.[732] Further, the majority of the accused received only suspended sentences (22 defendants), followed by imprisonment (9 defendants) and fines (2 defendants), as shown in Chart 8.1. There was just one case that was settled through mediation between victim and defendant and ratified by court decision.[733]

[730] Decision No. 2337/Pid.B/2014/PN.Tng.
[731] Decision No. 1838/Pid.B/2014/PN.Tng.
[732] See, for example, Stabat District Court Decisions Nos. 235/Pid.B/2015/PN.Stb and 300/Pid.B/2015/PN.Stb, and also Solok District Court Decision No. 03 /Daf.Pid.C/2013/PN.Slk.
[733] Solok District Court Decision No. 02/Pid.R/2013/PN.Slk.

Chart 8.1: Types of Punishment in Cases that Applied Supreme Court Regulation No. 2 of 2012 (N: 33)



In almost all cases where the courts imposed imprisonment, the defendants had already been detained prior to the trial – mostly because they were initially charged with a non-minor offence. Further, the length of the sentences was usually closely linked or even identical to the duration of the pre-trial detention, as shown in Table 3 below.

Table 8.2: Correlation between Imprisonment Sentence, Charge and Pre-Trial Detention

Charge (article)	**Pre-trial Detention** (months)	**Sentence**		**Decision**
		Article	Months	
364	± 1.8? [734]	364	1.8	25/Pid.C/2015/PN.Sim
364	0	364	1	62/Pid.C/2015/PN.Rap
364	0	364	1	214/Pid.C/2014/PN.Rap
363(1) 4	2.1	363(1) 4 & Regulation No. 2 of 2012	3	235/Pid.B/2015/PN.Stb
363(1) 4	2.5	364	3	300/Pid.B/2015/PN.Stb
363(1) 4	2.2	363(1) 4 & Regulation No. 2 of 2012	3	340/Pid.B/2015/PN.Stb
364	0.3	364	0.3	3/Daf.Pid.C/2013/PN.Slk
362	2.3	364	3	33/Pid/C/2013/PN.Smd
363(1) 4	1.6	363(1) 4 & Regulation No. 2 of 2012	1.6	191/Pid.B/2015/PN.Stb.

This indicates that judges tend to avoid imprisonment but, at the same time, are also reluctant to impose fines as encouraged by the Regulation, perhaps because, as discussed in Chapter 6, they believe most of the accused cannot afford them, and so will eventually serve time in prison in lieu of paying a fine.

[734] The length of the pre-trial detention is not mentioned in detail in this case. However, where the length of imprisonment was odd, for example, fifty-three days, it is safe to assume that it was identical with the duration of pre-trial detention.

Supreme Court Regulation No. 2 of 2012 was also used to reject or to dismiss minor offence cases that involved charges under other provisions. For example, in a case concerning embezzlement of approximately Rp2.3 million, the prosecutor charged the defendant with simple embezzlement (Article 372). On the defence lawyer's petition, the court dismissed the case due to wrong application of the law.[735] In another case, the prosecutor refused to process minor offence cases that had been brought under the wrong provisions by the police.[736]

Judges also considered the *raison d'être* for the enactment of Supreme Court Regulation No. 2 of 2012 in determining the severity of punishment for small offences that did not actually fall under the regulation. For example, the Ranai District Court meted out a light sentence to a recidivist burglar that was significantly lower than the prosecutor's sentence recommendation, reasoning that, although the case was concerned with burglary and reoffending (and so could not formally be dealt with under the Regulation), the spirit of the Regulation should be taken into consideration, given the loss was only Rp2.2 million.[737]

However, there were also cases that, while mentioning the Regulation, departed from it for various reasons, as shown in Table 8.3 below.

[735] Wates District Court Decision No. 114/Pid.B/2014/PN.Wat. The Jogjakarta High Court affirmed the decision in the appeal process (Decision No. 2/Pid.Plw/2015/PT.Yyk). See similar decision in Yogyakarta District Court Decision No. 85/Pid.B/2016/PN.Yyk.

[736] 'Kejari Medan Tolak 11 SPDP dari Penyidik Polri Terkait Tipiring', *Sinar Indonesia Baru* (online), 14 February 2014 <https://hariansib.com/Medan-Kita/Kejari-Medan-Tolak-11-SPDP-Dari-Penyidik-Polri-Terkait-Tipiring>.

[737] Decision No. 6/Pid.B/2014/PN. Rni [17]. The defendants were sentenced to between four and five months of imprisonment, far below the recommended sentences, which were one and a half years and two years. The court also took into account the fact that the nature of the losses did not hinder the victims from conducting their daily activities, and that the victim was out of town during the offence, as reasons for imposing lenient sentences.

Table 8.3: Decisions that Deliberately Departed from Supreme Court Regulation No. 2 of 2012

District Court & Case Number	Loss (Rp)	Charge		Decision		Length of Detention (months)	Reasons for Departure
		Ground (article)	Recommended Sentence (months)	Ground (article)	Sentence (months)		
Semarang District Court (Decision No. 525/ Pid.B.2014)	1,420,000	362	18	362	10	4	The court rejected the defence lawyer's argument that the case involved minor theft and so should be processed as a 'fast proceeding', and stated that the prosecutors were entitled to process the case under the theft provision (Article 362). It did not comment on the small nature of the loss in the case.
Solok District Court (Decision No. 11/ Pid.B/2012)	470,500		10	362	5	3.8	The majority of judges convicted the defendant of theft, with one dissenting opinion arguing the case should be tried under Supreme Court Regulation No. 2 of 2012.
Karanganyar District Court (Decision No. 52/Pid.B/2014)	250,000	363(1) 4	8	363(1) 4	4	3.8	The court rejected the defence lawyer's argument for applying the regulation, reasoning that since the offence was done in a mosque where the mosque's employee lived, it should be considered 'an enclosed yard where a dwelling stands'.
Sekayu District Court (Decision No. 106/ Pid.B/2015)	500,000		6	363(1) 4	4.5	4.3	The court rejected the defence lawyer's argument for applying the regulation, reasoning that it only applied to minor theft under Article 362, not aggravated theft (theft committed by multiple offenders (Article 363(1) 4), as in the case at hand.
Mungkid District Court (Decision No. 120/ Pid.B/2014)	764,000	362	8	362	3	2.3	The court acknowledged that the case should be tried under Supreme Court Regulation No. 2 of 2012 but still convicted the defendant of simple theft, as charged by the prosecutor, without providing any reasoning.

There are some similarities in all cases in Table 8.3 above where the courts expressly refused to apply Supreme Court Regulation No. 2 of 2012. First, all were brought under non-minor offences provisions and the defendants were detained prior and during trial, most of them for more than three months. Further, in the Karanganyar, Sekayu and Mungkin District Court decisions, although the judges departed from the Regulation, the lengths of the prison terms almost mirror the duration of the detention. In the Mungkid District Court decision, in particular, the judges clearly acknowledged and agreed that the defendant should be sentenced according to the minor theft provisions.[738] However, perhaps because the defendant was charged with simple theft, the judges seemed reluctant to apply the Regulation but nevertheless sentenced the defendant to just three months of imprisonment. This was far below the prosecutor's recommendation but still within the Regulation's penalty range.

In some cases, the courts did not apply the Regulation because they misinterpreted it (Decision No. 106/Pid.B/2015/Sky), or because the defence lawyer and the judges disagreed about whether the case should be considered a minor offence (Decision No. 52/Pid.B/2014/PN.Kray). Both issues are now discussed in more detail.

2.2. (Mis)interpretation and Inconsistency

Years after the enactment of Supreme Court Regulation No. 2 of 2012, law enforcement officials and judges still have different opinions about what is considered minor theft under Article 364 of the KUHP. As mentioned, according to the KUHP and the Regulation, (simple) theft (Article 362) and some aggravated thefts – those committed by more than one perpetrator (Article 363(1) 4) or done with some sort of force to get into the site of the crime or to get the property (Article 363(1) 5) - are considered minor theft, so long as the value of the stolen goods is less than Rp2.5 million and the theft is not perpetrated in a dwelling or an enclosed yard where a dwelling stands.[739] However, not every judge comprehends this simple proposition.

Judges from Sekayu District Court, for example, rejected defence arguments for applying the Regulation with just one line of reasoning - that the Regulation is applicable only to petty theft under Article 362, not aggravated theft under Article 363(1) 4 (theft by multiple offenders), as in the case at hand.[740] Similar mistakes were made by a Supreme Court Justice who was actually sympathetic to an accused charged with aggravated theft for stealing 30 kg of rubber tree sap worth around Rp750,000. At first instance, the judges agreed with the charge but only imposed two months of imprisonment, instead of one year as recommended by the prosecutor, which was then reinforced by the High Court on appeal.[741] On cassation, the Supreme Court affirmed the High Court decision. One Justice dissented. He said that since the offender was young and still attending school,

[738] Decision No. 120/ Pid.B/2014/Pn.Mkd [21].

[739] Soesilo states that daytime burglary, as long as the amount of loss is still within the definition of minor theft, should be considered minor theft. See Soesilo (n 374) 218. However, this interpretation is in conflict with Article 343 of the KUHP, which clearly excludes petty theft in a dwelling from being considered minor theft.

[740] Decision No. 106/ Pid.B/2015/PN.Sky [22].

[741] Tebing Tinggi District Court Decision No. 403/Pid.B/2012/PN.Ttd and Medan High Court Decision No. 435/Pid/2012/PT.Mdn as quoted in the Supreme Court Decision No. 1410 K/Pid.Sus/2013 [3-4].

imprisoning him would jeopardise his future.[742] More importantly, he maintained that the loss caused by the offence was relatively small and still within the Regulation's thresholds.[743] However, instead of declaring that the case should be dismissed for wrong application of the law, he proposed only a lenient punishment, a suspended sentence, reasoning that:

> Article 364 cannot be used in the case at hand because the defendant, in committing the offence, was not alone, but (acted) together with other defendants … This makes the offence fall into the category of aggravated offence (*vide* Article 363(1) of the KUHP).[744]

The boundary between minor theft and other theft-related offences is less clear when the act is done in 'a dwelling or in an enclosed yard where a dwelling stands' (Articles 364 and 363(1) 3). Soesilo, a leading commentator on the KUHP, defines this phrase as follows

> 'a dwelling' (*woning*) = a place that is used to rest (*berdiam*) day and night, meaning to eat, sleep, etc. A warehouse or a store that is not used to rest day and night is not considered 'a dwelling', while a shed, train cart or boat that is used, day and night, as a residence (*kediaman*) is included in a definition of a dwelling. An enclosed yard = a yard with clear marks that surround it, such as a fence, plants, etc.[745]

Sugandhi, another KUHP commentator, includes 'room' (*petak kamar*) in the definition of 'dwelling', as long as it is used as a place to rest by day and night.[746] No firm Supreme Court case law (*yurisprudensi*) offers a definition of this term. All these examples indicate that the term 'dwelling' refers to a particular building that is primarily used to rest and sleep. The question is whether this is true of a building that is not mainly designed for resting and sleeping but can be used, or has facilities, for such use.

In 2014, the Karanganyar District Court convicted a man of night burglary for stealing a Rp250,000 bicycle parked in a mosque yard (Article 363(1) 3). The judges declined to apply the Regulation, reasoning that because the offence was carried out in a mosque yard where the mosque's employees lived, it should be considered theft in 'an enclosed yard where a dwelling stands' (burglary).[747] On the other hand, the Surakarta District Court sentenced an offender who stole Rp64,000 cash from a mosque charity box for simple theft (Article 362) even though the prosecutor's primary charge was aggravated theft (Article 363(1) 3) because the offence was done in a mosque and, prior to the offence, the offender stole the key to the charity box from the mosque employee's room, located in the area of the mosque.[748] This decision was later affirmed on appeal by the High Court.[749] It is not clear why these courts did not apply the Regulation if they were convinced that the

[742] Supreme Court Decision No. 1410 K/Pid.Sus/2013 [7].
[743] Supreme Court Decision No. 1410 K/Pid.Sus/2013 [6].
[744] Supreme Court Decision No. 1410 K/Pid.Sus/2013 [6].
[745] Soesilo (n 374) 217.
[746] R. Sugandhi, *Kitab Undang-undang Hukum Pidana (K.U.H.P.) dengan Penjelasannya* (Jakarta: Usaha Nasional, 1981) 379.
[747] Decision No. 52/Pid.B/2014/PN.Kray [18].
[748] Surakarta District Court Decision No. 248/Pid.B/2012/PN.Ska, as quoted in Supreme Court Decision No. 702 K/Pid/2013.
[749] Semarang High Court Decision No. 364/Pid/2012, as quoted in Supreme Court Decision No. 702 K/Pid/2013.

mosque employee's room or the mosque was not a 'dwelling'. When the prosecutor brought this case to the Supreme Court, it rejected the appeal, simply stating that the offence was indeed a violation of Article 362 of the KUHP and the lower court decisions were applying the law correctly, despite their inherent contradiction.[750] In several other cases, also concerning charity box theft in mosques, prosecutors were more concerned with the issue of the thieves having broken open the box to get the money, not where the offences were done, and so charged the thieves under Article 363(1) 5 – theft by force– rather than burglary.[751] In each case, the courts accepted these charges.

Several law enforcers and judges also included petty theft on construction sites[752] and plantations[753] as burglary, probably because workers usually stayed nights in these locations. However, in many theft cases on plantations,[754] police and judges applied the Regulation and/or interpreted plantations as not being a dwelling or an enclosed yard where a dwelling stands.[755] In some cases, the same judges have even reached inconsistent interpretations. For example, a panel of judges in Rantau Prapat District Court convicted a man who had stolen approximately Rp500,000 (A$50) worth of palm fruit from a private plantation of aggravated burglary (Article 363(1) 3 and 4), interpreting the plantation area to be 'an enclosed yard where a dwelling stands'.[756] However, in other cases, they applied the Regulation to thefts in plantation areas, suggesting that they did not view them as an enclosed yards.[757]

As a side remark, from a pragmatic legal reasoning perspective, it is understandable that police, judges and victims (particularly corporations) would consider some kinds of palm oil fruit theft cases as not being minor, even where the stolen fruits are worth less than Rp2.5 million. This is not only for the reason, as discussed, that they occurred in an enclosed yard, but also because some of them were carried out in ways that indicated a high level of planning, including the offenders bringing a truck to carry the stolen goods.[758]

[750] Supreme Court Decision No. 702 K/Pid /2013 [9].
[751] See, for example, South Jakarta District Court Decision No. 1326/Pid.B/2012/PN.Jkt.Sel, Tangerang District Court Decision No. 1945/Pid.B/2014/PN.Tng; Central Jakarta District Court Decision No. 86/Pid.B/2014/PN.Jkt.Pst and Bandung District Court Decision No. 50/Pid.B/2015/PN.Bdg.
[752] Tangerang District Court Decision No. 2512/Pid.B/2014/PN.Tng.
[753] See, for example, Rantau Prapat District Court Decision No. 179/Pid.B/2015/PN.Rap; Tebing Tinggi District Court Decision No. 348/Pid.B/2015/PN.Tbt; Lubuk Basung District Court Decision No. 06/Pid.B/2015/PN. Lbb.
[754] There are approximately twenty theft cases in plantations in the studied sample that were tried by minor theft provisions.
[755] Stabat District Court Decision No. 191/Pid.B/2015/PN.Stb [12].
[756] Rantau Prapat District Court Decision No. 242/Pid.B/2015/PN.Rap.
[757] See, for example, Rantau Prapat District Court Decisions Nos. 98/Pid.C/2015/PN.Rap; 176/Pid.C/2015/PN.Rap; 59/Pid.C/2015/PN.Rap.
[758] See, for example, Pasaman Barat District Court Decision No. 62/Pid.B/2016/PN-Psb. In this case, the defendants were charged with aggravated theft even though the amount of stolen palm fruits was only Rp2,400,000. Despite that, the offence was well planned and well equipped. For instance, the offender already knew where the company left its harvest before transferring it to another place. They also brought a truck to carry the fruit (Decision No. 62/Pid.B/2016/PN-Psb [3-4]).

2.3. Calculation of Loss and Potential Mark-up

Another key legal issue in the implementation of the Regulation concerns calculation of loss. Usually, law enforcers and judges determine losses solely on the basis of the testimony of the victim, without questioning its accuracy or reliability and the method by which it is calculated, hence creating the possibility of error. For example, in one case, the prosecutor calculated the loss using the original or purchase price of the stolen goods – in this case, used cellular phones - and came to a total loss of Rp3.6 million, and therefore charged the offender with theft.[759] The court, correctly, argued that the loss should be calculated based on the current market price of the phones, which were below Rp2.5 million and, accordingly, dismissed the charge.[760]

There is also a possibility that a victim will mark-up loss, with or without the knowledge of law enforcers and judges to exceed the threshold for minor property offence provisions. As an illustration, in a case tried by the Rantau Prapat District Court, the defendant was charged under a non-minor offence provision for stealing palm fruit, even though the market price of the fruit, as acknowledged by the prosecutor, was only Rp450,000.[761] Nevertheless on top of that price, the prosecutor, based on the victim's testimony, added the production cost of growing the fruit, such as fertiliser and maintenance and so came up with a total loss of 'approximate Rp2.5 million',[762] allegedly to avoid applying the Regulation. Of course, these production costs should already be included in the market price. Somehow the judges approved this without questioning the odd calculation, and did so despite the fact that a Rp2.5 million loss is still within the threshold of loss for minor offences. Two of the judges in the panel also agreed with a rather odd calculation of losses in other palm oil fruit theft cases, as shown in Table 8.4 below.

Table 8.4: Value v. Amount and Weight of Stolen Palm Fruit

Stolen Goods Details			Year	Decision
Value (Rp)	**Quantity** (bunch)	**Weight** (kg)		
2,538,000	47	1,410	2016	594/2016/PN Rap
2,625,000	70	1,750	2016	498/2016/PN Rap
2,700,000	90	N/A	2015	446/2015/PN Rap
2,652,000	120	N/A	2015	464/2015/PN Rap
2,611,200	136	N/A	2016	07/2016/PN Rap
2,650,000	151	2,039	2015	111/2015/PN Rap
2,655,400	166	1,870	2015	512/2015/PN Rap

[759] Yogyakarta District Court Decision No. 85/Pid.B/2016/PN.Yyk [3], in conjunction with Supreme Court Decision No. 963 K/Pid/2016 [4].
[760] Yogyakarta District Court Decision No. 85/Pid.B/2016/PN.Yyk [3], in conjunction with Supreme Court Decision No. 963 K/Pid/2016 [4].
[761] Decision No. 986/Pid.B/2015/PN Rap.
[762] Decision No. 986/Pid.B/2015/PN Rap [4-5].

The total value of losses in each case in Table 8.4 was held by the judges involved to be just above the loss criterion in the Regulation. However, the actual amount of the palm fruit bunches that were stolen in each case differed, from just 47 bunches to 166 bunches. Since all the offences were carried out in similar areas and assessed by similar judges in the same court, there are only three possible explanations: there was fluctuation of price over time; there were different quantities and qualities of fruits in each bunch; and/or, the losses – particularly the weight in each bunches and the market price of the fruit - were arbitrarily determined by the victims, including to avoid the application of the Regulation. One cannot determine the actual losses from the text of the decisions alone because, as in most other decisions, the text usually only reveals the total losses and the weight and/or the volume of the fruits, without considering the market price of the stolen fruits.[763]

Some judges in Simalungun District Court seemed to be aware of these problems and tried to minimise them by ordering prosecutors to bring higher-level managers of the company to testify about the actual losses caused by the offence.[764] However, the Head of the District Court, at the request of the heads of the local police and prosecutor's office (who argued such an order created difficulties for their officers), agreed to only request them to bring the 'field supervisor', a lower-level management figure.[765] Interestingly, the heads of the local police and prosecutor office also requested the Head of the District Court to apply Law 39 of 2014 on Plantations in deciding palm oil theft cases.[766] This is another important issue in the enforcement of the Regulation, and is discussed in the next section.

