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ARTICLE

ADDITIONAL PENALTY BY REVOKING OF POLITICAL RIGHT IN CRIMINAL ACTS OF CORRUPTION: ARRANGEMENT PROPORTIONALITY AND IMPLEMENTATION DISPARITY

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Abstract

This research is a normative law research using a conceptual and statute approach. In the philosophical context, the revocation of political rights has the purpose to protect public morality, to guarantee that the public officer has a good integrity to keep the third person's interest –society–, to keep the democracy pillar, and to give the wary effect in order that the revocation of political right is not as the degradation of human status. In the human right context, the revocation of political right is derogable right through a justice process. The revocation of political right without a law mechanism is unconstitutional. The disparity of the judge's ruling in the revocation of political right is caused by some weak elements of law namely, no guidelines in revoking the political right, the position of the revocation of the political right as an optional additional-penalty, and the differences of judge's philosophical law of thought. In the legal constitutional context, the conflict occurs between the ruling of court and Cconstitutional Court. When there is a legal conflict problem related to the revocation of political rights, the solution is to refer to the decision of the constitutional court which has a higher position based on the principle of authority. Therefore, in the development of additional criminal sanctions related to the revocation of political rights in the future, the dimensions of criminal objectives must be absolute, with terms and conditions, criminal objectives which are relative to the terms and conditions, dimension of balance with terms and conditions, and eliminating the revocation of political rights on terms and conditions.

Keywords: proportion, disparity of revoking the political right, criminal acts of corruption

A. INTRODUCTION

Revoking the political right in corruption cases is allowed in Indonesian law system with the provision of not being met a demand in a basic obligation to the implementation of public office duties.[1] Political-right revocation should consider the principle of a criminal act proportion in a corruption case in order to avoid the arbitrary punishment form such as the judgment of Indonesian Supreme Court Number 2427 K / Pid.Sus / 2014 which states that the judge does not make a decision on political-right revocation. However, the judgment of Indonesian Supreme Court Number 1261 K / Pid.Sus / 2015 states that the judge makes a decision on political-right revocation even though those two cases have a relation in a criminal act. Therefore, the political-right revocation nowadays is not relevant to the ideals of justice and is in need of a legal reform. The legal reform can be created by two mechanisms of a criminal law policy namely (1) publishing issue guidelines for the political-right revocation used as a rule for the judge to give an additional penalty of political-right revocation, and (2) undertaking a legal reform in an additional penalty of political-right revocation in the law on eradicating corruption.

The principles of the political right cannot be separated from the principles of the human right as it is involved automatically. There are eight principles of human rights namely *universality, human dignity, non-*

1 There are many cases in revoking the political rigth sentenced to the certain figures, such as LHS (former PKS president), Anas Urbaningrum (former PD chairman), Akil Muchtar (Former Constitutional Court Chief Justice), and Ratu Atut Chosiyah (Former Banten Governor). The revocation of political rights shows an attempt of Indonesian Law system to minimize the corruption over the political and law areas. "Anti-corruption discourse is pervaded by the view that it is a dysfunction, a cancer of the body politic that must be eradicated to achieve good government. Another common belief is that corruption is the fault of bad people, who can be identified and removed from the bureaucracy, police, or parliament. Indonesia is a patronage society and its corruption is not only systemic but the means by which power and wealth are shared among contesting factions of the ruling elite by democratic norms". Howard Dick and Jeremy Mulholland, "*The Politics of Corruption in Indonesia*", 17 Geo. J. Int'l Aff. 43 (2016). Compare with Muhammad Saleh, Dimas Firdausy Hunafa*,"Pemilu Berintegritas: Menggagas Pencabutan Hak Politik Bagi Narapidana Tindak Pidana Korupsi Yang Dipilih Melalui Pemilihan Umum*", Seminar Nasional Hukum Universitas Negeri Semarang Volume 4 Nomor 3 Tahun 2018, 1069-1086, 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*", Jurnal Yudisial Vol. 8 No. 1 April 2015: 23 – 44, Rangga Alfauzi, *Penjatuhan Pidana Pencabutan Hak Politik Terpidana Korupsi Dalam Perspektif Hukum Pidana Dan HAM*. Tesis. Program Magister Ilmu Hukum program Pascasarjana Fakultas Hukum Universitas Islam Indonesia, 2015

discrimination, equality, indivisibility, interdependency, and *responsibility.*[2] Those are the basis of the study of human rights including political rights.