2.4. Charging Minor Offenders under Special Statutes

As discussed in Chapter 3, criminal penalties are stipulated not only in the KUHP, but also in numerous 'special' statutes. The main objective of enacting special statutes is to add new offences that are not yet covered or penalised by the KUHP. However, some of the statutes also criminalise acts that are similar to what is already prohibited in the KUHP, or at least define the offences in a broad and vague manner that can be applied to offences also proscribed in the KUHP, such as minor theft, but apply a more severe penalty. As a consequence, police and prosecutors can, and in several cases have, used special statutes to avoid implementing the Regulation. Putting aside the obvious injustice, is this a correct legal path?

As an illustration, Article 107 d of Law 39 of 2014 on Plantations states that any person who, without right, 'harvests and/or picks up crops' faces a maximum of four years' imprisonment or a four billion rupiah fine. In one case, the Stabat Prosecutors Office

[763] In several cases, the judges even mention the type of goods without stating their values: Central Jakarta District Court Decision No. 1493/Pid.B/2014/PN.Jkt.Pst, Bandung District Court Decision No. 772/Pid.B/2015/PN.Bdg, and South Jakarta District Court Decision No. 1329/Pid.B/2012/PN.Jkt.Sel. The only case concerning the palm fruit theft that I came across that assessed the actual loss in great detail was Muaro District Court Decision No. 72/Pid.B/2015/PN.Mrj.

[764] 'Polisi Minta Tidak Berlakukan Perma Tapi UU Perkebunan', *Hetanews* (online), 26 February 2018 <https://www.hetanews.com/article/93930/polisi-minta-tidak-berlakukan-perma-tapi-uu-perkebunan>.

[765] Ibid. As explained by Li, field supervisors usually are part of the so-called 'mafia system' of bribery and corruption in palm oil plantations. See Tania Murray Li, 'After the Land Grab: Infrastructural Violence and the "Mafia System" in Indonesia's Oil Palm Plantation Zones' (2017) *Geoforum* 4.

[766] 'Polisi Minta Tidak Berlakukan Perma Tapi UU Perkebunan' (n 763).

charged a man with 'stealing' Rp150,000 worth of palm fruits under the above provision and recommended ten months of imprisonment. The prosecutor described the offence as follows:

> the defendant, together with Zulpandi and Fajar Nugraha … took palm fruit belonging to Sewangi Sejati Ltd ... by entering their plantation with a sickle and when they were already on the site, the defendant … started to look for the ripe fruit and then Fajar Nugraha harvested six bunches of fruit with his sickle, which were then collected by the defendant … and carried them away.[767]

Clearly, the act was identical to (minor) theft and, in most cases, judges would consider it as such. However, since the prosecutor only charged the defendant under Article 107(d) of the Plantation Law and the defendant's acts satisfied all elements of that crime, the judges, perhaps, thought that they had no choice but to apply that Law. If the prosecutor offered alternative charges, including minor theft, then the court may have been able to avoid applying Article 107 d. For example, in a petty illegal logging case that caused Rp691,000 loss, the prosecutor indicted the defendant with alternative charges: illegal logging (under Law 18 of 2013 on the Prevention and Eradication of Illegal Logging) or simple theft (Article 362). The district court sentenced the man under Article 364 of the KUHP since the loss was within the definition of minor theft. The decision was then modified by the High Court, which convicted him of simple theft.[768] The Supreme Court affirmed the High Court decision without offering substantial reasoning.[769] While it is unclear why the Supreme Court did not sentence the defendant for minor theft, at least this decision can guide lower court judges to consider minor illegal logging as theft, where applicable.

C. Explaining the Data

The data show that the way a case is processed prior to trial significantly influences the enforcement, or lack of enforcement, of the Regulation. All minor offence cases that were charged and registered (by the court's clerk) as such, were always decided according to the regulation. The reverse was also true, with few exceptions.[770] The question is: why were the majority of minor offence cases not treated in this way in the first place? More importantly, why are most judges, regardless of how the cases were handled before trial, not applying the regulation? Surely ensuring defendants are pursued under the most appropriate law in all the circumstances is an integral part of their judicial function.

1. Issues in Registration, Distribution of Cases and Prosecutor's Charge

According to internal court procedures, the registration and distribution of criminal cases should occur as follows. When the prosecutor submits an indictment to the court, the Head Clerk for Criminal Cases (*Panitera Muda Pidana*) should review and register it in a register

[767] Stabat District Court Decision No. 698/Pid.Sus/2015/PN.Stb [11].
[768] Sumenep District Court Decision No. 307/Pid.Sus/2015/PN.Smp and Surabaya High Court Decision No. 02/Pid/2016/PT.Sby as quoted in Supreme Court Decision No. 725 K/Pid/2016 [2-5].
[769] Supreme Court Decision No. 725 K/Pid/2016 [7-8].
[770] As shown in Table 3, there were only a few cases where the judges departed from non-minor theft or embezzlement charges and applied the regulation.

book.[771] If the case involves a minor offence, and should, therefore, be tried by 'fast procedure', the clerk should register it as 'Pid.C' (*Pidana Cepat*) case.[772] On the other hand, if it involves other offences, like theft or aggravated theft, it should be registered it as 'Pid.B' (*Pidana Biasa*) case, and must be tried under the normal procedure. Next, the clerk sends the list of cases to the head of the district court to be distributed to either a single judge or a panel of judges, depending on the type of procedure.[773] Problematically, all minor offence cases that were not tried under the Regulation were registered as non-minor offence cases.

A possible explanation, one prosecutor suggested, is that the losses stated in the indictment submitted by the prosecutors (which are solely based on the police report or BAP (*Berita Acara Pemeriksaan*)), may have exceeded Rp2.5 million, and so were registered for normal proceedings (as non-minor offences cases).[774] Only later in the hearings did the prosecutors and judges become aware of the actual losses in the cases. If that were the case, however, why did prosecutors not recommend lenient sentences, equal to, or less than, three months imprisonment as the maximum penalty for those offences? A more plausible explanation is that the prosecutors knew that the losses were Rp2.5 million or less but still charged the offenders with non-minor offences and the court clerks simply registered them without thoroughly screening the indictment letters to check the actual losses, or mistakenly assumed them to be non-minor cases.

Despite all this, judges could still have processed those cases under normal proceedings but departed from the charges at the point of sentencing in order to apply the Regulation. While according to the Criminal Procedural Code judges should base their decisions on the provisions used in the indictment,[775] as discussed in Chapter 4, in firm jurisprudence (693/K/Pid/1980), the Supreme Court has allowed courts to depart from a charge as long as they apply a similar provision to that used by the prosecutor, but with a lower penalty.[776] Further, even without relying on this Supreme Court decision, judges could have accepted the charge but sentenced the defendant to three months or less to match the maximum penalty in the Regulation, but did not do so.[777] In short, although how cases

[771] Mahkamah Agung, *Pedoman Teknis Pelaksanaan Administasi dan Teknis Peradilan (Buku II Mahkamah Agung RI)* (Jakarta: Mahkamah Agung, 2007) 228.
[772] See attachment to the Chief Justice Decree No. 44/KMA/SK/III/SK/2014 on the Template of Decision and Standards of Case Registration.
[773] *Pedoman Teknis Pelaksanaan Administasi dan Teknis Peradilan* (n 770) 228.
[774] Interview with Prosecutor #17 (Melbourne, 12 February 2018). The prosecutors prepare their case solely based on the information gathered by the police during the investigation and presented by the police in the BAP. They are basically not involved in the investigation process, let alone the interviewing of suspects or witnesses. According to the Criminal Procedural Law, only the investigator (the police) has the power to call upon and interview a suspect or a witness (Article 7(1) g). Law 16 of 2004 on the Prosecutor's Office gives a new power to a prosecutor to conduct a 'pre-charge' (*prapenuntutan*) process, that is an addition to 'investigation' (*pemeriksaan tambahan*), which, in practice, may include interviewing witnesses. However, this power can only be exercised in complex cases, or cases involving serious public and state concerns (see Elucidation to Article 30(1) e).
[775] Article 182(3) and (4) of the Criminal Procedural Law.
[776] This principle was drawn from a case where the Supreme Court found that the evidence presented in this case only showed that the defendant committed an aggravated theft (Article 363(1)), although the prosecutor charged him with robbery (Article 353(1) and (2)). See discussion of this issue in Chapter 4.
[777] As mentioned, only six out of seventy-seven defendants received three months of imprisonment or less in Bandung, Tangerang and Central and South Jakarta District Courts decisions.

are registered and distributed appears to be influential, there must be other, more determinative factors that prompted judges to disregard the Regulation. This will be discussed next.

2. Preventing Appeal and Judicial Corruption

Like the general findings discussed in Chapters 6 and 7, judges were mainly influenced by the prosecutors' sentence recommendation in sentencing minor property offence cases. Of all the studied Bandung, Tangerang and Central and South Jakarta District court decisions, in only one case was the sentence less than half of the prosecutor's recommended sentence, and two sentences were exactly half of them. As mentioned before, this practice relates to judges' fear of appeal if they sentence offenders below the prosecutor's appeal threshold or with provisions not used by the prosecutors.

As discussed before, offenders usually do not have the legal knowledge or legal representation to challenge unjust sentences.[778] This makes judges less worried about disregarding the Regulation. The Head of Rantau Prapat District Court said when asked by a journalist about his decisions to detain minor theft offenders and assign the cases to be tried in normal proceedings 'I will not comment on these matters. Who are you to complain when the accused persons themselves did not object?'.[779]

In some, very particular, cases, judicial corruption also influenced the sentencing of minor property offences. A former Head of a District Court interviewed, for example, mentioned that he was once offered a monthly payment by a palm oil plantation's head of security to impose a relatively severe punishment of more than a year on petty palm fruit thief. The security head wanted to scapegoat them so that he could 'steal' the fruit on a large scale and blame the losses on them. The judge refused, although the briber informed him that some of his fellow judges had already taken the offer. It is safe to say that the briber also paid the police and the prosecutor for the same purpose. This, together with the company's interest in creating deterrence, might be one of the explanations for the apparent mark-up of losses, charging an offender under special statutes, and inconsistency in legal interpretation in the palm fruit theft cases, discussed above

3. Smoothing the Investigation and Trial

In principle, the Criminal Procedural Code only allows police and other law enforcement agencies to detain an offender charged with committing a crime punishable by five years of imprisonment and above when certain conditions are met. Accordingly, offenders whose cases fall within the Regulation should not be detained.[780] Police see this as a disadvantage. They expect that, if a suspect is not detained, police will need more

[778] There was only one defendant represented by a lawyer in the Bandung, Tangerang, Central Jakarta, and South Jakarta District Court cases referred in this study.
[779] 'Menyoal Sidang Kasus Pencurian Senilai Rp 98 Ribu di PN Rantau Prapat…', *Medansatu* (online), 17 March 2016 <http://medansatu.com/berita/16273/menyoal-sidang-kasus-pencurian-senilai-rp-98-ribu-di-pn-rantauprapat/3/>.
[780] Article 21(4) of the Criminal Procedural Code. The police, immediately after an arrest, can only hold a minor offence suspect for a day (art. 19[1]), for, among others, identification purposes, questioning, or simply to limit his or her movement for a short period of time.

personnel and a bigger budget (which are usually not available) for the case, including to bring suspects in for interrogation and trial.[781] Being unable to detain offenders also diminishes opportunities to extract illegal payments from the potential detainee, as will explained below. Besides, sometimes there is a legitimate reason to detain petty offenders, such as preventing public retaliation (lynching).[782] In short, it is often more practical and beneficial to charge an offender with non-minor offence provisions to enable detention.[783] Alternatively, as happened in several cases, police sometimes simply release or discharge the accused, hence frustrating the public and victims.[784] Not all police take such shortcuts, of course. Some process the cases under minor offence provisions, as shown earlier, or even resolve them through mediation between the offender and the victim.[785]

4. Disagreement with the Regulation, Mindset Issues, and Draconian Laws

Not every law enforcer and judge are pleased with Supreme Court Regulation No. 2 of 2012 for various, sometimes interrelated, reasons. Several judges and prosecutors, for example, said that the standard of loss for an offence to be considered minor was too high, and therefore unjust for the majority of victims, who are not well off. A prosecutor even challenged the Regulation in an open court hearing, arguing that:

> The prosecutor does not agree with the absolute implementation of Article 1 of the Supreme Court Regulation 2 of 2012 … it should be applied on a case by case basis, since individual victims' response to (financial) loss is relative (from one victim to

[781] It is commonly argued that many petty offenders do not have permanent residences or any type of identification that would enable the law enforcement officers and judges to locate them for investigation or trial purposes. See, for example, 'Perma Tipiring Soal Hapus Penahanan Sulit Diterapkan', *Okezone* (online), 3 March 2012 <https://news.okezone.com/read/2012/03/02/519/586111/perma-tipiring-soal-hapus-penahanan-sulit-diterapkan>.

[782] 'Kasus Pria Dibakar, Polisi Sebut Warga yang Main Hakim Sendiri Bisa Kena Pidana', *Kompas* (online), 5 August 2017 <https://megapolitan.kompas.com/read/2017/08/05/13532951/kasus-pria-dibakar-polisi-sebut-warga-yang-main-hakim-sendiri-bisa-kena>.

[783] Commenting on how the police and prosecutors dealt with the Asyani case, a member of the DPR suspected that law enforcers were intentionally avoiding application of Supreme Court Regulation No. 2 of 2012 so they could detain the suspect. 'Kasus Tipiring Tetap Diproses Polri Menyatakan Sudah Melakukan Mediasi antara Perhutani dengan Nenek Asyani', *Republika* (online), 19 March 2015 <https://www.republika.co.id/berita/koran/hukum-koran/15/03/19/nlg7ci-kasus-tipiring-tetap-diproses-polri-menyatakan-sudah-melakukan-mediasi-antara-perhutani-dengan-nenek-asyani>. In this case, Asyani, a 63 years old woman, was charged with "stealing" logs owned by the state-own enterprise. The value of the stolen logs was not clear, but some argued they were less than Rp2.5 million (A$250). Instead of charging the woman with theft (or possible minor theft) under the KUHP, the police and prosecutor charged her with violating Article 12 d and 83(1) a Law 18 of 2013 on Prevention and Eradication of Forest Destruction (which carries a minimum of one year of imprisonment and a fine of Rp500 million (A$50,000) for possessing (*menguasai*) or owning (*memiliki*) illegal log. See also 'Sidang Kasus Pencurian Jati Nenek Asyani Menangis Histeris', *Tempo* (online), 12 March 2015 <https://nasional.tempo.co/read/649417/sidang-kasus-pencurian-jati-nenek-asyani-menangis-histeris>.

[784] 'Copet di Komuter: Percuma Saja Diserahkan Polisi 4', *Tempo* (online), 6 July 2015 <https://metro.tempo.co/read/681303/copet-di-komuter-percuma-saja-diserahkan-ke-polisi-4>; 'Parah, Dilepaskan Polisi, Terduga Maling di Padang Serang Balik Warga', *Haluan* (online), 15 July 2017 <https://www.harianhaluan.com/news/detail/65826/parah-dilepaskan-polisi-terduga-maling-di-padang-serang-balik-warga>.

[785] 'Bocah yang Mencuri Susu Demi Gizi Adiknya Akhirnya Dibebaskan', *Kompas* (online), 3 December 2013 <https://regional.kompas.com/read/2013/12/03/1002278/Bocah.yang.Mencuri.Susu.demi.Gizi.Adiknya.Akhirnya.Dibebaskan?page=all>.

another), on one hand, a Rp1,420,000 loss is big for one person but on the other hand, for another person, it is not.[786]

There is also concern that the Regulation will push up crime levels. Generally, law enforcers and judges, like lawmakers and the public, believe that the level of criminal sanction and punishment severity are closely related to the level of crime deterrence,[787] despite lack of evidence supporting this conclusion.[788] As mentioned in Chapter 7, many judges (and prosecutors) view theft as a serious offence that disturbs the public peace (*meresahkan masyarakat*) and disrupts business (*mengganggu usaha/bisnis*). Thus, applying the Regulation, with its light penalties, will, on this perception, induce, or, at least, not deter offending or reoffending.[789] This perception in line with prosecutors' and judges' pro-victim mindset, discussed in Chapter 6 and 7.

This condition is worsening with the enactment of various draconian special statutes, such as the Plantation Law and the Prevention and Eradication of Illegal Logging Law mentioned earlier. With their strong 'deterrence paradigm' to protect business interests, these laws disregard the objectives of the Regulation by creating offences that can be, and are, applied to minor property offences.[790]

5. Lack of Seriousness of the Supreme Court

The courts' failure to apply the Regulation can also be the result of the lack of accountability mechanisms. The Supreme Court is aware of some of the problems in the enforcement of the Regulation but seems to blame them entirely on other law enforcement agencies.[791] More concerningly, Supreme Court judges themselves also ignore the Regulation. As shown earlier, they neither correct lower court decisions that

[786] Semarang District Court Decision No. 525/Pid.B/2014/PN.Smg. See similar comments from the Head of Pematangsiantar Prosecution Office made during a media interview. See 'Kajari Pematangsiantar Nilai Dalam Perma 2 Tahun 2012 Terlalu Tinggi', *Tribunnews* (online), 28 March 2014 <https://medan.tribunnews.com/2014/03/28/kajari-pematangsiantar-nilai-dalam-perma-2-tahun-2012-terlalu-tinggi>.

[787] 'Maling Minyak Tak Pernah Jera Karena Dihukum Ringan', *Detik* (online), 13 November 2012 <https://finance.detik.com/energi/d-2090070/maling-minyak-tak-pernah-jera-karena-dihukum-ringan>.

[788] See, for example, Klepper and Nagin (n 57); Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence?' (2010) 100(3) *Criminal Law and Criminology* 765.

[789] 'Respon Kejaksaan dan Polri atas Perma Tipiring', *Hukumonline* (online), 4 March 2012 <<https://www.hukumonline.com/berita/baca/lt4f5342a22d42e/respon-kejaksaan-dan-polri-atas-perma-tipiring/>.

[790] The 'theft provision' in the Plantation Law, for example, was intended to respond to the many theft cases that have disrupted the sector. See, for example, 'Jejak Pasal Pidana UU Perkebunan', *gresnews* (online), 30 August 2015 <http://www.gresnews.com/berita/hukum/101520-jejak-pasal-pidana-uu-perkebunan/>. I argue that this law, which was enacted two years after the issuance of Supreme Court Regulation No. 2 of 2012, was deliberately aimed to prevent the application of the Regulation in minor palm fruit theft cases. This is evident from the fact that it provides a shorter maximum penalty stipulated for 'plantation theft' (four years of imprisonment) than the five years maximum penalty for 'general theft' in the KUHP. Had the drafters been seriously concerned to deter offences, they would have prescribed longer imprisonment terms. This shows that their real interest was simply to ensure that minor palm fruit theft cases are processed under this special, more punitive, law, not Supreme Court Regulation No. 2 of 2012. After all, lawmakers know that judges very seldom impose maximum imprisonment penalties anyhow.

[791] 'MA Keluhkan Pelaksanaan Perma Tipiring', *Hukumonline* (online), 23 September 2013 <https://www.hukumonline.com/berita/baca/lt5240256b79ffe/ma-keluhkan-pelaksanaan-perma-tipiring/>.

sentence minor offence cases under other provisions nor do they respond to the objections made by defendants.[792]

The Supreme Court has also failed to provide guidance to assure consistent legal interpretation. It has not answered important legal questions, such as the definition of 'dwelling', and has even wrongly interpreted simple clauses in the Regulation. Further, it has not responded to the practice of the police and prosecutors of pursuing minor offences using provisions in special statutes that have more severe penalties.

D. Conclusion

This chapter has shown that injustice for petty offenders is not simply an issue of weak regulation. Four years after the enactment of Supreme Court Regulation No. 2 of 2012, many minor theft and embezzlement cases tried by Bandung, Tangerang and Central and South Jakarta District courts, and also in other courts (including the Supreme Court itself), were still conducted under non-minor offence provisions. Most of the defendants were detained prior to and during the trial. The regulation was wrongly and inconsistently enforced, and judges avoided it by inflating the losses caused by the offences or relying on special statutes. On the positive side, this study demonstrates that judges tended to impose lenient punishments, such as suspended sentences, on petty offenders in cases where the Regulation was applied. Only when defendants were detained prior to trial did judges usually impose imprisonment.

What really matters in sentencing minor property offence cases are complex interrelated extra-legal factors, from how the cases were wrongly registered, to law enforcers' and judges' pragmatic interests in easing their workload - sentencing defendants in accordance with prosecutor's charges and sentence recommendations to avoid their decisions being appealed, and detaining defendants to smoothen the investigation and trial processes. Other factors that lead to non-compliance with the Regulation include: corruption in the criminal justice system; the perception of law enforcers and judges that applying minor offence provisions, with their light sanctions, neither deliver justice for the victim nor deters potential offenders from engaging in crime; lack of proper supervision and guidance from the Supreme Court; and problematic criminal provisions in special statutes.

[792] See previous part for some examples of the above issues. For other Supreme Court Decisions that also did not enforce the regulation, see, Decision No. 133 K/Pid/2013, Decision No. 1042 K/Pid/2015, Decision No. 272 K/Pid/2016, Decision No. 402 K/Pid/2016 and Decision No. 3 K/Pid/2017.

CHAPTER 9
MANOEUVRING THE MANDATORY MINIMUM SENTENCES: JUDICIAL DECISIONS ON CORRUPTION

As shown in Chapter 6, the average sentence imposed in corruption cases was relatively light: 28.12 months. In fact, in 75 per cent of cases, the sentence imposed was under four years, below the minimum penalties in Article 2(1) of Law 31 of 1999 on Corruption Eradication. This is because offenders were "only" convicted under Article 3 (which provides lower minimum penalties), although, as indicated before, the majority of cases satisfied the elements of Article 2(1).

This chapter discusses judges' avoidance of Article 2(1) of the Corruption Eradication Law. It begins by returning to discuss the binding status of mandatory minimum penalties in more detail and problems in the language of Articles 2(1) and 3, as well as the Supreme Court's response to these issues, touched on in Chapters 4 and 5. It then analyses how judges avoided the requirement to impose minimum penalties in Article 2(1) of the law, and why they did so.

A. Minimum Penalties and Problematic Provisions in the Corruption Eradication Law and the Supreme Court's Response

1. Supreme Court's Position on Mandatory Minimum Sentences

As discussed in Chapter 3, since the late 1990s, there has been an increasing trend in Indonesia for the government and the legislature to enact so-called 'special statutes'[793] with mandatory minimum penalties. The formal and most common reason lawmakers give for introducing minimum penalties is creating a stronger deterrent, although many studies have challenged the association of minimum penalties with crime prevention.[794] The Elucidation (*penjelasan*) to Law 31 of 1999 on Corruption Eradication, for example, reads:

> To effectively achieve the objective of corruption prevention and eradication, this Law contains different provisions to the previous Law, including prescribing minimum mandatory sentences, more severe fines and the death penalty.[795]

[793] As explained in Chapter 3, the term 'special criminal statute' (*Undang-undang Tindak Pidana Khusus*) refers to an Act that criminalises particular actions that have not been dealt with, or not sufficiently dealt with, by the general criminal provisions in the Criminal Code, which apply to all persons, time and place (not only to particular members of a class of persons, or in a particular place and time).

[794] See, for example, Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65, 65, 67-8; United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991), cited in Greenblatt, Nathan, 'How Mandatory Are Mandatory Minimums-How Judges Can Avoid Imposing Mandatory Minimum Sentences' (2008) 36 *American Journal of Criminal Law* 1, 1, 4. See also the discussion of the lack of evidence that the severity of punishment or threat of punishment deters crime in Chapter 2.

[795] See also, for example, the Elucidation to Law 18 of 2013 on the Prevention and Eradication of Forest Destruction; the Elucidation to Law 23 of 2004 on the Elimination of Domestic Violence; and the Elucidation to Law 9 of 2013 on the Prevention and Eradication of Terrorist Financing.

Another connected justification is to minimise 'disparity in sentences', which, in the Indonesian context, refers to light charges and punishments for those committing serious offences,[796] including corruption. Even after the introduction of mandatory minimum punishments in the Corruption Eradication Law, prosecutors and judges sentenced below the minimum penalties required in some cases, including by imposing suspended sentences.[797] In 2008 alone, both lower courts and the Supreme Court imposed suspended sentences on at least thirteen offenders, some of whom had caused billions of rupiah of loss to the state.[798]

Part of the reason for this is that before 2012, the Supreme Court had not taken a firm position on how to deal with minimum penalties in general. As shown in Chapter 4, in a leading 2005 decision concerning minimum sentences in Law 39 of 1999 on Human Rights, the Court annulled a High Court decision that departed from the minimum sentence, reasoning that this decision was against separation of power principles, and 'will create bad precedent … and hinder the achievement of the punishment objectives, which are to be beneficial, bring about justice and maintain legal certainty'.[799] However, in the *Kardono* case (2010) the Supreme Court changed its position.

Kardono received Rp2.9 million (A$290) to allow his company to be used by Erwin (the main perpetrator) in a project tender. However, Erwin never completed the project, causing state losses of approximately Rp61 million (A$6,100), which triggered a criminal investigation. The prosecutor charged Kardono under Article 2(1) of the Corruption Eradication Law, which carries a minimum of four years' jail and a Rp200 million (A$20,000) fine. The Supreme Court, however, only imposed a single year's imprisonment, without fines, reasoning that:

1. … the fact that the prosecutor only charged the defendant with Article 2(1) … puts the panel in a dilemma in seeking to impose a just punishment and enforce the law at the same time …
2. … the application of a mandatory minimum penalty … can harm the sense of justice because it is disproportionate as between the culpability of the offender and the state's financial loss and also the gain that the defendant received from the offence, that is Rp2,900,000;
3. … corruption should not be responded to permissively, regardless of the amount of the state loss, but at the same time, imposing sentences that disturb the sense of justice should also be avoided;

[796] See, for instance, the government responses to judicial review of minimum penalties provisions in the Corruption Eradication Law in Constitutional Court Decision No. 39/PUU-X/2012 [17-18]. See also 'Sanksi Berat Disiapkan untuk Pembalak Liar', *Hukumonline* (online), 17 June 2011 <https://www.hukumonline.com/berita/baca/lt4dfa9a802053a/sanksi-berat-disiapkan-untuk-pembalak-liar-/>.

[797] Ismail Rumadan, Johanes Brata Wijaya and Tri Mulyani, *Penafsiran Hakim terhadap Pidana Minimum Khusus dalam Undang-Undang Nomor 31 Tahun 1999 Jo Undang-Undang Nomor 20 Tahun 2001 tentang Tindak Pidana Korupsi: Suatu Kajian Asas, Teori, Norma dan Praktik Penerapannya* (Jakarta: Puslitbang Mahkamah Agung, 2013).

[798] Indonesian Corruption Watch, 'Vonis Percobaan Bagi Terdakwa Korupsi Telah Jadi "Jurisprudensi"?' (Media Release, Jakarta: ICW, 2009).

[799] Supreme Court Decision 06 K/Pid.HAM.AD HOC/2005.

4. In very particular cases, the Supreme Court … can interpret and apply the law in a way that is not fully in line with the spirit and the intention of the drafter of the law, to ensure justice.[800]

Just a few months later, however, the Supreme Court changed its position once again. In an unrelated case, it gave Herlina Koibur four years, for assisting corruption, even though she received just Rp100,000 (A$10) more than Kardono.[801] This raised the issue of whether *Kardono* case was binding.[802] To clarify this, the Supreme Court issued Circular Letter No. 7 of 2012, which explicitly prohibited judges from sentencing below the required penalties and also from imposing suspended sentences in such cases. This Circular also provides guidance on how to apply Articles 2(1) and 3 of the Corruption Eradication Law, to address the problems faced by judges in imposing severe Article 2(1) minimum punishments in minor cases like *Kardono* and *Koibur*, as will be discussed next.

2. Supreme Court's Solution to Articles 2(1) and 3

As discussed in Chapter 5, Articles 2(1) and 3 of the Corruption Eradication are multi-interpretable. Article 2(1) reads:

> Any person who illegally (*secara melawan hukum*) enriches (*memperkaya*) him or herself, another person or a corporation in a way that could damage the state finances and economy is punishable by imprisonment for life, or between a minimum of four years and a maximum of 20 years imprisonment, and fines between a minimum of Rp200,000,000 (two hundred million rupiahs, or A$20,000) and a maximum of Rp1,000,000,000 (one billion rupiah, or A$100,000).

Article 3 defines the elements of the crime in a fairly similar manner, as below:

> Any person, who, with the aim of profiting (*menguntungkan*) him or herself, another person or a corporation, misuses his or her authority, opportunities or means at his or her disposal which arise because of the office and the position he or she holds (*kedudukan dan jabatan*), and by doing so could damage state finances and economy, is punishable by imprisonment for life, or between a minimum of one year and a maximum of 20 years imprisonment and/or fines between a minimum of Rp50,000,000 (fifty million rupiahs, or A$5,000) and a maximum of Rp1,000,000,000 (one billion rupiah).

The critical difference between these two clauses are: first, the meaning of 'illegally enriching' (*secara melawan hukum memperkaya*) and 'aims of profiting' (*menguntungkan*) by 'misusing authority, opportunities, or means arising from one's office and position'; second, the level of minimum penalties (e.g., four years of imprisonment for a violation of Article 2(1) and only one year for a violation of Article 3). The Law does not define 'enriching' and 'profiting.' Assuming that both share a similar meaning, actions that fall under Article 3 will also satisfy the elements in Article 2(1) (because misusing authority,

[800] Supreme Court Decision No. 2399 K/Pid.Sus/2010 in Mahkamah Agung RI, *Yurisprudensi Mahkamah Agung RI 2011* (MA-RI, 2011) 488-9.

[801] 'Korupsi Rp 3 Juta Dipenjara 4 Tahun, Herlina Menggugat ke MK', *Detiknews* (online), 11 May 2012 <https://news.detik.com/berita/d-1914994/korupsi-rp-3-juta-dipenjara-4-tahun-herlina-menggugat-ke-mk>.

[802] As mentioned in Chapter 4, after the Kardono case, the Supreme Court had allowed lower court judges to depart from mandatory minimum penalty in several other statutes.

for example, is also an illegal action), but with a much less severe minimum sentence. More importantly, since Article 3 highlights the element of abuse of power, it can be interpreted as a specific clause intended only to be used to charge power holders (or at least public officials), which makes the difference between its penalties and those in Article 2(1) more absurd. According to general sentencing principles in the KUHP, offences committed by a public official are considered an aggravating factor deserving higher penalties.[803] These issues become more relevant in sentencing because in most corruption cases, the prosecutors charge the defendants with a 'subsidiary charge', such that Article 2(1) is the primary charge and Article 3 the subsidiary. This gives judges options about which charge is most suited to the case before them.[804]

To guide judges in determining which provision is to be used, the Supreme Court issued Circular Letter No. 7 of 2012, which clarifies the subject (addressee) and the object (action) of the two provisions. Concerning the subject, it maintains that 'Articles 2(1) and 3 are designed for any person…[thus] both are applicable for civil servant and non-civil servant (private individuals) defendants.'[805] On the issue of the object, the Court requests judges to consider the harm of the offence. It states that:

> If the element of illegal enriching (*memperkaya*) him or herself, another person or a corporation in Article 2 is not satisfied, then [judges should] impose [a punishment under] Article 3, with a minimum threshold of Rp100 million (A$10,000). It is not just to apply Article 2, with a minimum of four years of imprisonment and a fine for the defendant who only damages state finances below Rp100 million.[806]

The Supreme Court also maintains that when a defendant causes severe financial state loss, but he or she is only charged under Article 3 (with a single charge), judges should impose 'proportional punishment', meaning they should not simply apply the minimum penalties in that provision.[807]

The use of the amount of the state loss as a standard to differentiate between the objects of the two clauses is reasonable to prevent the possible injustice of a relatively harsh minimum sentence for petty corruption or a light minimum punishment for grand corruption. However, it is not clear why judges are asked to assess first whether the element of illegal enrichment is satisfied before applying Article 2(1).[808] Furthermore, the

[803] Article 52 of the KUHP provides that the sentence for public officials who abuse their power to commit an offence can be increased by up to one-third of the maximum penalty of the offence. Similar sentence aggravation applies to private individuals (see, for example, Articles 307, 374, 375 and 349 of the KUHP).

[804] For the discussion of different types of charges and its relation with how judges to sentence, see Chapter 3.

[805] Supreme Court Circular Letter No. 7 of 2012 [21].

[806] Supreme Court Circular Letter No. 7 of 2012 [21]. The words in brackets have been added by the author. As a side note, in Supreme Court Circular Letter No. 3 of 2018, the Court increased the threshold and indicated that the guidance is not compulsory by stating '[If] the state loss is above Rp200,000 [A$20] [the judge] can impose Article 2(1) …'. Further, when justifying the new rules, the Court implicitly states that previous guidance (Circular Letter No. 7 of 2012] is meant to be optional, which is strange, given the wording used. Besides, the whole purpose of the Letter was to help judges to differentiate between the two problematic provisions, and none of the judges I interviewed perceived it as optional.

[807] Supreme Court Circular Letter No. 7 of 2012 [21-2].

[808] This can be interpreted as meaning that judges should use Article 2(1) whenever they find that an offender is proven to enrich him or herself or others, irrespective of the amount of state loss or the illicit gain (thus including

circular letter does not provide a definition of 'illegal enrichment,' which, as discussed next, raises multiple interpretations.

Aside from these two policies, the Supreme Court has also (as mentioned in Chapter 4) demanded, in several circular letters, that judges inflict 'proportional punishment' for large corruption cases as a deterrent, to respond to public criticism of the many lenient punishments imposed by courts.

B. After the 2012 Guidelines: Almost Full Compliance with Minimum Penalties, but Manoeuvring the Guidance

1. Almost Full Compliance but Light Punishment

Of 205 cases decided in the Jakarta and Bandung Anti-Corruption courts (ACC) in 2012-2015, almost all offenders were sentenced at or above the mandatory minimums. In nine cases where prosecutors recommended fines between Rp50 to 100 million for offences under Article 2(1), which is below the Rp200 million minimum fine,[809] the judges adjusted them.

The only case where judges sentenced below the mandatory minimum was the *Hendra Saputra* case.[810] The justification judges gave for not applying the minimum sentence in this case was 'to do justice', given the background of the offender, as well as his motive and role in the offence. Saputra, a primary school dropout, worked as an office boy at a company owned by Riefan Avrian, the son of a former government minister. In 2012, Avrian used Hendra's name to set up a phony company, PT Imaji Media, and made him the CEO in order to bid for a Rp24.5 billion (A$2,450,000) project funded by his fathers' office. The company won the project, which was then subcontracted to Avrian's own company. Saputra agreed to all these actions in order to secure his job, and received a Rp19 million (A$1,900) 'bonus' after the project was completed. However, there was a problem with the execution of the project, and the state suffered losses of almost Rp5 billion loss (A$500,000), which led to a criminal investigation. Prosecutors charged Saputra under Article 3, recommending two years and six months imprisonment and a Rp50 million fine. The majority of judges in the panel, however, found him guilty of violating Article 2(1), the primary charge, but sentenced him to just one year of prison and Rp50 million fine, below the mandatory minimum. They reasoned that Saputra was merely used and manipulated by Avrian, the main perpetrator (who was tried separately).[811] The judges also relied on

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cases where the state loss is below Rp100 million). However, this interpretation contradicts one of the purposes of the policy, that is to prevent injustice caused by the application of Article 2(1) and its four year minimum sentence to petty corruption. Supreme Court judges interviewed inform me that what the Circular Letter expects is that judges use the above-mentioned threshold of state loss to differentiate between the two articles (Interviews with Justice #2 (13 December 2016), Justice #3 (2 August 2017), Judge #12 (20 January 2017)). This thesis adopts this generous interpretation.

[809] See, for example, Bandung ACC Decisions Nos. 2/Pid.Sus/TPK/2014/PN.Bdg; 64/Pid.Sus/TPK/2014/PN.Bdg; 65/Pid.Sus/TPK/2014/PN.Bdg; 84/Pid.Sus/TPK/2015/PN.Bdg.

[810] There was another case where the Jakarta ACC sentenced a defendant to less than the minimum penalties in Article 2(1), however, it seemed that the judges misquoted the article because their arguments concluded that the defendant had violated Article 3. See Jakarta ACC Decision No. 85/Pid.Sus/TPK/2015/PN.Jkt.Pst [96-105].

[811] Jakarta ACC Decision No. 36/Pid.Sus/TPK/2014/PN.Jkt.Pst [184-5].

the limited intellectual capacity of the defendant as a justification for mitigating the sentence.[812] One judge dissented and found Saputra not guilty, using similar reasoning.[813] It is not clear, however, why the judges did not simply apply Circular Letter No. 7 of 2012 to come to the same result without having to violate the law.