The basis of state responsibility for the protection, promotion, enforcement, and fulfillment of human rights can be found in the formulation of article 28I paragraph (4) and (5) of the 1945 Constitution of the Republic of Indonesia. It states that Indonesia adheres to the principles of a democratic constitutional state that promotes appreciation and respect for human rights in various aspects including respect for political rights. They are an integral part that cannot be separated into Indonesia's democratic system.

Wiratraman[3], states both articles have their conception as an element of state obligation. The concept of Article 28I paragraph (4), substantially affirms that the state must establish human rights conditions in continued, high, and clear standard and step while the paragraph (5) refers to the concepts of the authorization, utilization and legal instrumentation. It means that the state in carrying out its obligations may use all its authority specially to develop legal instrumentation to protect the rights of the community, both in the establishment of institutional facilities that protect human rights and the legislation process.

Article 43 of law no. 39 year 1999 concerning human rights has affirmed the democratic system of respect for political rights in the form of the right to vote and be elected. It confirms that every citizen deserves the equal opportunity in political life and government. Normatively, the meaning of the provisions of the article are not substantially binding because the protection of human rights is limited. In this case, the right may be violated if

2 N. Flowers, *The Human Rights Education Handbook: Effective Practice for Learnig, Action and Change, University of Minnesota,* Minneapolis, MN. 2000 and D.J. Ravindran, *Human Rights Praxis: A Resource Book of Study, Action, and Reflection,* The Asia Forum of Human Rights and Development. Bangkok, Thailand, 1998, In Herlambang Perdana Wiratraman, "*Konstitusionalisme & Hak-Hak Asasi Manusia Konsepsi Tanggung jawab Negara dalam Sistem Ketatanegaraan Indonesia*", Jurnal Ilmu Hukum YURIDIKA Vol. 20, No. I- Januari, 2005, at3. These eight principles of human rights can not necessarily be practiced in Indonesia. According to Joeni A. Kurniawan, the main problem associated with the legal and human rights protection instruments which already exist in Indonesia is that these instruments still focus only on protecting and maintaining mere coexistence among the different cultural groups, and not on building/facilitating communication and dialogue among said cultural groups in order to build a common understanding and stronger sense of societal cohesion, which is, in fact, exactly what is promoted by the 'interculturalist' approach.

3 R. Herlambang Perdana Wiratraman, "*Konstitusionalisme & Hak-Hak Asasi Manusia Konsepsi Tanggung jawab Negara dalam Sistem Ketatanegaraan Indonesia*", Jurnal Ilmu Hukum YURIDIKA Vol. 20, No. I- Januari, Fakultas Hukum Universitas Airlangga, Surabaya, 2005, at 9.

a person commits a criminal act that harms the state through the punishment mechanism. One of the well-known punishments in the Criminal Procedure Code is a deprivation of political rights that constitutes an additional penalty.

Based on a postulate that states *Ubi non est principalis, non potest esse accesorius:* where there is no principal thing, there can be no additional thing.[4] That is the postulate that underlies the essential and additional things. Therefore, additional criminal penalty may not be imposed without a principal penalty. Additional criminal sanction such as revoking some certain rights is only temporary, unless the convict has been sentenced to life imprisonment.[5]

One of the additional penalties is the deprivation of certain rights including political rights. In fact, the revocation of political rights has existed since the Roman era called *Imfamia*, which then the French included it in their penal code under the name *peines infamantes*, and finally, our law makers have listed it as the first additional penalty in Article 10 of the Penal Code.