While judges generally observed the one- or four-years minimum sentence in Articles 3 and 2(1) of the Corruption Eradication Law, the average prison sentence imposed was relatively light: two years and four months (Table 9.1). This is almost identical to the average sentence for corruption across Indonesia identified by other studies, about two years and eight months (in 2014), or two years and two months (in 2016).[814]

Table 9.1: Average Sentence for Corruption Cases (Articles 2(1) and 3) by Range of State Loss Caused (2014-5)[815]

Range of State Loss (Rp)	**Av. Charge** (months)	**Av. Sentence** (months)	**Av. Illicit Gain**[816] (Rp)	**Av. State Loss** (Rp)	**Total Cases**
1-25 million	18	**12**	12,215,155	12,215,155	2
> 25-100 million	24.92	19.69	50,848,346	60,609,994	13
> 100 million-1 billion	29.60	**20.83**	167,750,275	378,010,592	109
> 1-10 billion	45.63	**32.66**	590,232,198	2,702,466,190	59
Above 10 billion	92.18	**58.5**	5,111,796,512	104,129,746,929	22
Average	40.76	**28.12**	810,992,496	12,333,258,793	205

Moreover, 58 per cent of defendants received imprisonment of between just 12 to 18 months or less,[817] while 25 per cent received a significantly longer imprisonment sentence, between 48 and 108 months. This means that the average sentence was influenced by this quarter of higher-penalty 'outlier' cases.[818]

[812] Jakarta ACC Decision No. 36/Pid.Sus/TPK/2014/PN.Jkt.Pst [185].
[813] Jakarta ACC Decision No. 36/Pid.Sus/TPK/2014/PN.Jkt.Pst [173-83].
[814] *Studi atas Disparitas Putusan Pemidanaan Perkara Tindak Pidana Korupsi* (n 11); Indonesian Corruption Watch, 'Catatan Pemantauan Perkara Korupsi yang Divonis oleh Pengadilan Selama Tahun 2016 Vonis Tanpa Menjerakan Koruptor' (ICW, 2016) 22.
[815] As mentioned, the sample used in this study is court decisions between 2012 and 2015 (excluding 2013). However, there were only four decisions for the year 2012 published on the court's website.
[816] The amount of illicit gain received by offenders refers simply refers to that mentioned in the decision, which may be vulnerable to error. As mentioned in Chapter 5, some judges confused illicit gain and state loss, seeing both as the same. Consequently, the actual average illicit gain was lower than what is stated in Table 9.1.
[817] Of 117 defendants in this category, the majority, 85 persons (73 per cent), caused above Rp250 million in state loss. Forty-four of them also obtained between Rp100 million and 5.5 billion in illicit profit.
[818] Of the 51 offenders sentenced to four years and above, seventeen received between 72 and 108 months imprisonment.

Table 9.2: Range of Imprisonment Sentences Imposed on Offenders Charged with Different Types of Offences

Range of Sentences	Number of Cases and Percentage (N: 205)	
< 12 months	-	-
12 months	85	41%
> 12 to 18 months	32	17%
>18 to < 48 months	37	18%
≥ 48 months	51	25%

How can judges, while observing the minimum penalties in the Corruption Eradication Law, still impose lenient average sentences?

2. Escaping the Severe Minimum Sentence: Deliberately Misinterpreting the Corruption Eradication Law and the Circular Letter

The reason for the lenient sentences for corruption is because in most the cases judges deliberately chose to convict offenders under Article 3, which carries only a one-year minimum term of imprisonment. Of 205 offenders, 165 of them (80 per cent) were sentenced under that provision.

Table 9.3: Comparison Between Numbers of Offenders Sentenced with Article 2(1) and 3 and Punishment Severity

Article	Total Case	Sentences		
		Average (months)	Below 4 years (total case)	4 years-above (total case)
2(1)	40	62	1	39
3	165	20	152	13

Of the 152 cases in which the offenders were sentenced to less than 4 years' imprisonment, most (139 cases or 91.4 per cent) involved above Rp100 million of state loss. Further, 61 cases where the judges applied Article 3 and imposed imprisonment of less than four years involved offenders receiving Rp100 million or more in illicit gains.

The practice of convicting most offenders under Article 3 relates to the type of charges used and recommended by the prosecutors. In the majority of cases, the prosecutor indicted the defendants with a subsidiary charge, with Article 2(1) as the primary and Article 3 as the secondary. At the end of the proceedings, however, the prosecutor recommended that judges sentence under Article 3 (77 per cent of cases). In most cases, judges accepted prosecutor's recommendations, although, as shown below, many of the cases actually met the element of offences in the primary charge, Article 2(1).

To justify the primary charges as not proven, there are several strategies commonly used by judges (and also by the prosecutors): deliberately misinterpreting the elements of crimes in Article 2(1) of the Corruption Eradication Law (particularly the element of 'any person' and 'enriching') and the Rp100 million threshold in Circular Letter No. 7 of 2012; and reading the subsidiary charge as an alternative charge. I now explain these in more detail.

2.1. Enriching v. Profiting

As mentioned, Article 2(1) uses the term 'enriching' (*memperkaya*), while Article 3 uses 'profiting' (*menguntungkan*). To avoid applying Article 2(1), judges in the majority of cases interpreted 'enrichment' as 'an act to make someone become rich or richer'. They then claimed this element of crime was not established because increase in wealth of the defendant as a result of the offence, was never proven, despite he or she or another party gaining profit from the offence.[819] Meanwhile these judges used a lower threshold to establish the element of 'profiting,' that is, whether the defendant or others received some profit from the offence. Some judges also claimed that the element of enrichment was not established in cases where offenders received less than Rp100 million or where they returned all the unlawful gains (or returned an amount below Rp100 million), referring to Circular Letter No. 7 of 2012.[820] This is because they see the Rp100 million threshold in the letter as referring to the profit won from the offence, not the state's losses. This can also work the other way around. In one case, the judges claimed, 'because the [stolen] money is still kept safe on a desk in the offenders' office and has not been used … we cannot conclude that he became rich because of the offence'.[821]

On the other hand, other judges interpreted 'enrichment' in a broader manner, and were more relaxed in imposing Article 2(1). Some defined it as 'a change or increase of one's wealth, measured by the gains received'[822] or simply as 'increase of wealth, either money or valuable assets'.[823] Only a few, referring to *yurisprudensi* and other Supreme Court decisions, defined it as a condition where 'a defendant or other party or a corporation has received some money or asset illegally.[824]

2.2. 'Any Person': General and Specific to Those with Office and Position

Another, equally common, strategy to escape convicting offenders under Article 2(1) is to interpret the element of 'any person' in this clause as general in nature, while seeing Article 3 as more specific, applying to those with position and authority, either in public office or in a private entity, despite the clear directive on this matter in Circular Letter No.

[819] See, for example, Bandung ACC Decisions Nos. 150/Pid.Sus/TPK/2013/PN.Bdg; 79/Pid.Sus/TPK/2014/PN.Bdg; 24/Pid.Sus/TPK/2015/PN.Bdg; 90/Pid.Sus/TPK/2014/PN.Bdg; 127/Pid.Sus/TPK/2013/PN.Bdg.

[820] Bandung ACC Decisions Nos. 24/Pid.Sus/TPK/2015/PN.Bdg; 48/Pid.Sus/TPK/2015/PN.Bdg; 77/Pid.Sus/TPK/2014/PN.Bdg; 75/Pid.Sus/TPK/2015/PN.Bdg; 103/Pid.Sus/TPK/2015/PN.Bdg.

[821] Bandung ACC Decision No. 58/Pid.Sus/TPK/2015/PN.Bdg [83].

[822] Jakarta ACC Decision No. 78/Pid.Sus/TPK/2014/PN.Jkt.Pst [238].

[823] Jakarta ACC Decision No. 79/Pid.Sus/TPK/2014/PN.Jkt.Pst [538].

[824] Jakarta ACC Decision No. 58/Pid.Sus/TPK/2013/PN.Jkt.Pst [237]. This decision referred to the Supreme Court Decisions 275 K/Pid/1983, 577 K/Kr/1980, and 951 K/Pid/1982. The judges used similar interpretation in another decision but not citing any case law (See Jakarta ACC Decision No. 77/Pid.Sus/TPK/2013/PN.Jkt.Pst [237]).

7 of 2012. Worse, in several cases, judges indicated that Article 3 was intended to apply only to public officials, but still convicted a private individual under this clause because he committed the offence together with public officials.[825] By contrast, judges who applied Article 2(1) interpreted the phrase generically, with or without referring to Circular Letter No. 7 of 2012 and other Supreme Court decisions.[826]

Some judges also maintained that the phrase 'any person' in Article 2(1) should be read in conjunction with the element 'illegally', which is more general than in Article 3, which states '… misuse his or her authority, opportunities, or means at his or her disposal which arise because of the office he or she holds ...' Thus, they claimed it is 'more correct' to apply Article 3 to those who commit the offences by abusing their power or authority.[827]

2.3. Reading a subsidiary charge as an alternative charge

As discussed, if prosecutors use a subsidiary charge, judges should decide first whether the primary charge is proven before examining the second charge. However, there are cases where the judges read the subsidiary charge as an alternative charge. For example, in a case where the defendant obtained almost Rp645 million, or A$64,500, and did not return it, the judges immediately convicted him under the second charge, Article 3, without giving substantial reasoning.[828] Some judges employed a similar approach but justified by it referring to similar practices of the Supreme Court.[829]

2.4. Interpreting the Rp100 Million Threshold as Illicit Gain Obtained

The majority of the decisions did not cite Circular Letter No. 7 of 2012, which should guide them in how to apply Articles 2(1) and 3 of the Corruption Eradication Law. In cases where judges did refer to that guideline, most, as mentioned earlier, treated the Rp100 threshold as referring to the gain the defendant personally received rather than state loss. Even when the illegal gains acquired were above Rp100 million, but the defendant had returned it entirely (or to the amount below Rp100 million), some judges claimed that Article 2(1) should not be applied.[830] However, there are some exceptions.

In one case, the judges explicitly interpreted the Rp100 million threshold as being the total state loss. They found that the defendant, who gained *and* caused the loss of precisely

[825] See, for examples, Bandung ACC Decision No. 114/Pid.Sus/TPK/2014/PN.Bdg [117]; Jakarta ACC Decision No. 85/Pid.Sus/TPK /2015/PN.Jkt.Pst [100-2].

[826] See, for examples, Bandung ACC Decision Nos. 17/Pid.Sus/TPK/2015/PN.Bdg [158-9]; 8/Pid.Sus/TPK/2015/PN.Bdg [159-60]; 63/Pid.Sus/TPK/2015/PN.Bdg [106-8].

[827] Jakarta ACC Decision Nos. 69/Pid.Sus/TPK/2013/PN.Jkt.Pst; 1/Pid.Sus/TPK/2014/PN.Jkt.Pst; 38/Pid.Sus/TPK/2014/PN.Jkt.Pst; and Bandung ACC Decisions Nos. 16/Pid.Sus/TPK/2015/PN.Bdg; 35/Pid.Sus/TPK/2014/PN.Bdg; and 48/Pid.Sus/TPK/2014/PN.Bdg.

[828] Bandung ACC Decision No. 12/Pid.Sus/TPK/2014/PN.Bdg.

[829] Jakarta ACC Decision No. 85/Pid.Sus/TPK/2015/PN.Jkt.Pst [96] referring to Supreme Court Decisions Nos. 606 K/Pid/1984 and 112 K/Pid/2006.

[830] Bandung ACC Decision Nos. 76/Pid.Sus/TPK/2014/PN.Bdg; 103/Pid.Sus/TPK/2015/PN.Bdg; 48/Pid.Sus/TPK/2015/PN.Bdg.

Rp100 million, guilty of violating Article 2(1) and sentenced him to four years.[831] In a few other cases, judges interpreted that threshold as the total profit received by all offenders involved in an offence, not what the individual defendant gained.[832] A panel of judges in the Bandung ACC, for instance, convicted a woman who only received Rp20 million (A$2,000) of illegal profit under Article 2(1), reasoning that the offence had also enriched other offenders to a total value that exceeded the Rp100 million threshold.[833] This interpretation was shared by the Supreme Court judges interviewed.[834]

2.5. Self-contradicting Interpretations

Most, if not all, judges interpreted Articles 2(1) and 3 inconsistently, depending on what clause they wished to use. In some cases, this was also true of the Supreme Court guidelines. For example, when a panel of judges in the Bandung ACC sentenced a man under Article 2(1), they concluded that the term 'any person' in this provision was identical to the phrase 'whoever' (*barang siapa*) in the Penal Code, which refers to any individual who can bear criminal responsibility.[835] These judges also used a similar interpretation when applying Article 3 and clarified (by reference to several Supreme Court decisions and not Circular Letter No. 7 of 2012) that 'the meaning of [the term] 'any person' in corruption offences does not refer only to public servants, but also private individuals, businesspersons and corporation'.[836] However, in other cases where they wished to apply Article 3, the same judges argued that 'any person' in Article 2(1) was aimed at those who did not have authority, opportunities, or means to commit corruption.[837] Similar inconsistent interpretations arose regarding the meaning of 'enrichment'.[838] Further, all judges who argued that subsidiary charges can be read as alternative charge did not apply this interpretation in most of their other decisions.

Worse, some judges even used different interpretations to support the same conclusions, some of which were inherently contradictory, as shown in Table 9.4 below.

[831] Bandung ACC Decision No. 78/Pid.Sus/TPK/2015/PN.Bdg [106]. However, in other cases, the same panel interpreted the Rp100 million threshold as the profit gained by the offender. See, for example, Bandung ACC Decisions Nos. 111/Pid.Sus/TPK/2014/PN.Bdg; 77/Pid.Sus/TPK/2014/PN.Bdg; 82/ Pid.Sus/TPK/2014/PN.Bdg.

[832] Bandung ACC Decisions Nos. 65/Pid.Sus/TPK/2015/PN.Bdg; 64/Pid.Sus/TPK/2014/PN.Bdg; 84/Pid.Sus/TPK/2015/PN.Bdg; 135/ Pid.Sus/TPK/2015/PN.Bdg.

[833] Bandung ACC Decision No. 90/Pid.Sus/TPK/2015/PN.Bdg [230]. See similar interpretation from the same judges but not referring to the Penal Code in 20/Pid.Sus/TPK/2014/PN.Bdg.

[834] Interviews with Justices #2 (11 September 2017) and #3 (2 August 2017).

[835] Bandung ACC Decision No. 74/Pid.Sus/TPK/2014/PN.Bdg [100].

[836] Bandung ACC Decision No. 50/Pid.Sus/TPK/2014/PN.Bdg [90]. See a similar interpretation by the judges in Bandung ACC Decision No. 20/Pid.Sus/TPK/2014/PN.Bdg [114], although here, they did not quote the case law.

[837] Bandung ACC Decisions Nos. 35/Pid.Sus/TPK/2014/PN.Bdg [116-7]; 47/Pid.Sus/TPK/2014/PN.Bdg.

[838] See Table 9.4.

Table 9.4: Conflicting Interpretations by a Single Panel of Judges of the Bandung ACC

State Loss (Rp. thousand)	**Illicit Gain Acquired** (Rp. thousand)	**Charge**		**Sentence**		**Interpretation**
		Art	**Prison** (months)	**Art**	**Prison** (months)	
						Inconsistent Interpretation of 'Any Persons' and 'Illegally'
4,647,751	None	2(1)	90	3	48	• The element of 'any person' in art 2(1) was established because the defendant can bear criminal responsibility for his/her offence [Decision No. 2/2015; 208]. The defendant was a public servant. • The element of 'illegally' in art 2(1) was not met because the defendant committed the offence due to his power and position [Decision No. 2/2015; 211-2]
1,568,551	Unclear	3	42	3	36	• The 'element of 'illegally' in art 2(1) was proven because the defendant failed to observe his duty (which relates to his power and position) [Decision No. 96/2015; 167-70]. The judges, however, argued that the element of 'enriching' was not met and so applied art 3 [171-2]
2,444,033.5	90,000 (fully returned)	3	24	3	16	The judge used a similar argument to Decision No. 2/2015 (see above) for the private individual defendant (Decision No. 69/2014; 162-3). Note: the illicit gains were less than Rp100 million and the defendant had already returned them entirely
						Inconsistent Interpretation of 'Enrichment'
1,568,551	Unclear	3	42	3	36	The element of 'enriching' was not satisfied because the amount of money that the defendant received was small, and it was thus more appropriate to define it as 'profiting' under art 3 (Decision No. 96/2015; 171-2)
750,000	641,330 (fully returned)	3	18	3	12	The element of 'enriching' was not established because all the state loss had been voluntarily repaid by the defendants (Decision No. 95/2015; 160).
390,786.6 (fully recovered)	122,339. 8	3	24	3	16	The element of enrichment was not proven because the stolen money was kept safe on the desk in the defendants' office and had not been used (Decision No. 58/2015; 83). Note: unlike Decision No. 95/2015, the judges did not use the argument that the state loss had been fully recovered to argue that the element of enrichment was not proven
131,780	131,780	3	48	3	36	The element of 'enriching' was not met because, 'although the defendant admitted that he spent all the money that he received from the offence, the court did not find any evidence of an increase in the defendant's wealth' (Decision No. 80/2015; 184)
300,000	300,000	2(1)	54	2(1)	48	The element of 'enriching' was met because the defendant received money from the offence (although his wealth pre and post-offence was never verified) (Decision No. 121/2014; 49)

In conclusion, the only consistent pattern in the cases described above is that judges tried to sentence along the lines proposed by the prosecutors, including the charges they selected and their sentence recommendations. However, this does not explain why they needed such acrobatic interpretations.

C. Explaining the Practices

As shown above, judges deliberately avoid imposing the relatively severe minimum penalties in Article 2(1) of the Corruption Eradication Law by misinterpreting the elements of this provision, the Circular Letter No. 7 of 2012, and the procedural law (in the case of treating subsidiary charges as alternative charges). In this way, they can impose more lenient minimum penalties under Article 3.

Part of the motive of the ACC judges for finding ways to impose less severe minimum penalties was avoiding perceived injustice when confronted with "small" corruption cases. In many cases, however, they were driven by other factors: the weakness of the prosecution case, paradigmatic issues, and judicial corruption.

1. Doing Justice to Petty Corruptors

One of the reasons judges avoided imposing Article 2(1) was to prevent perceived injustice, mainly when the harm caused by the offence or the culpability of the defendant was relatively low. Of 152 cases where the judges' employed Article 3 and imposed imprisonment of less than four years, seven concerned small corruption (ranging from Rp4.4 million to Rp49 million of state loss), or 13 cases if Rp100 million is used as the threshold. The numbers increase to approximately 45 cases if more significant state losses (up to Rp1 billion) are included, but the amount of illicit gain received by the offenders was relatively small (below Rp50 million).

For judges, it is safer to sentence using Article 3 in such cases, even if that means they have to 'misinterpret' the law, than to impose penalties below the minimum penalty in Article 2(1). Several judges interviewed admitted that they are afraid to be reported, reviewed or even sanctioned by the Supreme Court or the Judicial Commission if they sentence below the mandatory minimum.[839] Another judge also said that he might be suspected of taking bribes if he did so.[840] In short, by applying Article 3 in minor corruption cases, they can balance the interests of justice, while protecting their careers.

However, the justice-seeking argument can only explain the legal manoeuvrers and lenient punishments in small-scale corruption cases, and the majority of cases were not in this category. As shown earlier, seventy-three offenders who received between Rp100 million to Rp1 billion of the money stolen were sentenced, on average, to only approximately two years three months (or just below just twenty months, if only those who were sentenced

[839] Interviews with Judge #4 (14 December 2016), Judge #7 (10 January 2017); Judge #9 (12 January 2017); and Judge #10 (15 January 2017).
[840] Interview with Judge #14 (20 January 2017).

under Article 3 are counted.) Besides, there were a few small corruption cases where judges also imposed relatively stiff sentences.[841] Further explanation is needed.

2. Weakness of the Prosecution Case

Another issue that drove judges to impose lenient sentences, or even in some cases, to acquit, is weakness of the prosecution case. In a number of cases, police and prosecutors seemed to fail to establish the culpability of the offenders, including whether they received illicit gains. For example, 60 co-offenders in the cases studied were said to have not received any profit from the offences. This seems quite odd, because some of them were high-level officials,[842] and it is unlikely they would risk involvement in a criminal offence unless there was real benefit for them. In some cases where offences were carried out in concert between the public officials and private individuals, prosecutors claimed that only the private individuals received the illegal profit of the offense.[843] But this is also unlikely.