The basic norms for the revocation of political rights in public office have been contained in Article 10, Article 35 paragraph (1) and Article 38 of Law Number 1 Year 1946 in the Criminal Code. In addition, revocation of certain rights (political rights) has also been regulated in Article 18 paragraph (1) sub-paragraph "d" of Law Number 31 Year 1999 concerning the Eradication of Corruption as amended by Law Number 20 Year 2001 regarding amendment to Law No. 31/1999 on the Eradication of Corruption (so-called the Corruption Eradication Act). Besides the norms mentioned before, a Decision of the Constitutional Court Number 4 / PUU-VII / 2009 also explains that the revocation of political rights in public office is conditionally unconstitutional. It means that the provision is declared unconstitutional if it does not meet the four conditions set by the Constitutional Court in its decision namely, (1) it is not applicable for elected officials, (2) it applies only for five years now that the convicted person under goes punishment, (3) it is exception for a former convict who openly and honestly discloses to the public that he/she is an ex-convicted person; (4) it is not for a recidivist. The terms and conditions of the revocation of political rights in Decision of

4 Joeni A. Kurniawan, "*When Human Rights are not Enough: A "Failure" of Multiculturalism in Indonesia? (A Preliminary Hypothesis)*", Journal of Southeast Asian Human Rights, Vol. 2 No. 1 June 2018, at 245.

5 Eddy O.S. Hiariej, *Prinsip-prinsip Hukum Pidana Edisi Revisi*, Cahaya Atma Pustaka, Yogyakarta, 2016, at 471

the Constitutional Court Number 4 / PUU-VII / 2009 are further clarified and limited by the Constitutional Court Decision Number 42 / PUU-XIII / 2015 which stipulates that a former inmate has the opportunity to propose as a candidate for a regional head if the convicted person openly and honestly discloses to the public that she/he is an ex-convicted person. Both Decisions of the Constitutional Courts indicate that the revocation or restriction of political rights is not permitted in the case of criminal acts, especially corruption.[6]

Several examples of Supreme Court rulings in corruption that have permanent legal force related to the decision of the revocation of political rights in public office and to the contrary in corruption cases are as follows:

1. Decision of the Supreme Court of the Republic of Indonesia Number 285 K / Pid.Sus / 2015[7]
2. Decision of the Supreme Court of the Republic of Indonesia Number 1195 K / Pid.Sus / 2014[8]

6 See also Muhammad Siddiq Armia, "*The Role of Indonesian Constitutional Court In Protecting Energy Security*." Jurnal Konstitusi 13.2 (2016): at241-258. See also Muhammad Siddiq Armia, "*Constitutional Courts And Judicial Review: Lesson Learned For Indonesia*", Negara Hukum, Vol.8, No.1, June 2017, at 107-130

7 The revocation of political rights is imposed because a criminalis found guilty of a corruption act as it has been stipulated in the provisions of Article 6 paragraph (1) of Law Number 31 Year 1999 concerning the Era dication of Corruption as amended by Law Number 20 Year 2001, concerning the amendment to the Law Number 31 Year 1999 concerning the Eradication of Corruption in Article 55 paragraph (1) of the Criminal Code. In the Decision of the Supreme Court, the judge in his ruling imposed a 7 (seven) year imprisonment and a fine of Rp. 200.000.000,00 (two hundred million rupiahs). If the fine is not paid, it is replaced with imprisonment for 6 (six) months and stipulated an additional penalty of the revocation of political rights in public office.

8 The revocation of political rights is imposed because the criminal is proven to commit a corruption act and money laundering as it has been stipulated in the provisions of Article"12 a"of Law Number 31 Year 1999 concerning the Eradication of Corruption as amended by Law Number 20 Year 2001 regarding the Amendment to Law Number 31 Year 1999 concerning the eradication of corruption in Article 55 paragraph (1) of the Criminal Code and Article 3 paragraph (1) a, b and c of Law Number 15 Year 2002 regarding money laundering as amended by Law Number 25 of 2003 concerning the amendment to Law Number 15 of 2002 concerning money laundering crimes with Article 65 Paragraph (1) of the Criminal Code andArticle 6 Paragraph (1) "b" as amended Number 25 Year 2003 on Amendment to Law Number 15 Year 2002 concerning Money Laundering with Article 65 paragraph (1) of the Criminal Code and Article 6 paragraph 1 "b and c"of Law of Republic of Indonesia Number 15 Year 2002 regarding Money Laundering as amended by Law Number 25 Year 2003 regarding Amendment to Law Number 15 Year 2002 concerning Money Laundering Act, Article 3 of Law Number 8 Year 2010 concerning Prevention and Eradication of Money Laundering with Article 55 Paragraph (1) of the Criminal Code Article 65 Paragraph (1) of the Criminal Code and Article 5 of Law Number 8 Year 2010 concerning Prevention and Eradication of Money Laundering Article 55 Paragraph (1) of the Criminal Code in Article 65 Paragraph (1) of the Criminal Code. in the decision of the Supreme Court, the judge in his ruling imposed a criminal sentence of 18 (eigh teen) years and a fine Rp. 1,000,000,000.00 (one billion rupiah). If the fine is not paid, it is replaced withim prisonment for 6 (six) months and an additional penalty of revocation of political

3. Decision of the Supreme Court of the Republic of Indonesia No. 1648 K / Pid.Sus / 2014[9]
4. Decision of the Supreme Court of the Republic of Indonesia Number 537K / Pid.Sus / 2014[10]
5. Decision of the Supreme Court of the Republic of Indonesia Number 1885 K / PID.SUS / 2015.[11]
6. Decision of the Supreme Courtofthe Republic of Indonesia Number 1261 K / Pid.Sus / 2015[12]
7. Decision of the Supreme Courtofthe Republic of Indonesia Number 809 K / Pid.Sus / 2016[13]
8. Decision of the Supreme Court Number 2427 K / Pid.Sus / 2014[14]
9. Decision of the Supreme Court of the Republic of Indonesia Number 1616 K / Pid.Sus / 2013[15]

rights in public office.

9 The revocation of political rights is imposed for violating Article 2 Paragraph (1) with Article 55 Paragraph (1) of the Criminal Code with Article 65 Paragraph (1) ofthe Indonesian Criminal Code andArticle 12 “a” with Article 55 Paragraph (1) ofArticle 1 criminal code with Article 64 paragraph (1) of the Criminal Code, and Article 5 Paragraph (1) “a” with Article 55 Paragraph (1) of the Criminal Code oflaw No.31 year 1999 with Law No.20 year 2001 on Amendment to Law No.31 yaer 1999 on the Eradication of Corruption,

10 The revocation of political rights is imposed on the defendant because the Defendant is proven to receive a cash flow of Rp32,000,000,000; (thirty two billion rupiahs).

11 The revocation of political rights is taken because the Defendant’s action has fulfilled the elements of Article 2 Paragraph (1) of Law Number 31 Year 1999 as amended by Law Number 20 Year 2001.

12 The revocation of political rights is imposed because the Defendant’s action is political corruption. The series of actions of the defendant fulfils the elements of Article 12 a of Law Number 31 Year 1999 as amended by Law Number 20 Year 2001 with Article 64 of the Criminal Code as the first indictment and Article 3 of Law number 8 of 2010 with Article 65 paragraph (1) (second indictment) and Article 3 paragraph (1) of Law number 15 of 2002 as amended by Law number. 25 Year 2010.

13 The revocation of political rights is handed down by the judge because the defendant commits not only a criminal act of corruption but also a crime of money laundering.

14 The decision of the Supreme Court Number 2427 K / Pid.Sus / 2014 on be half of convicted Andi Alfian Malarangeng in the Decision of the Court which has a permanent legal power of the appeal petition of the Public Prosecutor is granted and the Defendant is found guilty as well as Article 2 paragraph (1) with Article 18 of Law no. 31 of 1999 as amended by law no. 20 year 2001 with Article 55 paragraph (1) and Article 65 paragraph (1) of the Criminal Code. The Supreme Court Decision Number 2427 K / Pid.Sus / 2014 corroborates the verdict of the Corruption Crime Court in the Jakarta High Court Number. 57 / PID / TPK / 2014 / PT.DKI, which corroborates the decision of the Corruption Court of the Central Jakarta Number. 23 / Pid.Sus / TPK / 2014 / PN.Jkt.Pst. In the Supreme Court Decision Number 2427 K / Pid.Sus / 2014 the judge imposes a penaltyof 4 (four) years imprisonment and a fineof Rp 200,000,000.00 (two hundred million rupiahs). If the fine is not paid, it is changed with imprisonment for 6 (six) months and in the Supreme Court Decision, the judge does not impose an additional penalty by there vocation of political rights.