Similar issues occur in proving the degree of a defendant's culpability. In a number of cases where the government official offenders had paid private contractors for work that had then not been completed, they were only proved to be negligent, for instance, by failing to monitor the projects or recheck them before making payment, and so received only a year of imprisonment.[844] Nevertheless, judges also sentenced equally lightly many of those whose wrongdoing was obvious, [845] with judges complaining that offenders brought to trial were not the 'masterminds' behind the offences.[846]

In contrast, in at least six cases investigated and brought by the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or 'KPK'), the Commission could demonstrate the detailed role of each defendant and the illicit profit they received. This gave confidence to judges (or 'compelled' them) to inflict deserved punishments, even when they sentenced the offenders under Article 3, as shown below.

[841] See Bandung ACC Decisions Nos. 78/Pid.Sus/TPK/2014/PN.Bdg; 3/Pid.Sus/TPK/2014/PN.Bdg; 133/Pid.Sus/TPK/2014/PN.Bdg.

[842] Such as the: President of a university (Bandung ACC Decision No. 87/Pid.Sus/TPK/2015/PN.Bdg); the heads of government state-owned companies (Bandung ACC Decision No. 76/Pid.Sus/TPK/2015/PN.Bdg; Jakarta ACC Decision No. 15/Pid.Sus/TPK/2015/PN.Jkt.Pst); the heads of the regional office of the central government agencies (Jakarta ACC Decisions 58/Pid.Sus/TPK/2014/PN.Jkt.Pst; 58/Pid.Sus/TPK/2014/PN.Jkt.Pst).

[843] Compare, for example, Bandung ACC Decisions Nos. 83/Pid.Sus/TPK/2014/PN.Bdg; 4/Pid.Sus/TPK/2015/PN.Bdg; 5/Pid.Sus/TPK/2015/PN.Bdg; 71/Pid.Sus/TPK/2015/PN.Bdg; 77/Pid.Sus/TPK/2015/PN.Bdg; 76/Pid.Sus/TPK/2015/PN.Bdg.

[844] Jakarta ACC Decisions Nos. 1/Pid.B/TPK/2012/PN.Jkt.Pst [133]; 41/Pid.Sus/TPK/2014/PN.Bdg [205]; 108/Pid.Sus/TPK/2013/PN.Bdg [111].

[845] Bandung ACC Decisions Nos. 27/Pid.Sus/TPK/2014/PN.Bdg [150]; 45/Pid.Sus/TPK/2014/PN.Bdg [117]; 116/ Pid.Sus/TPK/2014/PN.Bdg [118]; and Jakarta ACC Decision No. 69/Pid.Sus/TPK/2013/PN.Jkt.Pst [104-8].

[846] Interviews with Judge #12 (19 January 2017) and Judge #15 (20 January 2017).

Table 9.5: Sentences of Jakarta ACC in Cases Brought by the KPK[847]

Charge		State Loss (Rp)	Illicit Gain (Rp)	Sentence	
Article	Prison (months)			Article	Prison (months)
2(1)	144	121,830,768,863	17,136,912,198	2(1)	96
2(1)	144	80,002,814,755	1,030,000,000	3	108
2(1)	60	36,484,670,450	770,291,375	3	48
2(1)	48	80,002,814,755	550,000,000	3	48
3	108	463,668,000,000	300,000,000	3	72
3	60	13,071,468,264	20,000,000	3	30
Average	**94**	**132,510,089,514**	**3,301,200,595**		**67**

Severe punishments were imposed not just because these cases involved big loses. A senior judge, comparing the conventional law enforcement agencies to the KPK, stated:

> When the KPK is the prosecutor [and investigator of the case], the evidence [in the case] is very strong … everything, even the amount [each defendant received]. Who did what, where the money went … the culpability [of the defendant] is crystal clear …[848]

3. Misconception of the Threshold

As shown above, a number of judges, including Supreme Court judges, referred to the Rp100 threshold in Circular Letter No. 7 of 2012 not as the state loss but as illicit gain received either by an individual offender personally or by all offenders. This issue is connected to another common misconception: that state loss is the same as illicit gain.

4. Paradigm Issues and Judicial Corruption

Judicial preference for lighter sentences was also influenced by common sentencing paradigms. As shown in Chapter 7, many judges took the view that corruption offences – other than "big ones" – are not serious, and that the most appropriate approach to sentence corruption offenders is through restitution. They also attributed less blameworthiness to corruption offenders, and were concerned about the impact of lengthy imprisonment on them.

As discussed in Chapter 7, judicial corruption is also a significant factor that causes serious sentencing disparity and disproportionality -including light sentences in corruption cases. This is particularly because corruption offenders are, arguably, more willing to bribe law

[847] See Jakarta ACC Decisions Nos. 48/Pid.Sus/TPK/2013/PN.Jkt.Pst; 59/Pid.Sus/TPK/2012/PN.Jkt.Pst; 36/Pid.Sus/TPK/2013/PN.Jkt.Pst; 62/Pid.Sus/TPK/2014/PN.Jkt.Pst; 65/Pid.Sus/TPK/2014/PN.Jkt.Pst. As a comparison, according to the Indonesian Corruption Watch, in 2008, the average sentence imposed by the ACC was four years of imprisonment. Indonesian Corruption Watch, 'Pengadilan Umum: 'Kuburan' Pemberantasan Korupsi' (2008) in Simon Butt, *Corruption and Law in Indonesia* (Routledge, 2012) 39.
[848] Interview with Judge #4 (14 December 2016).

enforcers and judges because these offenders have more resources (many of them were from middle and upper economic backgrounds) and faced severe minimum and maximum penalties. It is not a coincidence that two of the Bandung first instance ACC judges and one Bandung high court judge assigned to hear corruption cases have been convicted of receiving bribes from offenders.[849]

5. Inconsistency in Supreme Court Decisions

As in sentencing for minor property offences, some Supreme Court judges also disobeyed the Courts' own guidance on sentencing for corruption contained in Circular Letter No. 7 of 2012. For example, in 2014, the Jayapura ACC convicted the Secretary of the West Papua Provincial Government for enriching local legislators with Rp22 billion (A$2,2 million) by lending them money from a provincial government-owned company budget. He was sentenced to one year and three months of imprisonment under Article 3.[850] This decision contradicted the Circular Letter No. 7 of 2012, even though all the borrowed money was returned after the police investigated the case. On appeal, the Jayapura High Court reaffirmed the lower court decision but increased the sentence to four years of imprisonment.[851] Similarly, in the cassation, the Supreme Court did not consider the application of Article 3. Instead, it reduced the sentence to one year and six months of imprisonment, reasoning that the High Court decision failed to consider mitigating factors in the case, namely that all the state losses had been recovered.[852]

D. Conclusion

This chapter has shown that, overall, judges in the Jakarta and Bandung ACCs observed the minimum penalties in Article 2(1) and Article 3 of the Corruption Eradication Law. Only in one case did the judges ignore the four-year minimum sentence under Article 2(1) because the culpability of the defendant was minimal. However, judges intentionally circumvented the mandatory minimum in the Corruption Eradication Law by convicting most offenders under Article 3 (which carries a minimum of just one year in prison). This was achieved by deliberately misinterpreting some elements of the crimes in Articles 2(1) and 3 and Circular Letter No. 7 of 2012. In a number of cases, judges also ignored the procedural law and the Supreme Court guidelines for the same purpose. As a result, the average sentence was low, around just two years and four months.

Part of the judges' intention in seeking lesser minimum penalties was to avoid injustice in cases involving minimal harm (such as where state losses were small) or where the offenders' culpability was nominal (for instance, their roles in the offences were marginal, or they only received small profits). However, these comprise only a small percentage of cases. There is substantial evidence that in the majority of cases (middle and large-scale corruption) these legal manoeuvres were driven by other factors: paradigmatic issues; the

[849] 'Deretan Hakim Tersangkut Kasus Suap', *CNN* (online), 26 May 2006 <https://www.cnnindonesia.com/nasional/20160526165624-12-133654/deretan-hakim-tersangkut-kasus-suap>.
[850] Supreme Court Decision No. 431 K/Pid.Sus/2015 [28].
[851] Supreme Court Decision No. 431 K/Pid.Sus/2015 [30].
[852] Supreme Court Decision No. 431 K/Pid.Sus/2015 [60-3].

weakness of prosecution cases; a misunderstanding the Circular Letter, and, possibly, judicial corruption.

This chapter has provided more obvious evidence to support the claim made in previous chapters of bias in the way judges treat corruption and theft-related offenders, including minor ones. In sentencing corruptors, judges deliberately disregarded the law and the Court's guidance to impose lighter sentences, while in sentencing minor theft cases, they were willing to set aside the Court's own regulations in order to impose harsher sentences on offenders. In other words, the sentiments expressed in phrase '*hukum tajam ke bawah dan tumpul ke atas*' (the law cuts sharp downwards but is blunt upwards) are true.

CHAPTER 10
CONCLUSION AND RECOMMENDATIONS

The main purpose of this thesis is to gain insight into criminal sentencing practices in Indonesia. Four main questions were asked to achieve this aim. First, to what extent are sentences imposed by different judges in the studied courts consistent and proportionate, as well as fair (unbiased)? Particular emphasis was given to assessing proportionality in the sentencing of offenders from different socio-economic backgrounds to test the common perception that judges tend to be harsher to offenders from lower socio-economic backgrounds than otherwise. Second, what are the legal and extra-legal factors that influence sentencing practice? Third, how do judges choose the different types of penalties to be imposed? Fourth, how do judges justify the application of mitigating and aggravating factors in particular cases? This thesis also assesses relevant legislation, case law and other policies to get a clear picture of how they limit and guide judges in exercising sentencing discretion.

To answer these questions, this thesis used both qualitative and quantitative methods. Approximately 26 respondents, mostly judges, were interviewed, and over one thousand decisions were assessed using statistical techniques. The decisions were made by first instance courts in four major cities (Central and South Jakarta, Bandung and Tangerang) between 2011 and 2015 (but excluding 2013), and dealt with theft-related offences, embezzlement-related offences, and corruption. The twenty variables assessed in these cases included: the type and severity of penalties imposed (e.g. length of imprisonment sentence or amount of the fine imposed); offence seriousness (e.g. level of loss, the offender's role in the offence, profit gained, or number of offences committed); the offender's socio-economic background (indicated by his/her occupation, education or type of legal representation); and key mitigating and aggravating factors surrounding the offence and offenders (e.g. returning loss/compensating the victim, forgiveness by the victim, recidivism, and offender's financial needs).

In the next part, the key research findings and the theoretical and methodological implications of this thesis are summarised. Further, some recommendations are offered, including for future research.

A. Research Findings

1. Principal Findings

This thesis finds unwarranted disparity and disproportionality in sentencing practices in Indonesia, particularly in cases involving medium or large losses. It also finds that many law enforcers and judges suffer from class bias or are involved in corruption, which leads them to be lenient in charging and sentencing corruption offenders from middle and upper socio-economic backgrounds.

Further, while judges do consider legal factors in sentencing, particularly the type of offence committed and the amount of loss caused, they tend to be overly influenced by a

desire to avoid appeal by prosecutors (which would increase their workload and prolong the time that offenders have to spend behind bars due to the common practice of pretrial detention and, to a lesser extent, the long appeal process). This often leads judges to closely follow the prosecutor's sentencing recommendations, particularly in theft and embezzlement related offences. In the sentencing of minor offences, the provision under which the defendant is charged also influences sentencing. In other words, how the case is processed by investigators and prosecutors significantly shapes sentencing outcomes. The Supreme Court's failure to provide sufficient sentencing guidelines and, more importantly, consistent decisions, including enforcing existing guidelines, also contributes to these problems.

In summary, this thesis empirically confirms the public perception of class bias and corruption in the Indonesian criminal justice system and, further, illustrates how poor law enforcement, case management and weaknesses in the Supreme Court distort sentencing.

2. Detailed Findings

2.1. Weak Sentencing Limitations and Guidance in the Law and Policies

In Indonesia, sentencing limitations and guidance are provided by statutes, mainly the Criminal Code (or KUHP) and some 'special-purpose' statutes and Supreme Court policy documents. Until July 2020, there were no numerical sentencing guidelines in Indonesia and even those that now exist are restricted to just a few types of corruption offences. However, as discussed in Chapter 3, the KUHP, which provides general sentencing principles and guidance, is designed to provide wide sentencing discretion to the judiciary. The KUHP therefore has no mandatory minimum penalties and no punishment goals as references for judges, as well as very few mitigating and aggravating factors to be taken into consideration. Some special statutes, such as the Corruption Eradication Law, provide additional limitations and guidance, including by providing mandatory minimum penalties. However, the criminal provisions and the minimum penalties in this Law are poorly articulated and thus create problems in their implementation.

Moreover, the Supreme Court generally fails to meaningfully supplement the limited sentencing guidance in the KUHP and other statutes, either through firm jurisprudence (similar to case law but not fully binding) or circular letters. As shown in Chapter 4, most guidance provided by the Court merely reiterates already clear provisions in the law, only responds to certain sentencing practices sporadically, or instructs judges to impose firm punishment for certain offences, such as corruption. Further, some of the circulars, particularly concerning the binding status of mandatory minimum penalties, are ambiguous, contradictory, or have been amended over a short timeframe, which creates confusion.

In some areas, however, the Supreme Court has proactively responded to weakness in laws that caused injustice and inconsistent application of the law. For example, it issued a circular letter that basically altered the amount of loss necessary for an offence to constitute a minor property offence under the KUHP, as well as increasing the maximum

fines for almost all offences. It aimed, among other things, to deliver justice for minor offenders and encourage the use of fines. The Court also tried to address drafting issues in the Corruption Eradication Law to minimise inconsistency in its application by issuing another circular. Nevertheless, the Supreme Court's firm jurisprudence, and circulars suffer from a lack of authority. As demonstrated in Chapters 8 and 9, many judges, including Supreme Court justices themselves, continue to disregard them.

Weak guidance on sentencing and wide sentencing discretion in the law, a lack of firm jurisprudence and Court guidance, and, in particular, judicial reluctance to apply progressive guidance (influenced by non-legal factors) contribute to disparity, disproportionality and bias in sentencing practice, as demonstrated in Chapters 6 to 9.

2.2. Overreliance on Imprisonment

Judges overwhelmingly prefer imprisonment over other types of punishment. As shown in Chapter 6, of 891 embezzlement and theft-related offenders involved in the cases studied, only seven received a suspended jail sentence (none were corruptors, as the law prohibits suspended sentences for corruptors). Fines were only imposed in corruption cases (because it is a compulsory, in addition to imprisonment) but were never used in any theft or embezzlement cases, despite the Supreme Court's efforts to encourage their use, particularly for minor offences. This is because judges view suspended sentences and fines as 'too soft', and believe that imposing 'soft' sentences would create dissatisfaction on the part of victims and the public, as well as not deterring crime. Moreover, these types of sentences were very seldom recommended by prosecutors and, as mentioned, judges take prosecutors' sentencing recommendations very seriously. On a positive side, there were no extreme disparities concerning the type of sentences imposed.

2.3. Unwarranted Disparity and Disproportionality in Sentencing Do Exist

Overall, this study shows unwarranted disparity and disproportionality in sentencing of all types of offences, particularly in cases involving medium and large losses (Rp100 million [A$10,000] and above). Sentencing disparity and disproportionally were much sharper in corruption and, to some extent, embezzlement, cases.

<u>Theft-related Offences</u>

On the issue of disparity, up to 36 per cent of sentences imposed in minor to medium theft and embezzlement-related cases (which involved loss between zero and Rp100 million) were beyond (below or above) the margin of tolerance compared to similar cases. Meanwhile, more than 50 per cent of sentences imposed in all types of offence involving loss above Rp100 million were outside the margin of tolerance. This shows that, as discussed before, disparity is more acute in cases involving greater losses.

In terms of proportionality in sentencing, offenders committing different types of theft-related offences received sentences relatively proportional to the seriousness of the offences (the type of offence and the level of harm they caused). There were, however, a few exceptions. Sentences imposed in medium aggravated theft cases, for example, were

generally lighter than for medium theft cases. Similarly, those who were charged with large or grand aggravated burglary received significantly more lenient sentences than those charged with medium or small burglaries.

Embezzlement-related Offences

Like theft-related offences, more severe disparity was evident in the sentencing of embezzlement-related offences with greater losses. By contrast to theft-related offences, sentencing disproportionality was more apparent in embezzlement-related cases. The majority of sentences imposed in medium-to-large simple embezzlement cases, for example, were lighter than those imposed in medium ones. Worse, in all groups of loss, offenders charged with simple embezzlement received longer than average sentences of imprisonment compared to aggravated embezzlers.

Corruption Offences

As indicated above, sentencing disparity and disproportionality were sharper in corruption cases. Sentences imposed on offenders charged with large corruption, for example, were more severe than those charged with large/grand and grand corruption. This is partly because of the inconsistent application of Articles 2(1) and 3 of the Corruption Eradication Law, which have significantly different minimum penalties, as shown in Chapter 9.

In corruption cases, severe sentencing disparity and disproportionality were present in fines as well as prison sentences imposed in substitution for unpaid fines, particularly unpaid restitution orders. As illustrated in Chapter 6, offenders ordered to pay Rp59.5 million and Rp17.13 billion in restitution received identical substitute periods of imprisonment should they fail to pay. Judges also did not consider the offender's financial capability in determining the level of fine imposed.

Disproportionality in Sentencing "Street Crimes" and "White-collar Crimes"

Chapters 6-9 showed relative disproportionality in the sentencing of theft and aggravated theft (excluding aggravated burglary, robbery or aggravated robbery), predominately committed by offenders from lower socio-economic backgrounds, and, on the other hand, corruption, predominantly committed by offenders from middle and high socio-economic backgrounds.[853]

At first glance, the data indicated that offenders charged with corruption received, on average, relatively longer periods of imprisonment than offenders charged with theft and aggravated theft in the same categories of loss. The average length of imprisonment imposed for theft-related offences was 12.45 months, and 28.12 months for corruption offences. However, when examined further, the heavier average sentence for corruptors was influenced by the 25 per cent of cases where judges imposed severe sentences (between four to nine years). Meanwhile, in the majority of corruption cases (43 per cent)

[853] As shown in Chapter 6, the majority of theft-related offenders were uneducated, unemployed or worked as labourers/equivalent, and were not represented by lawyers during the trials. The exact opposite is true for corruption offenders.

of offenders received light sentences, 12 months, and another 17 per cent received between 12 months and 18 months.[854] Therefore the average sentence in the majority of corruption cases was similar to the average sentence in theft and aggravated theft cases.

More importantly, if the differences between the minimum and maximum penalties for those offences – as an expression of the seriousness of the offences – are put in the equation, corruptors are arguably punished lighter than thieves. As shown in Chapter 5, the prison terms for corruptors are much higher: between four to twenty years (for a violation of Article 2(1)), and one to twenty years (for a violation of Article 3). In contrast, the prison terms for theft and aggravated theft are much lower: a maximum of only five to seven years imprisonment, with no minimum. Further, judges tended to interpret the Corruption Eradication Law so that they could apply Article 3 of the Law to sentence defendants with the lower minimum penalty, while in a number of cases, judges were reluctant to sentence minor theft defendants under the minor theft provision.

2.4. Subjective, Pro forma and Biased Use of Mitigating and Aggravating Considerations

Common aggravating factors relied on by judges in sentencing were public disturbance (for theft-related offences), acting contrary to government programs (for corruption), and harm caused to the victim or state (for all offences). In cases where recidivism or multiple offences occurred, sentences increased, although they were still far below what are allowed by the law. By contrast, most first-time offenders received mitigated sentences, despite such a mitigating consideration not being acknowledged by the law. Other common mitigating considerations included: remorse; admission of guilt; courteous demeanour during trials; and status as the breadwinner of the family (see Chapter 6). Very few decisions considered the motive of the offence, the level of planning, or the role of an offender in offences committed by multiple offenders.

As shown above, some of these sentencing considerations are very broad (e.g. acting contrary to government programs) and subjective (e.g. remorse or courteous demeanour during trial). There was also some indication of bias in the application of mitigating factors. For example, the majority of offenders who received a mitigated sentence because they were the breadwinner of the family[855] were corruption offenders from middle and high socio-economic backgrounds. Some of the mitigating and aggravating considerations were merely applied as pro formas (including by judges simply copying and pasting considerations from other decisions), or were even false or contradictory (e.g. the same decision stating that the offender had no prior record but was a recidivist).

[854] As a comparison, of 701 offenders charged with theft-related offences, only eight received more than four years of imprisonment.

[855] This mitigating consideration aims to minimise the impact of long periods of imprisonment with respect to economic hardship experienced by offenders' families.

2.5. Sentencing Minor Offences and Corruption: Non-compliance with the Law and Guidance

As shown in Chapter 8, all minor theft offenders (causing losses of Rp 2.5 million or less) were wrongly charged with, and sentenced for, non-minor theft offences, and received more severe sentences (an average of eight months imprisonment) than is permissible under the minor theft provision (a maximum of three months or a Rp 250,000 fine). Comparison with decisions from other jurisdictions in Indonesia show that this problem was caused by a combination of factors, namely: offenders being detained and (incorrectly) charged under non-minor offence provisions; judicial misinterpretation of the law and guidelines (Supreme Court Regulation 2 of 2012); and other extra-legal factors, discussed next. On the positive side, this study also demonstrates that judges tended to impose suspended sentences on minor property offenders in cases where they were charged under the correct provision and were not detained prior to trial.

On the other hand, many prosecutors and judges (usually deliberately but sometimes mistakenly) misinterpreted the Anti-Corruption Law and Supreme Court guidance to sentence offenders who caused Rp 100 million or more in state loss under Article 3 (a provision that carries a lighter minimum penalty, one year of imprisonment), despite the crimes meeting the elements of Article 2(1) (which carries a minimum of four years imprisonment) (Chapter 9). This is achieved by misinterpreting some elements of the crime. Judges were also influenced by extra-legal factors that led them operate in this manner.

2.6. Influence of Extra-legal Factors on Sentencing Compared to Legal Factors

<u>The Role of Legal and Extra-legal Factors in Sentencing according to Statistical Analysis</u>

The bivariate analysis results in Chapter 7 indicate several factors that, to varying degrees of significance, associate or correlate with sentencing of different offences, including severity of recommended sentence, type of offence, amount of loss, and type of victim. However, when the bivariate analysis results were further examined by path analysis (multiple regression) to understand the decisive factors that influence sentencing practice (and the extent of their influence), the results showed that it is only prosecutors' recommended sentences that directly influence the length of imprisonment imposed by judges across all types of offences (between 83 to 93 per cent). Further, as the prosecutor's sentence recommendation already, to a certain degree, considers the legal factors of the case, these factors are indirectly considered by the judges. For theft-related offences, the legal factors that mainly (indirectly) influenced the sentencing outcomes are the type of offence and the amount of loss caused, while the role of other factors (such as recidivism, type of victim and multiple offences) was less significant. For embezzlement-related offences, factors that (indirectly) correlated with the sentencing outcomes included the amount of loss and, to a lesser degree, the type of victim (where offenders who harmed individual victims received longer imprisonment). The type of offence committed was not found to notably influence sentencing. For corruption, the main factors that (indirectly) influenced sentencing were the amount of loss and the amount of illicit

gain received by an offender, followed by the amount of illicit gain and amount of loss returned and recovered.

These statistical findings, however, cannot explain why, for example, sentence recommendations have such a strong influence on sentencing outcomes. More importantly, these statistics cannot alone confirm which other extra-legal variables or factors might also influence sentencing outcomes. Such extra-legal factors cannot be measured by statistics, including explaining the disparity, disproportionality and bias in sentencing shown in Chapter 6. Below is a more in-depth analysis of extra-legal factors based on interviews and studying the text of decisions, as well as findings from other research.

The Decisive Role of the Prosecutor's Sentencing Recommendations, Charges, and the Pre-trial Processes

As mentioned, part of the reason judges gives serious weight to prosecutors' sentencing recommendations is that these already take into account the legal factors of the cases. There are, however, other stronger motivations or causes, including the practical constraints and consequences of their decisions, and the influence of other court actors.

Judges are fully aware that according to the Attorney General Office's guidelines, a prosecutor must appeal any sentence that is less than the recommended sentence by a certain fraction (1/2 for corruption, and 1/3 for theft and embezzlement-related offences). Among other things, an appeal means additional work for judges. If appealed, judges have to spend more time to prepare their reasons and the minutes of the court session to make their decisions presentable to a higher court. In many cases, judges need to do this work themselves due to poor support provided by court clerks. Practically, this means that judges tend to hand out sentences lighter than those proposed by the prosecutor but still above the prosecutor's appeal threshold, to "please" all parties. Further, in many cases defendants are better off if prosecutors do not appeal the decision, especially if the original sentence does not involve a long prison sentence. This is because the appeal process can take months, and almost all defendants are detained up to the sentencing stage. Consequently, defendants face spending a longer time behind bars if the decision is appealed. The practice of imposing a sentence close to the recommended sentence is also influenced by collusion between judges and prosecutors, as will be discussed next.

The prosecutor's choice of charge, the robustness of the initial investigation and pretrial detention practices also significantly influence sentencing outcomes, at least for some offences. As mentioned before, cases where minor property offenders received longer prison sentences than was appropriate based on the nature of the offence were influenced by the fact that they were incorrectly charged under more serious provisions and detained pre-trial. To some extent, a lack of access to legal representation worsens these conditions. The relatively lenient sentences for corruptors are also influenced by a lack of robustness in the investigation stage by the police or prosecutors. In many cases, law enforcement failed to convincingly establish the culpability of the offenders, including whether they

received illicit gains, or whether the acts were intentional or simply negligent. In contrast, cases investigated by the Corruption Eradication Commission (only six were assessed) clearly demonstrated the detailed role of each defendant and the illicit profit they received, which gave confidence to, or even "compelled" judges to hand down harsher punishments.

Corruption in the Criminal Justice System

Any discussion of law enforcement in Indonesia cannot escape the issue of endemic corruption in the criminal justice system, established by numerous previous studies mentioned in Chapter 7. In the context of sentencing, the most common practice of judicial corruption is collusion between the offender and, usually, both law enforcers and judges, so that he or she is not detained before or during the trial and faces only a lenient charge, sentencing recommendation, and sentence. The higher the bribe paid by the offender, the greater the potential collusion; potential benefits include acquittal, having the evidence fabricated to downgrade the offender's role in the offence, marking down the amount of loss or the illicit profit gained, or invention of mitigating considerations.

Judicial Perceptions of Offence Seriousness

Disproportionality between sentences imposed in theft-related offences and corruption (and, to a certain extent, embezzlement) is also influenced by judges' views on the seriousness of different offences. Some judges believe that theft-related offences are more concerning than corruption (except very large corruption cases) because they harm individual victims, while the latter only harms the state. There is also a judicial view that embezzlers are generally less blameworthy than thieves, because embezzlement is perceived to involve negligence on the part of the victim (e.g., a lack of supervision of the defendant by the victim).

More importantly, almost all judges and prosecutors interviewed held the opinion that the main objective in sentencing corruption was to recover the stolen assets (restitution), as opposed to deterrence. Accordingly, they were willing to give generous sentencing discounts if the loss was recovered (through voluntary repayment or even confiscation). Some judges even supported the idea of only imposing a fine if the offender returned the loss before conviction. On the other hand, most judges believed that imprisonment of theft-related offenders was necessary to deter crime because these kinds of offences were considered 'troubling the public'.

Views such as these are problematic because they violate the equal treatment principle and do not discourage offending in corruption cases, since under this logic the cost of committing corruption is much lower than its potential benefit. In addition, the probability of detection or prosecution for corruption remains low. Further, the overall harm caused, and the maximum and minimum penalties for corruption offences, are much greater compared to theft-related offences.

Biased Views based on Defendants' Socio-economic Status

Closely connected to the above issues is the problem of class bias in sentencing. In interviews, a number of judges argued that corruptors, who usually come from middle or higher socio-economic backgrounds, will suffer far more than, for instance, thieves, if both received the same prison sentence. Others claimed that, unlike thieves (who are mostly from lower socio-economic backgrounds), those convicted of corruption would also face reputational damage. Some also viewed corruptors as potentially being able to make contributions to the community/the public good if outside a prison cell, perhaps because many of them are public officials or businesspersons (compared to theft offenders, who are usually blue-collar workers or unemployed).

These biases (and the practices of judicial corruption discussed above) explain the application of certain mitigating factors in the favour of corruption offenders. For example, about three-quarters of the sentencing discounts given to defendants charged with corruption were based on the consideration that "the defendant is the breadwinner of the family", meaning that a longer period of imprisonment would cause financial hardship for their families. However, less than one-tenth of theft and embezzlement offenders received mitigation on this basis.

Other Indirect and Structural Problems Influencing Sentencing

There are other, more indirect factors and structural conditions that influence sentencing practices and outcomes, as mentioned in Chapters 7, 8 and 9. For example, the role of the Supreme Court in ensuring legal certainty and compliance with the sentencing law in the lower courts is minimal and ineffective. Further, the weak support from court staff for judges, particularly in providing reliable minutes of court sessions, is another factor that influences judges to avoid appeals. It should also be noted that an offender's lack of access to good legal representation is likely to influence sentencing outcomes. Lastly, as shown in corruption cases, insufficient sentencing guidance in the law, and unclear or poorly drafted statutes and Supreme Court circular letters on corruption (as discussed in Chapter 9), also contribute to disparity and disproportionality in sentencing.

B. Theoretical, Practical and Methodological Significance, and Potential Future Research

Chapter 7 demonstrated that the sentencing practices in the selected courts were generally consistent with the focal concerns perspective,[856] which predicts that sentencing outcomes are the result of three concerns: the offender's culpability and harms caused by the offence ("blameworthiness concern"); the desire to protect the public ("community protection concern"); and the practical constraints faced by judges, courts, or other institutional stakeholders in judicial decision-making and their consequences for individual offenders ("practical constraints and consequences of judicial decisions

[856] This finding is not surprising because, as discussed in Chapter 2, this perspective incorporates, to varying degrees, different perspectives on sentencing, particularly substantive rational attribution theory (which, to some extent, is also influenced by conflict theory), the organisation maintenance perspective, and the court community perspective.

concern"). The second concern, community protection, was not considered in corruption cases because judges did not view this type of offence as directly threatening the public.[857]

Further, as predicted by the focal concerns perspective, judicial interpretation of the importance of various concerns and their meanings varies from one court to another, due to local court contexts (including the social, political and cultural environment), and also because every judge has unique attitudes, beliefs, and characteristics, which are not immune from biases and prejudices. This thesis identifies several areas where Indonesian judges have placed different emphasis on, and have different interpretations of, these three concerns in comparison with the "common" focal concerns perspective. For example, the role of a prior criminal record in increasing an offender's blameworthiness (the 'blameworthiness' concern) and his or her threat to the public (the 'community protection' concern) was minimal. Judges also did not seem to consider the cumulative impact of excessive imprisonment on prison overcrowding (the 'practical constraints and consequences' concern). The meaning of community protection in sentencing theft and embezzlement-related offences were also relatively different, in that it was interpreted not as a need to protect the public from dangerous offenders or from reoffending, but mainly as a need to deter potential offenders. Like other courts in jurisdictions abroad, Indonesian judges were concerned with the court's workload (the 'practical constraints' of the decision). However, in Indonesia, this is manifested in judges following the prosecutor's sentencing recommendations to prevent appeal, not in granting substantial sentencing discounts to offenders who pleaded guilty.[858] Further, the influence of legal factors is less significant than extra-legal factors in predicting sentencing outcomes.

More importantly, this study identified further concerns that influence sentencing outcomes in the Indonesian context that have not been previously considered by the focal concerns perspective (or other common perspectives that try to explain sentencing outcomes) – that is, judge's personal motives or interests in illegally profiting from exercising sentencing discretion (judicial corruption), and lessening their workload (laziness).[859] This thesis proposes the addition of these concerns to the focal concerns perspective so the theory can be applied more widely, including in contexts where judicial accountability remains an issue.

Further, at a practice level, the findings of this thesis concern the vast influence of extra-legal factors in sentencing, particularly with respect to the socio-economic status of offenders and corruption. These findings have broader implications for the discussion of the extent to which judges should have unfettered sentencing discretion. As shown in

[857] As discussed above, most judges viewed theft as more concerning because it harms individual victims. Besides, most corruption cases brought to trial, according to a number of judges, are not large cases.

[858] As mentioned in Chapter 7, this is mainly because of the different impact of pleading guilty in Indonesia and other jurisdictions where it has become the basis of the focal concern theories, such as the US. As mentioned, in Indonesia, a plea of guilty does not obviate the need for a trial.

[859] As discussed in Chapter 7, focal concerns perspective proponents have already considered one aspect of judges' personal interest or motives, that is to save their career, particularly in contexts where judges are elected public officials. However, due to the nature of this interest, theorists have classified this concern as a 'practical constraint' (that judges may be reluctant to impose light sentences to avoid public criticism i.e. 'to be tough on crime' and 'to protect the community' in places with partisan judicial elections).

Table 1, different viewpoints (which relate to different theories, perspectives and principles) offer different answers to that question.

Table 10.1: Illustration of the Correlation Between Theory, Perspective and Principle and Level of Sentencing Discretion Given to Judges

Viewpoint (Theory, Perspective and Principle)		Relation to Sentencing Discretion
Punishment Goals	What are the goals of punishment and how to allocate/distribute punishment?	Application of deterrence, incapacitation and rehabilitation goals require wide discretion
		Application of retributive goal requires less discretion
Constitutional Law	Can legislation limit judicial sentencing discretion (separation of powers issues)	Interpretation of separation of powers principles might influence the legality of fixed punishment, certain types of punishments, or mandatory minimum sentences
Drivers of Crime	What makes someone commit a crime and how to respond it? E.g. social and economic conditions, personal choice (free will), human nature/conditions (biology and psychology)[860]	Understanding criminal activities as human nature/condition, requires wide sentencing discretion so that punishment fits individual offenders
		Understanding criminal activity as an effect of social and economic conditions (poverty, education, environment, etc), requires limitation of discretion and guidance in handling cases involving socially disadvantaged offenders
Sentencing Practices or Impacts	How do judges exercise their discretion? E.g., fairness, consistency or legal compliance by judges, and the influence of a judge's background, value, attitudes as well as wider social, politic, culture and economic context. This includes the role of other actors in sentencing practices	Understanding how judges exercise their discretion determines the level of discretion to be given to judges
	Are certain types of punishment more effective than others? What are the impacts of punishment imposed? (Role of correctional facilities, impact of imprisonment on offenders, etc)	Understanding the effectiveness of different types of punishment will require limits and guidance for judges in determining appropriate types of punishment

[860] There are different, and sometimes, multiple factors, that lead someone to commit different types of offences. This may result in different levels of sentencing discretion, depending on the nature of the offence.

Viewpoint (Theory, Perspective and Principle)		Relation to Sentencing Discretion
Sentencing Principles	What principles should be adopted by judges in sentencing? (Human rights, proportionality, equality before the law, equal impact, parsimony, etc)	Sentencing principles require limitation and guidance for judges in exercising discretion (including to avoid unnecessarily harsh punishment, prevent sentencing disparity and biases as well as to minimise impact towards offenders from socially disadvantaged backgrounds)

From a punishment goals point of view, for example, different goals require different levels of sentencing discretion. As discussed in Chapter 2, a criminal law that applies general deterrence or rehabilitation goals, for example, will offer a wide range of punishments, or provide a wide range between the minimum and the maximum penalties, for judges to choose from, depending on the specific case or the offender's context. Nevertheless, such wide discretion may not be desirable in certain social and political contexts. For example, the Napoleonic Criminal Code was influenced by utilitarian goals (mainly deterrence), as well as classical thought, which held that human beings have free will and so should be fully responsible for their actions. Nonetheless, because the Code was prepared in a context where the judicial system was corrupt, arbitrary, feudal, and involved in inhuman practices, the Code vastly limited judicial discretion in sentencing and legal interpretation.[861] Due to the influence of positivist schools in criminology, which view crimes as caused by biological, phycological and social factors,[862] rehabilitation goals became dominant. This has also driven the introduction of indeterminate sentences, particularly in the US, which largely limits judicial discretion in sentencing and strengthens the role of physicians and criminologists in parole process.[863] However, this approach generally failed to 'cure offenders' and resulted in serious sentencing disparity, except for certain groups of offenders or certain types of offences and treatments,[864] which led the US, for example, to "return" to the retributive goals (under the banner of desert goals) and limit judicial discretion through the application of numerical sentencing guidelines or mandatory minimum penalties. This approach has met with differing levels of success, with some positive and some negative outcomes.[865] Other countries maintain certain levels of sentencing discretion for judges and apply a more flexible approach, for example, by only providing general sentencing guidance, as opposed to numerical sentencing guidance, which has been successful in some cases.[866]

In the Indonesian context, this study shows that wide sentencing discretion and the adoption of all types of punishment goals has caused serious sentencing disparity and

[861] See for example Canals (n 53) 542-3; Cappelletti (n 53) 11-6.
[862] This view and the rehabilitation approach were also influenced by the rise of new sciences, particularly, psychiatry, criminology and psychology. See for example Canals (n 53) 542-3; Cappelletti (n 53).
[863] In the concept of 'indeterminate sentencing', the role of the sentencing judge was merely to decide the minimum and maximum penalties, while the parole board determines the exact date when the offenders are to be released. Zalman (n 98); Klein (n 98).
[864] See for example von Hirsch and Maher (n 54) 28; Andrews et al (n 54).
[865] See the discussion on the issue of numerical guidance and mandatory minimum sentences in Chapter 2 and 9.
[866] See the discussion on this issue in Chapter 2.

disproportionality as well as bias in the sentencing process. Existing limitations on sentencing discretion in statutes, such as the application of minimum mandatory penalties in the Corruption Eradication Law, have failed to address these problems for various reasons, including drafting weaknesses in the law. Similar issues have occurred in the application of mandatory minimum sentences in other statutes, which has also led to abuse by law enforcers and judges.[867] However, without these limitations in the Law, more disparity and disproportionality of sentencing would likely occur.[868]

This discussion leads to a second important outcome of this study: it confirms that the 'one size fits all' approach does not work and that policy makers should determine the right level of sentencing discretion to be given to judges by understanding sentencing practices – that is, how judges exercise their discretion. Further, judicial discretion should be limited and guided by sound sentencing principles, such as those in Table 1, in order to minimise sentencing bias and to ensure equal punishment for offenders from different socio-economic backgrounds.