15 The decision of the Supreme Court of the Republic of Indonesia Number 1616 K / Pid. Sus / 2013 on behalf of the convicted Angelina Fatricia Pingkan Sondakh in the Supreme Court ruling rejected the appeal of the defendant and canceled the verdict of PT Number 11 / Pid / TPK / 2013 / PT.DKI and reinforced the District Court DecisionNumber 54 / Pid.B / TPK / 2012 / PN.Jkt.P stand self-trial. A convicted person has committed a criminal act of

The decision of the Supreme Court to impose a revocation of the right clearly contradicts the Constitutional Court's decision and this raises the legal issues regarding which decision is higher?, what is the recovery mechanism for the decision issued by the legitimate institution?, and what is the cause of disparities in the revocation of political rights? Because the revocation of political rights is still a legal dialectic nowadays. For the pro-revocation of political rights, they might state that the revocation of political rights is not contrary to the law because the provisions have been regulated in the legislation.[16] In opposition, the supporters of anti-revocation of political rights might argue that the revocation of political rights is considered as a

corruption as stipulated in the provisions of Article 12 with Article 18 of Law Number 31 Year 1999 concerning the eradication of criminal acts of corruption as amended by Law Number 20 Year 2001 regarding the amendment to Law Number 31 Year 1999 regarding eradication of criminal acts of corruption with Article 64 paragraph (1) of the Criminal Code and has been imposed a 12 (twelve) year imprisonment and a fine of Rp. 500.000.000,00 (five hundred million rupiahs). If the fine is not paid, it is replaced with imprisonment for 8 (eight) months and pay there placement money of Rp. 12.580.000.000,00 (twelve billion five hundred eighty million rupiah) and U $ 2,350,000.00 (two million three hundred and fifty thousand US Dollars). If the convicted person does not pay there placement money for a maximumof 1 (one) month after the decision of the Court has obtained a permanent legal force, its property may be seized by the Prosecutor and auctioned off to pay there placement money. If the defendant does not have sufficient assets to pay, it is replaced by a maximum imprisonment of 5 years. as well as in the Supreme Courtruling, the judge did not impose an additional criminal sanctions with the revocation of political rights.

16 For example, Saldi Isra said,"The constitutional right of citizens to vote and to be elected is a right guaranteed by the constitution, international law and convention, so that the limitation of the annihilation and abolition of such rights constitutes a violation of the human rights of the citizens". For example, the annulment of additional criminal sanction of the right to vote and elected in public office in the case of Djoko Susilo which does not include the length of the revocation of the right means that it has deleted or excluded the right to vote and be elected in public office. This is contrary to the Human Rights of the 1945 Constitution Article 28 D paragraph (3). If the imposition of sanctions of political rights revoked for corrupt, the legal reform in joint of statead ministration through JR must be done. (https://safwaalmahyra.wordpress.com/2016/12/27/pencabutan-hak-politik-bagi-koruptor/). According to Bambang, more and more legal decisions on the addition of corporal punishment. "But if the removal of political rights goes beyond human rights, that's the most fundamental right," he added (http://www.tribunnews.com/nasional/2013/12/20/pro-kontra-pencabutan-hak-politik-jenderal-djoko-susilo). While, Basarahasses, the revocation of this political right does not violate human rights. According to him, the rights of convicted politicians should have been revoked when they were found guilty https://nasional.kompas.com/read/2013/12/19/1146096/ Tak. Perlu. Berpikir. Seribu. Kali .untuk. Cabut.Hak.Politik.Koruptor). Refly Harun assessed that the verdict of the revocation of political rights is potentially contrary to the decision of the Constitutional Court (VIVA.co.id, Tuesday 10 January 2017), ICW, Asrul Sani (JAKARTA, KOMPAS.com Wednesday 11/1/2017). Mohammad Mahfud MD as a neutral person on November 29, 2014, ever wrote the article "Revocation of Political Rights" in Koran Sindo. In his writing, Mahfud does not want to get caught up in the pro- and anti-revoking the political rights about whether it violates human rights or not. He underlined the criticism that the revocation of political rights is excessive, Abdul Aziz,"Seberapa Besar Pencabutan Hak Politik Halangi Rio Capella?"http:// tirto.id, December 29, 2016.

form of punishment which can dehumanize and leave the moral stigma for ex-prisoners. Even from the aspect of the state ideology, the revocation of political rights is considered contrary to the principles of democracy and the rule of law. Therefore, it can violate the human rights which are considered as the most fundamental rights. The rise of disparity on the implementation of the political-rights revocation in corruption crime that is caused by its standard-norm guidance can be imposed as the penalty of the revocation of political rights as it is still facultative. This has led to disparities in judges' decisions in corruption cases and is particularly vulnerable to misuse.

Based on the background description, it can be formulated a problem of proportionality of the revocation of political right for the corruption acts in preventing the disparity of punishment.

B. POLITICAL RIGHT: ISSUES TOWARD HUMAN RIGHT

Political rights cannot be explained without knowing the definition of rights and politics itself. Rights, in this case, must be interpreted as a unity of the concept of human rights. Human rights are rights that (should) be universally acknowledged as inherent rights to human beings[17] because of their nature as human beings. Moreover, politics is an attempt to determine the rules that can be accepted by society to create a harmonious life.[18] The

17 Soetandyo Wignjosoebroto, *Hak Asasi Manusia Konsep Dasar dan Perkembangan Pengertiannya dari Masa Ke Masa,* (lembaga studi dan advokasi masyarakat, Jakarta,2005), at 1.The simply term of human rights is also determined by the values of the certain society, especially related to cultural values, tradition and political system. It implies to the writing ofNgo T.M Huong, Vu Cong Giao, Nguyen Minh Tam, for reading Vietnamese case, primarily in the "*Asian Values and Human Rights: A Vietnamese Perspective*,", Journal of Southeast Asian Human Rights, Vol. 2 No. 1 June 2018 at 302-322doi: 10.19184/jseahr.v2i1.7541.In the case of Vietnam, the writers state, that for a long period even after independence, human rights as peruniversal conception encoded in international human rights laws were not clearly upheld inlegal development or in the in the rhetoric of national leaders. Relating to the 'universal' term of human rights, Shahrul Mizan Bin Ismail states that norms of human rights are, as the name implies, ultimately relative and dependent upon the individual circumstances of those demanding said rights. In other words, whenever one attempts to interpret the meaning or ascertain the viability of application of any particular human right, one must first consider the cultural, social, and even religious background of the individuals which the right pertains to. See, Shahrul Mizan Bin Ismail, "*Innovation in Human Rights Protection: A Proposition for an Inverted Triangular Model for the Developmentof and Enforcement of Human Rights Law*", Journal of Southeast Asian Human Rights, Vol. 1 No. 1 June 2017, at 18.

18 Miriam Budiarjo, *Dasar-Dasar Ilmu Politik,* (GramediaPustaka Utama, Jakarta, 2008), at 15. It assumes that The political struggle for human rights is universal and potentially engages all human beings,Stanati Netipatalachoochote, Aurelia Colombi Ciacchi, Ronald Holzhacker, "*Human Rights Norm Diffusion in Southeast Asia: Rolesof Civil Society Organizations (CSOs) in Ending Extrajudicial Killings in the Philippines*",Journal of Southeast Asian Human Rights, Vol. 2 No. 1 June 2018, at 253.

political sphere includes the legal and state department and the system of values and ideologies that legitimize it. So, political rights are individualistic and liberating rights.[19] These rights essentially govern the relationship between the individuals and the organizations of the country.[20]Elements of political rights are rights related to the scope of politics itself. Therefore, several rights can be classified as the elements of political rights, namely:

a. To get the freedom of opinion and expression;
b. To get right to peaceful assembly;
c. To get the freedom of association;
d. To get right to vote; and
e. To get right to take part in public affairs directly or through freely-chosen representatives[21]

Restrictions on human rights can only be done by the law, but human rights should not be restricted to the International Covenant on Civil and Political Rights Article 4, as has been ratified in Law Number 12 Year 2005 on the ratification of the non-derogable International Covenant on Civil and Political Rights contained in Article 6 (right to life), Article 7 (torture), Chapter 8 (anti-slavery), Article 11, Article 15 (the nature of expired criminal or non-retroactive actions), Article 16 (personal or person before general), and Article 18 (thinking, believing, religious) while Political Right are included into the group of rights that may be reduced (derogable rights). Reduction or restriction of rights must be applied in order to maintain national security, public orderliness, health, or morality and respect for the rights or freedoms of others. In addition, any reduction or limitation of the right by the State should be communicated to the States Parties to the Covenant with clear reasons. Reduction or restriction of rights should not exceed what has been set in the International Convenant on Civil and Political Rights (1966). The restriction or indifference of citizens' constitutional rights should be based on the constitutional foundation of Article 28 J Paragraph (2) of the 1945 Constitution of the Republic of Indonesia and Article 70 of the Human Rights Law.