Lastly, as this is the first in-depth study of sentencing practices in Indonesia that employs multiple methods, this study can be used as a reference point for future research on this topic. It offers, for example, a relatively simple but rigorous method by which to assess sentencing consistency, and to identify similar cases and margins of tolerance.[869] The research in this thesis was conducted using three levels of analysis: statistical analysis of factors related to sentencing; in-depth interviews of judges and relevant court actors; and legal analysis of court decisions. This combination of methods makes this thesis' results representative of actual sentencing practices. The results therefore disprove the common statement made by judges that 'every case is unique' when confronted with claims that there are issues of sentencing disparity and disproportionality.

The findings of this thesis can also serve as hypotheses for future research, to be tested on similar or different types of offences or court locations. For example, whether judges in rural areas behave similarly to judges in the urban courts selected for this study could be investigated, as could whether similar sentencing patterns occur in relation to types of offences other than those covered by this thesis.

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[867] For example, the description of elements of offences in several articles of Law 35 of 2009 on Narcotics that provide severe mandatory minimum penalties (designed for drug producers, sellers or traffickers) are multi-interpretable, and are therefore open for abuse by law enforcers and judges in charging drug users. Another example is the mandatory minimum provisions in the Immigration Law (Law 6 of 2011) or the Management of Coastal Zones and Small Islands Law (Law 27 of 2007) that have been used prosecute minor offences committed by offenders from low socio-economic backgrounds. See for example, Palmer and Missbach (n 242); Rifqi S. Assegaf, 'Injustice and Inconsistency: Sentencing Minor Property Offenders under Supreme Court Regulation No. 2 of 2012' in Tim Lindsey and Helen Pausacker (eds), *Crime and Punishment in Indonesia* (forthcoming).

[868] As shown in Chapter 9, before the Supreme Court issued Circular Letter 2 of 2012, some judges imposed suspended sentences for offences under Article 2(1) and (3) of the Corruption Eradication Law, despite the Law fixing mandatory minimum penalties. Judges even deliberately misinterpret the Law as well as Circular Letter 2 of 2012 to avoid applying mandatory minimum penalties.

[869] As discussed in Chapter 1, all previous small-scale studies on sentencing in Indonesia have not only had very few samples (which is a problem) but also did not categorise similar cases or identify the margin of tolerance.

Further, this thesis highlights the importance of studying "how prosecutors work". As discussed before, the provisions under which a defendant is charged and the sentence recommendations proposed by prosecutors significantly influence sentencing outcomes. As indicated in Chapter 7, prosecutors also seem to be influenced by extra-legal factors in making sentencing recommendations,[870] or at least used different considerations to those considered by judges. All these factors deserve more scrutiny in future research.

C. Policy Recommendations

The complexity of sentencing practices in Indonesia outlined in this thesis means there is not a single, simple or short-term policy recommendation that can be offered. As mentioned, some sentencing issues involve structural issues, such as widespread judicial corruption, biased paradigms and perceptions, a lack of consistency in decision-making and enforcement of laws and guidance, and a lack of legal capacity, as well as other issues related to the performance of court staff, investigators and prosecutors. Further, as long as wide socio-economic gaps in society remain, many of these problems will be endemic. All of these issues need to be addressed to reduce unwarranted disparity, disproportionality and bias in sentencing.

There are, however, a few short-term measures that can be taken, particularly through legislative reform. Lawmakers should provide clear guidance on sentencing principles (factors to be considered in sentencing), as well as on mitigating and aggravating considerations, that properly take into account the socio-economic status of offenders. Such legislative guidance should be made very clear and in explicit terms to avoid ambiguity or misinterpretation.[871] For serious offences and other offences that have illustrated potential for sentencing disparity and disproportionality, legislation should limit judicial discretion by providing numerical sentencing guidance. Further, lawmakers should provide mandatory minimum penalties for offences involving severe harm and high offender culpability, and ensure that the elements of crimes for offences with mandatory minimums are defined in a clear manner and are not applicable to offenders from lower socio-economic backgrounds to prevent bias and abuse by police, prosecutors and judges.

In other words, we need laws (and sentencing practices) that do not have, as Anatole France sarcastically put it, 'majestic equality'. Indonesia needs laws that would not treat the poor and rich alike for sleeping under bridges, begging in the streets, and stealing loaves of bread.[872]

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[870] For example, they shared similar biases against offenders of lower socio-economic background, viewed theft-related offences as more serious than corruption (except grand corruption), and were involved in judicial corruption.

[871] See my criticism of the proposal concerning sentencing principles and mitigating and aggravating considerations in the Criminal Code Bill in Rifqi S. Assegaf, 'Sentencing Guidance in the Indonesia's Criminal Code Reform Bill: For Whose Benefit?' (2018) 19(1) *Australian Journal of Asian Law* 1.

[872] In *The Red Lily,* this French writer criticises the formal conception of equality before the law, that claims that the same law should apply equally to every person despite the fact that the rich will never be in a position to be the target of the law because of their socio-economic status. The exact quote of the book reads 'In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread' (91).

APPENDIX 1: RESULTS OF THE BIVARIATE ANALYSIS

1. Theft-related Offences

1.1. Length of Imprisonment Sentence v. Length of Prosecutor's Recommended Sentence, Total of Mitigating and Aggravation Considerations, Number of Offenders and Duration of Pre-trial detention

Correlations

		Length of Sentence
Length of Prosecutor's recommended sentence	Pearson Correlation	.936 **
	Sig. (2-tailed)	.000
	N	700
Total of mitigating considerations	Pearson Correlation	.015
	Sig. (2-tailed)	.695
	N	701
Total of aggravating considerations	Pearson Correlation	.261 **
	Sig. (2-tailed)	.000
	N	701
Number of Offenders	Pearson Correlation	.201
	Sig. (2-tailed)	.587
	N	701
Duration of pre-trial detention	Pearson Correlation	.342 **
	Sig. (2-tailed)	.000
	N	701

Correlation is significant at the 0.01 level

1.2. Length of Imprisonment Sentence v. Type of Victim

Group Statistics

Type of Victim	N	Mean	Std. Deviation	Std. Error Mean
Business/State	110	10.4282	5.84780	0.55757
Individual	591	15.3519	10.78906	.44380

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	-4.659	699	.000	-4.92376	1.05686	-6.99876	-2.84877

1.3. Length of Imprisonment Sentence v. Recidivism

Group Statistics

	Repeated Offender	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	39	20.7949	17.74740	2.84346
	No	662	14.2131	9.61248	.37360

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	3.907	699	.000	6.58173	1.68459	3.27426	9.88920

1.4. Length of Imprisonment Sentence v. Victim Forgiveness

Group Statistics

	Forgiveness from Victim	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	41	10.8537	7.73486	1.20798
	No	660	14.8108	10.42762	.40589

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	-2.389	699	.017	-3.95710	1.65660	-7.20961	-.70459

1.5. Length of Imprisonment Sentence v. Multiple Offences

Group Statistics

	Multiple Offences	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	35	19.5571	12.60647	2.13088
	No	666	14.3177	10.13724	.39281

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	2.942	699	.003	5.23943	1.78117	1.74235	8.73650

1.6. Length of Imprisonment Sentence v. Offender's Gender

Group Statistics

	Gender	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Male	678	14.6764	10.38031	.39865
	Female	23	11.7174	8.28995	1.72858

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	1.352	699	.177	2.95901	2.18827	-1.33736	7.25538

1.7. Length of Imprisonment Sentence v. Offender's Age

Group Statistics

	Age	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	16-21 years	173	15.4046	10.00891	.76096
	22-65 years	528	14.3089	10.42429	.45366

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	1.212	699	.226	1.09572	.90438	-.67991	2.87135

1.8 Length of Imprisonment Sentence v. Type of Offence

Descriptive

	N	Mean	Std. Deviation	Std. Error Mean	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
362	96	9.4896	5.40759	.55191	8.3939	10.5853	3.00	27.00
363 (1)	445	13.0002	7.66434	.36332	12.2862	12.7143	1.50	42.00
363 (2)	16	20.7500	18.53746	4.63186	10.8774	30.6226	8.00	72.00
365 (1)	10	17.1000	8.51730	2.69341	11.0071	23.1929	5.00	27.00
365 (2)	134	22.5448	14.30632	1.23588	20.1003	24.9893	4.00	84.00
Total	701	14.5793	10.32708	.39005	13.8135	15.3451	1.50	84.00

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	12771.419	4	3192.855	35.910	.000
Within Groups	61882.631	696	88.912		
Total	74654.050	700			

Duncan[ab]

	N	Subset for alpha =.05			
		1	2	3	4
362	96	9.4896			
363 (1)	445	13.0002	13.0002		
363 (2)	16		17.1000	17.1000	
365 (1)	10			20.7500	20.7500
365 (2)	134				22.5448
Sig.		.169	.108	.153	.482

Means for groups in homogeneous subsets are displayed.

a. Uses Harmonic Mean Sample Size = 27.378

b. The group sizes are unequal. The harmonic mean of the group sizes is used. Type I error levels are not guaranteed.

1.9. Type of Stolen Goods

Ranks

	Type of Goods	N	Mean Rank	Sum of Ranks
Sentence	Motorbike	202	420.25	84891.00
	Others	499	322.97	161160.00
	Total	701		

Test Statistics

	Sentence
Mann-Whitney U	36410.000
Wilcoxon W	161160.000
Z	-5.779
Asymp. Sig. (2-tailed)	.000

1.10. Length of Imprisonment Sentence v. Amount of Loss

Correlations

			Length of Sentence	Amount of Loss
Spearman's rho	Length of Sentence	Correlation Coefficient	1.000	.382(**)
		Sig. (2-tailed)	.	.000
		N	701	701
	Amount of Loss	Correlation Coefficient	382(**)	1.000
		Sig. (2-tailed)	.000	.
		N	701	701

**. Correlation is significant at the 0.01 level (2-tailed).

1.11. Length of Imprisonment Sentence v. Occupation

Descriptive

	N	Mean	Std. Deviation	Std. Error Mean	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Student	6	9.1667	8.06019	3.29056	.7080	17.6253	2.00	24.00
Not working	204	13.9167	10.11122	.70793	12.5208	15.3125	1.50	84.00
Labour/eq	237	15.2025	10.70577	.69541	13.8325	16.5725	2.50	84.00
Private/gover-men employee	99	12.5152	8.17864	.82198	10.8840	14.1464	1.50	42.00
'Private'	155	16.0265	11.06865	.88906	14.2710	17.7828	2.50	72.00
Total	701	14.5793	10.32708	.39005	13.8135	15.3451	1.50	84.00

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	1103.826	4	275.957	2.611	.034
Within Groups	73550.224	696	105.676		
Total	74654.050	700			

Duncan[ab]

	N	Subset for alpha =.05	
		1	2
Student	6	9.1667	
Not working	204	13.9167	13.9167
Labour/eq	237	15.2025	15.2025
Private/gover-men employee	99	12.5152	12.5152
Other	155		16.0265
Sig.		.052	.268

Means for groups in homogeneous subsets are displayed.

a. Uses Harmonic Mean Sample Size = 25.996

b. The group sizes are unequal. The harmonic mean of the group sizes is used. Type I error levels are not guaranteed

1.12. Length of Imprisonment v. Court Location

Descriptive

	N	Mean	Std. Deviation	Std. Error Mean	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Central Jakarta	86	10.2674	10.44698	1.12653	8.0276	12.5073	1.50	72.00
South Jakarta	78	10.5321	13.25630	1.50098	7.5432	13.5309	3.00	84.00
Bandung	298	17.8007	10.65110	.61700	16.5864	19.0149	2.00	72.00
Tangerang	239	13.4351	7.06237	.45683	12.5352	14.3351	2.50	42.00
Total	701	14.5793	10.32708	.39005	13.8135	15.3451	1.50	84.00

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	6281.867	3	2093.956	21.346	.000
Within Groups	68372.183	697	98.095		
Total	74654.050	700			

Duncan[ab]

	N	Subset for alpha =.05		
		1	2	3
Central Jakarta	86	10.2674		
South Jakarta	78	10.5321	13.4351	
Bandung	298			17.8007
Tangerang	239			20.7500
Sig.		.833	1.000	1.000

Means for groups in homogeneous subsets are displayed.

a. Uses Harmonic Mean Sample Size = 125.046

b. The group sizes are unequal. The harmonic mean of the group sizes is used. Type I error levels are not guaranteed

2. Embezzlement-related Offences

2.1. Length of Imprisonment Sentence v. Length of Prosecutor's Recommended Sentence, Total of Mitigating and Aggravation Considerations, Number of Offenders and Duration of Pre-trial detention

Correlations

		Length of sentence
Length of Prosecutor's recommended sentence	Pearson Correlation	.847 **
	Sig. (2-tailed)	.000
	N	190
Total of mitigating considerations	Pearson Correlation	-.086
	Sig. (2-tailed)	.239
	N	190
Total of aggravating considerations	Pearson Correlation	.215 **
	Sig. (2-tailed)	.003
	N	190
Number of Offenders	Pearson Correlation	-.248
	Sig. (2-tailed)	.001
	N	190
Duration of pre-trial detention	Pearson Correlation	.231 **
	Sig. (2-tailed)	.001
	N	190

Correlation is significant at the 0.01 level

2.2. Length of Imprisonment Sentence v. Type of Victim

Group Statistics

Type of Victim	N	Mean	Std. Deviation	Std. Error Mean
Business/State	104	13.2721	7.33699	.71945
Individual	86	17.3837	7.99878	.86253

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	-3.691	188	.000	-4.11161	1.11402	-6.30919	-1.91403

2.3. Length of Imprisonment Sentence v. Recidivism

Group Statistics

	Repeated Offender	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	5	16.4000	5.17687	2.31517
	No	185	15.0989	7.96163	.58535

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	.363	188	.717	1.30108	3.58612	-5.77312	8.37529

2.4. Length of Imprisonment Sentence v. Victim Forgiveness

Group Statistics

	Forgiveness from Victim	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	1	16.4286	9.37829	3.54466
	No	183	15.0836	7.85824	.58090

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	.441	188	.659	1.34496	3.05683	-4.66540	7.35533

2.5. Length of Imprisonment Sentence v. Multiple Offences

Group Statistics

	Multiple Offences	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Yes	13	11.9231	8.01521	2.22302
	No	177	15.3689	7.85668	.59054

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	-1.524	188	.129	-3.44585	2.26059	-7.90523	1.01353

2.6. Length of Imprisonment Sentence v. Offender's Gender

Group Statistics

	Gender	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	Male	155	15.7890	7.98563	.64142
	Female	35	12.2286	6.85173	1.15815

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	2.441	188	.016	3.56046	1.45838	.68357	6.43735

2.7. Length of Imprisonment Sentence v. Offender's Age

Group Statistics

	Age	N	Mean	Std. Deviation	Std. Error Mean
Length of Sentence	16-21 years	10	8.6000	5.66078	1.79010
	22-65 years	180	15.4961	7.85334	.58535

Independent Sample Test

	t-test for Equality Means						
	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
						Lower	Upper
Length of Sentence	-2.734	188	.007	-6.89611	2.52199	-11.87114	-1.92108

2.8. Length of Imprisonment Sentence v. Type of Offence

Ranks

	Type of Offence	N	Mean Rank	Sum of Ranks
Sentence	Art. 372	90	108.47	9762.50
	Art.374	100	88.83	8382.50
	Total	190		

Test Statistics

	Sentence
Mann-Whitney U	3332.500
Wilcoxon W	8382.500
Z	-3.093
Asymp. Sig. (2-tailed)	.002

2.9. Type of Stolen Goods

Ranks

	Type of Goods	N	Mean Rank	Sum of Ranks
Sentence	Motorbike	4	63.75	255.00
	Others	186	96.18	17890.00
	Total	190		

Test Statistics

	Sentence
Mann-Whitney U	245.000
Wilcoxon W	255.000
Z	-1.170
Asymp. Sig. (2-tailed)	.242

2.10. Length of Imprisonment Sentence v. Amount of Loss

Correlations

			Length of Sentence	Amount of Loss
Spearman's rho	Length of Sentence	Correlation Coefficient	1.000	.309(**)
		Sig. (2-tailed)	.	.000
		N	190	190
	Amount of Loss	Correlation Coefficient	.309(**)	1.000
		Sig. (2-tailed)	.000	.
		N	190	190

**. Correlation is significant at the 0.01 level (2-tailed).

2.11. Length of Imprisonment Sentence v. Occupation

Descriptive

	N	Mean	Std. Deviation	Std. Error Mean	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Not working	7	16.1429	5.39841	2.04041	11.1502	21.1365	9.00	2.00
Labour/eq	30	15.4667	7.31900	.1.33626	12.7337	18.1996	7.00	36.00
Private/gover-men employee	105	13.4410	7.35365	.71764	12.0178	14.8441	1.00	36.00
"private"	38	17.7632	8.00484	1.29856	15.1320	20.3942	2.00	39.00
Mid-level bureaucrat/executive	5	15.6000	4.82701	2.15879	9.6065	21.5935	12.00	24.00
High-ranking official/executive	5	26.8000	13.29286	5.94474	10.2947	43.3053	15.00	46.00
Total	190	15.1332	7.89440	.57272	14.0034	16.2629	1.00	46.00

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	1255.655	5	251.131	4.391	.001
Within Groups	10523.106	184	57.191		
Total	11778.761	189			

Duncan[ab]

	N	Subset for alpha =.05	
		1	2
Not working	7	16.1429	
Labour/eq	30	15.4667	
Private/gover-men employee	105	13.4410	
"Private"	38	17.7632	
Mid-level bureaucrat/executive	5	15.6000	
High-ranking official/executive	5		26.8000
Sig.		.268	1.000

Means for groups in homogeneous subsets are displayed.

c. Uses Harmonic Mean Sample Size = 9.803

d. The group sizes are unequal. The harmonic mean of the group sizes is used. Type I error levels are not guaranteed

2.12. Length of Imprisonment Sentence v. Court Location

Descriptive

	N	Mean	Std. Deviation	Std. Error Mean	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Central Jakarta	19	15.4737	9.83965	2.25737	10.7311	20.2162	6.00	46.00
South Jakarta	17	12.6471	5.52201	1.33929	9.8079	15.4862	2.00	24.00
Bandung	93	15.5892	7.91784	.82125	13.9582	17.2203	3.60	36.00
Tangerang	61	15.0246	7.79980	.99866	13.0270	17.0222	1.00	39.00
Total	190	15.1332	7.89440	.57272	14.0034	16.2629	1.00	46.00

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	127.340	3	42.447	.678	567
Within Groups	11651.422	186	62.642		
Total	11778.761	189			

Duncan[ab]

	N	Subset for alpha =.05		
		1	2	3
Central Jakarta	86	10.2674		
South Jakarta	78	10.5321	13.4351	
Bandung	298			17.8007
Tangerang	239			20.7500
Sig.		.833	1.000	1.000

Means for groups in homogeneous subsets are displayed.

c. Uses Harmonic Mean Sample Size = 125.046

d. The group sizes are unequal. The harmonic mean of the group sizes is used. Type I error levels are not guaranteed