19 Franz Magnis Suseno, *Etika Politik Prinsip-Prinsip Dasar Kenegaraan Moderen,* (PT Gramedia Pustaka Utama, Jakarta, 2001), at 19.

20 Scott Davidson, *Hak Asasi Manusia: Sejarah, Teori, dan Praktek dalam Pergaulan Internasional, (*translated by A. Hadyana Pudjaatmaka), (Pustaka Utama Grafiti, Jakarta, 1994),at 7.

21 Ifhdal Kasim, ed. *Hak Sipil dan Politik: esai-esai pilihan*, (Lembaga Studi dan Advokasi Masyarakat, Jakarta, 2001),at32

The restrictions of passive suffrage according to the position of convicted criminal acts of corruption are:[22]

a. The restrictions in positioning the elected official. The elected official is a public position that the procedure of filling the position directly or indirectly requires the participation or the support of the people.
b. The restrictions in positioning the appointed official. The appointed official is a position whose election is conducted by an authorized official to elect such as the position of the Supreme Court Justice nominee elected by the Supreme Court Justices and the ministers elected by the President.

C. III. POLITICAL RIGHT OF CORRUPTION PERPETRATOR AS DEROGABLE RIGHTS

The International Covenant on Civil and Political Rights (1966) divides the rights into two groups namely non-derogable rights and derogable rights.[23] In fact, this division is not the first to be found in this Covenant but it has been regulated in the previous instrument of political right namely *the* Universal Declaration of Human Rights (1948).[24] In Article 2, Universal Declaration of Human Rights (1948) indirectly regulates the right restriction. The United Nations is not given the authority to intervene in the state jurisdiction.[25]

"Nothing contained in the present Charter shall authorize the United Nation to intervene in matters which are essentially within the domestic jurisdiction of any state"

Article 2 has given the clear basis for the state that has sovereignty to give the certain restriction on the right as long as it is applied to the basis of state legitimacy and it is not discrimination. Human rights, especially civil and political rights, have some traits that should be understood as something that should not be fulfilled without any restriction.

22 Yosy Dewi Mahayanthi."*Dasar pertimbangan hakim dalam menjatuhkan putusan pencabutan hak pilih aktif dan pasif terhadap terpidana tindak pidana korupsi dalam perspektif hak asasi manusia*", http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1046/1034,Universitas Brawijaya Malang 2015, at 8-9.

23 Ifdal Kasim, at xii-xiii.

24 Scott Davidson, "*Introduction",*in Alex Conte et al, *Defining civil and political rights : the jurisprudence of the United Nations Human Rights Committee*(Aldershot, Hants, England ; Burlington, VT : Ashgate, 2004), at 3.

25 Miriam Budiarjo, *Dasar-Dasar Ilmu Politik,* (Gramedia Pustaka Utama, Jakarta, 2008), at 223.

Non-derogable right is an absolute right that cannot be reduced by the state even though it is in an emergency. The state that breaks non-derogable rights will be criticized by another state and that state is considered to have committed the gross violation of human rights.[26] The examples of non-derogable rights are the right to live, to be free from torture, to be treated humanely with human dignity, to be free from slavery, to be from the prison based on the inability to fulfill the obligation in the contract, to be free from retroactive law, to be treated equally in law, and to be free in thinking, conscience, and belief.

Political right is included in the derogable right, allowed to be reduced or restricted in giving the right by the state. The reduction and limitation of the right is based on "Claw Back" the procedure which is formulated by Rosalyin Higgins. This procedure regulates the requirement of the reduction and restriction of the right in which it can be only done if the deviation equals to the threat that will be faced and it is not discrimination.