3. Corruption

3.1. Length of Imprisonment Sentence v. Length of Prosecutor's Recommended Sentence, Amount of Loss, Amount of Illicit Gain Received, Total of Mitigating and Aggravation Considerations, and Occupation

Correlations

			Sentence
Spearman's rho	Length of Prosecutor's recommended sentence	Correlation Coefficient Sig. (2-tailed) N	.875(**) .000 205
	Amount of Loss	Correlation Coefficient Sig. (2-tailed) N	.379(**) .000 205
	Amount of Illicit Gain Received	Correlation Coefficient Sig. (2-tailed) N	.287(**) .000 205
		Sig. (2-tailed) N	
	Total of aggravating considerations	Correlation Coefficient Sig. (2-tailed) N	.297(**) .000 205
	Total of mitigating considerations	Correlation Coefficient Sig. (2-tailed) N	-.200(**) .004 205
	Occupation	Correlation Coefficient Sig. (2-tailed) N	.006 .929 205

** Correlation is significant at the 0.01 level (2-tailed).

3.2. Length of Imprisonment Sentence v. Type of Offence

Mann-Whitney Method

Ranks

	Type of Offence	N	Mean Rank	Sum of Ranks
Length of Sentence	Art.2(1)	40	177.05	7082.00
	Art.3	165	85.05	14033.00
	Total	205		

Test Statistics

	Length of Sentence
Mann-Whitney U	338.000
Wilcoxon W	14033.000
Z	-9.142
Asymp. Sig. (2-tailed)	.000

3.3. Length of Imprisonment Sentence v. Gender

Mann-Whitney Method

Ranks

	Gender/Sex	N	Mean Rank	Sum of Ranks
Length of Sentence	Male	187	103.88	19426.00
	Female	18	93.83	1689.00
	Total	205		

Test Statistics

	Length of Sentence
Mann-Whitney U	1518.000
Wilcoxon W	1689.000
Z	-.713
Asymp. Sig. (2-tailed)	.476

3.4. Length of Imprisonment Sentence v. Repaying Illicit Gain

Correlations

		Length of Sentence	Repaying Illicit Gain
Length of Sentence	Pearson Correlation	1	.386**
	Sig. (2-tailed)		.000
	N	205	205
Repaying Illicit Gain	Pearson Correlation	.386**	1
	Sig. (2-tailed)	.000	
	N	205	205

** Correlation is significant at the 0.01 level (2-tailed).

3.5. Length of Imprisonment Sentence v. Recovery Loss

Correlations

		Length of Sentence	Recovery Loss
Length of Sentence	Pearson Correlation	1	.406**
	Sig. (2-tailed)		.000
	N	205	205
Recovery Loss	Pearson Correlation	.406**	1
	Sig. (2-tailed)	.000	
	N	205	205

** Correlation is significant at the 0.01 level (2-tailed).

3.6. Length of Imprisonment Sentence v. Age

Correlations

		Age
Length of Sentence	Pearson Correlation	-.069
	Sig. (2-tailed)	.326
	N	205

3.7. Length of Imprisonment Sentence v. Court Location

Ranks

	Location	N	Mean Rank	Sum of Ranks
Length of Sentence	Jakarta ACC	41	134.51	5515.00
	Bandung ACC	164	95.12	15600.00
	Total	205		

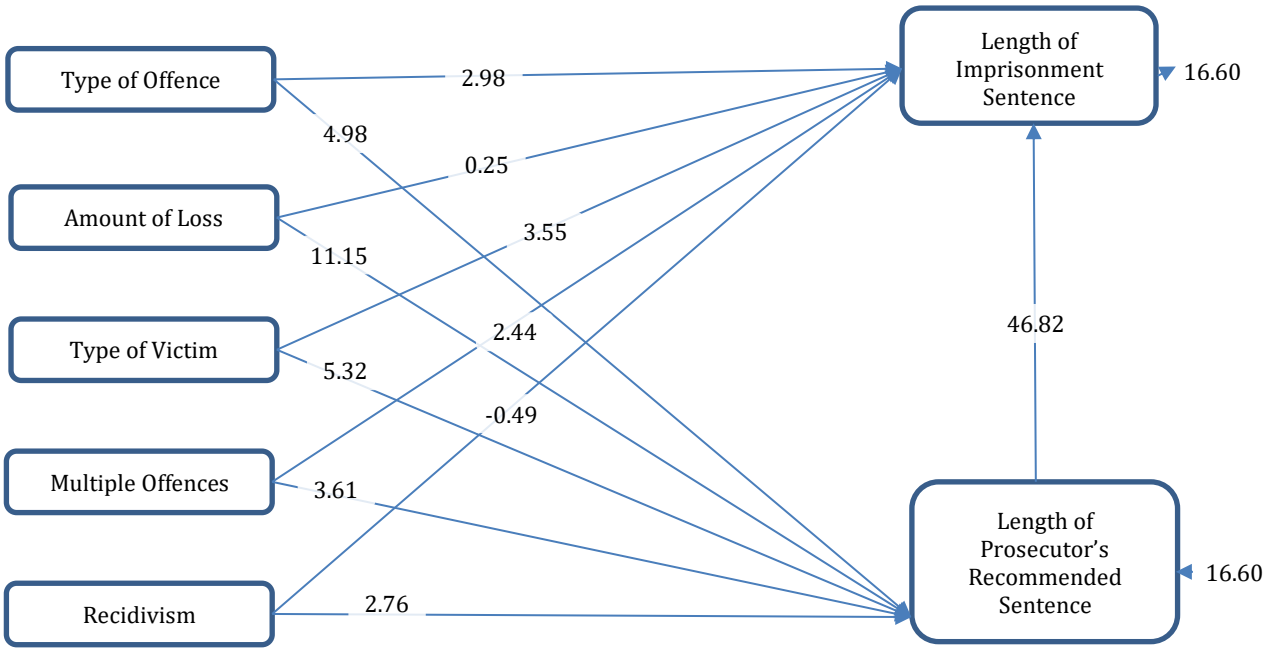
Test Statistics

	Length of Sentence
Mann-Whitney U	2070.000
Wilcoxon W	15600.000
Z	-3.951
Asymp. Sig. (2-tailed)	.000

APPENDIX 2: RESULTS OF THE PATH ANALYSIS

Theft-Related Offences

T-Value



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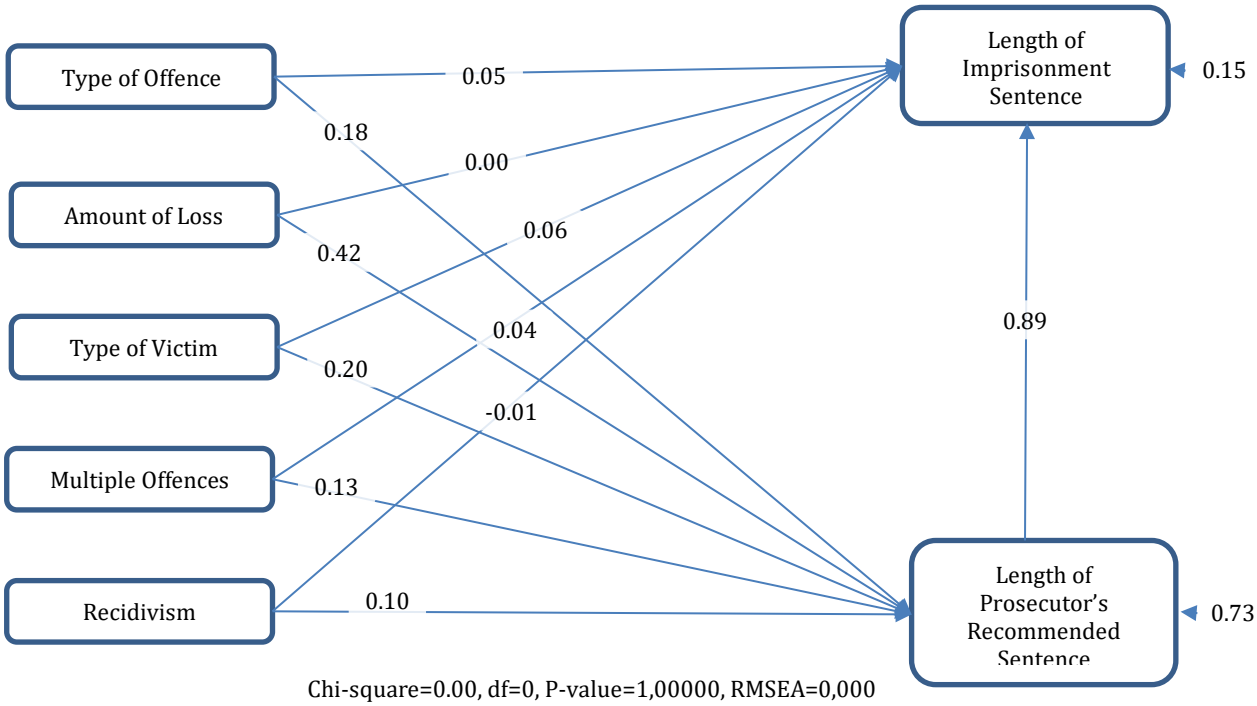

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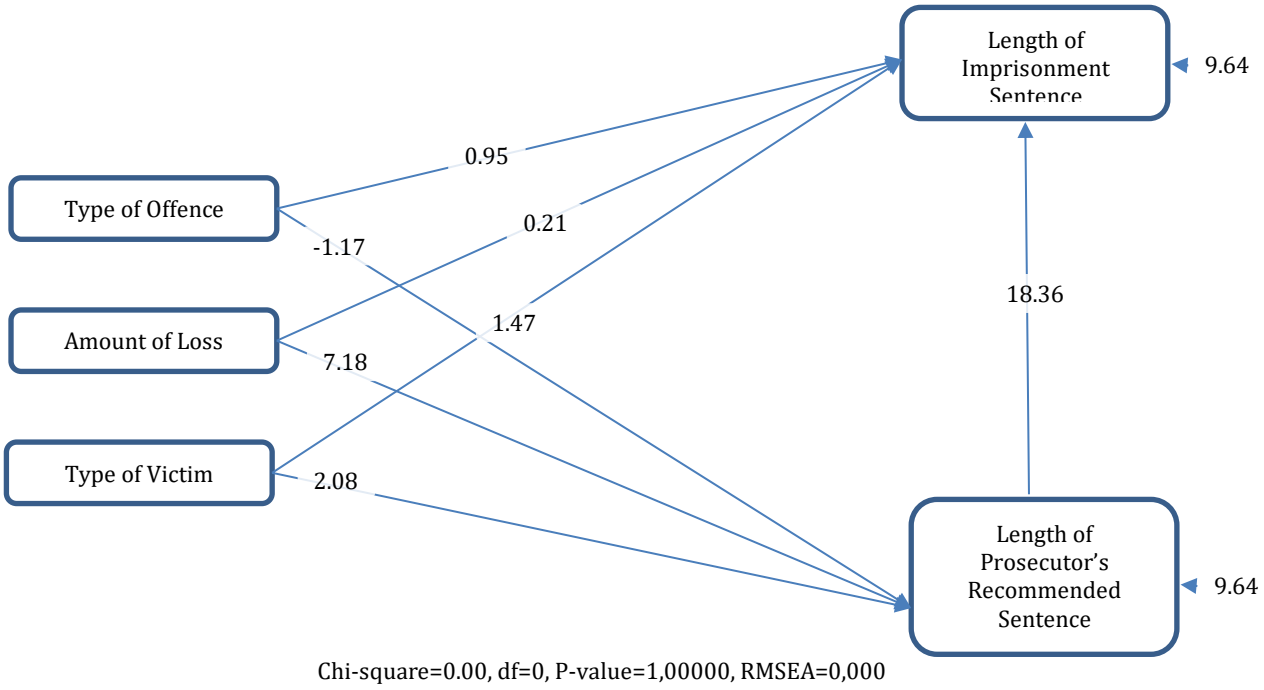
Embezzlement-related Offences

T-Value



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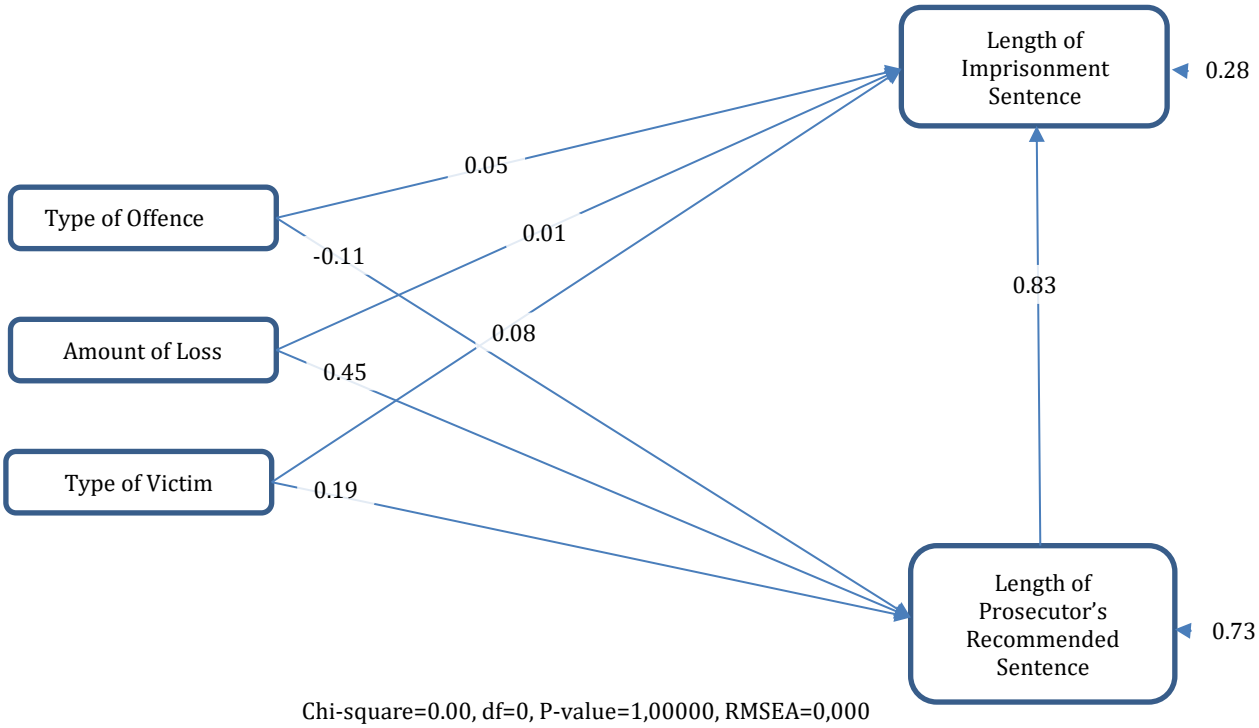

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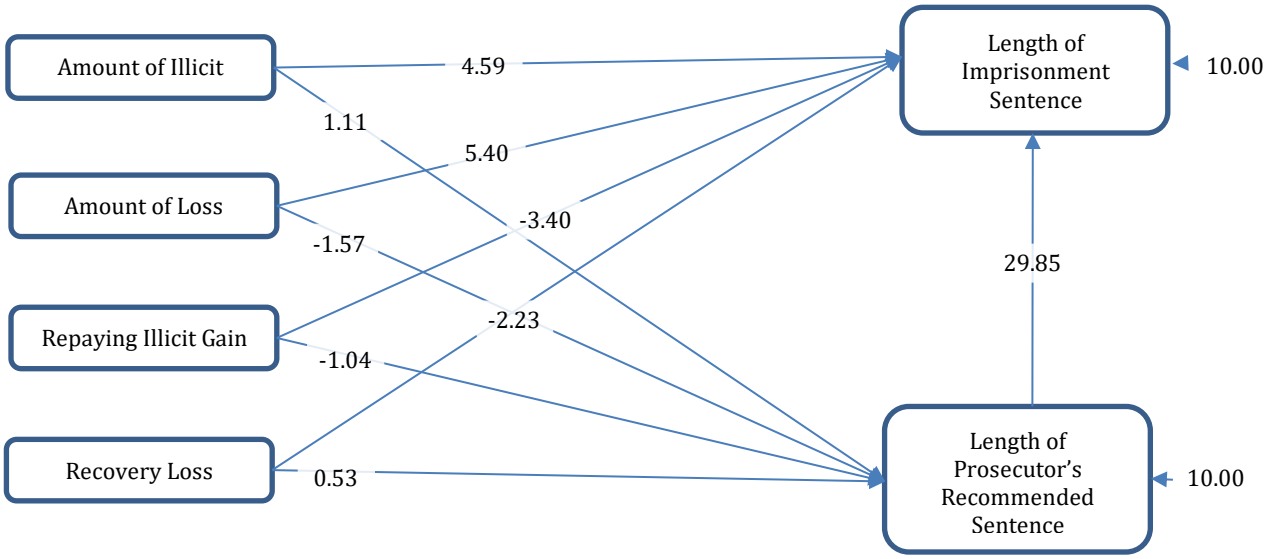
Corruption

T-Value



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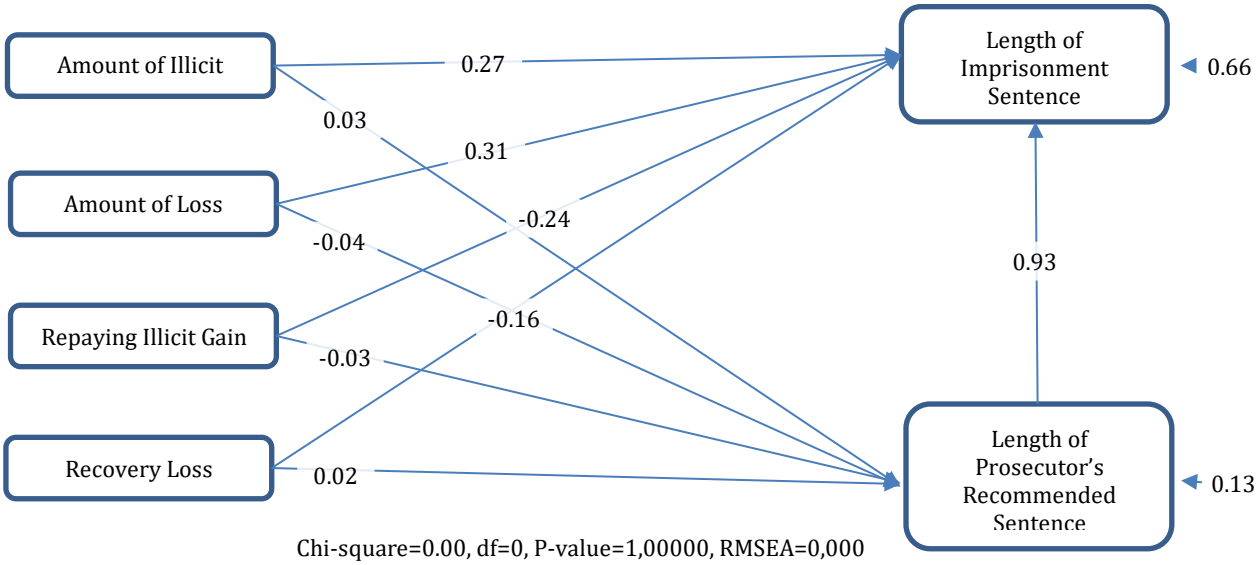

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