The reduction and restriction of the right is showed to keep the national security, public order, health, or public morality and respect the right or freedom of others. Furthermore, the reduction and restriction of the right by the state should be conveyed to the states in covenant with clear reasons. The reduction and restriction of the right must not exceed what has been regulated in the International Covenant on Civil and Political Rights (1966).[27] The examples of derogable rights are the right to peacefully assembly, to get freedom in association, to be free in giving opinion and expression, to vote, and to take part in public affairs directly or through freely-chosen representatives.

If it is related to political rights, especially the right in public participation, the right to vote and be elected, as well as the right to access public services as regulated in Article 25 of the International Covenant on Civil and political Rights (1966), restrictions on these rights can be possible. The formulation of Article 25 of the International Covenant on Civil and Political Rights (1966) includes the phrase "without any restrictions as referred to in Article 2" and "without improper restrictions" as the basis for guarantees of rights stipulated in that article. The phrase "without any restrictions as referred to in Article 2" means that the guarantee of political rights must be applied without restrictions

26 Ifdal Kasim, at xiii
27 *Ibid*., at xii-xiii

as long as they are not regulated in national legislation. Restrictions on rights are permitted as long as they are regulated in legislation and are not applied in discrimination. Whereas the phrase "without improper restrictions" implies the implication of *a contrario* that restrictions on the basis of reasonable reasons can be made. In CCPR / C / 21 / Rev.I / Add.7, General Comment No. 25 has explained that the limitation on a reasonable basis can be done if it is regulated in national legislation and has a strong and objective basis. For example, the right to vote and be elected can be given only to citizens who have reached a certain age. Restriction based on this age can be done because it has a strong and objective reason, where at a certain age, a person can only be said to be an adult and has the right to act in his capacity as a legal subject (competent).

In the conception of criminal law, revoking political rights can only be done if a person commits a criminal act through the criminal mechanism. Criminal punishment is the most important part of criminal law because it is the culmination of all accountability of someone guilty of a criminal offence. *"A criminal law without sentencing would merely be a declaratory system pronouncing people guilty without any formal consequences following form that guilty"*.[28]

The conception of guilt has a significant influence on the criminal imposition and the process of its implementation. If the error is understood as "reproachable" then the punishment is a manifestation of the reproach.[29] Thus, the criminal theory is the basis of justification and criminal objectives by the state.[30]

The Constitution of the Republic of Indonesia in 1945 states that political rights are human rights but it does not mean that political rights have no restriction. It must be understood that the concept of human rights which is always directly proportional to basic obligations must be applied in accordance with what is stipulated in article 28J as follows:

(1) Everyone must respect the human rights of others in an orderly life in society, nation and state.

(2) In doing their rights and freedoms, everyone is obliged to submit to the restriction which is stipulated by law to guarantee the recognition

28 Andrew Ashworth. *Principles Of Criminal Law*, (Oxford: Clarendon Press, 1991), at 12.

29 Chairul Huda, "*Dari Tiada Pidana Tanapa Kesalahan Menuju Kepada Tiada Pertanggung jawaban Pidana Tanpa Kesalahan" Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana dan Pertanggung jawaban Pidana,* (Jakarta Kencana, 2011), at 129.

30 Didik Endro Purwoleksono, *Hukum Pidana*. (Airlangga *University Press* (AUP). Surabaya, 2014), at 92.

and respect for the rights and freedoms of others and to fulfil demands in accordance with moral considerations, values – the value of religion, security and public order in a democratic society.

The provision of restrictions in article 28J can be interpreted as an effort to maintain orderly community and state. In the context of the 1945 Constitution, because Article 28J paragraph (1) and (2) provides space for the revocation of political rights against convicted corruption through the judicial mechanism, its application must be commensurate, logical, and should pay attention to the basic principles of human rights in the political field.

However, the political-right revocation of a convicted person of corruption without a judicial mechanism is a form of human-right violation as referred to Article 28I paragraph (4) and (5) of the 1945 Constitution and Article 43 of the Human Rights Law. Thus, in the implementation of political-right revocation, it needs to be carried out with the principles of proportional equality so that the revocation of political rights is not arbitrarily applied in the name of absolute criminal objectives, namely "entrapment and retaliation". The political-right revocation given to the convicted person as a punishment should not be considered as a goal but as a tool to achieve that goal.

In other words, if the punishment does not provide greater benefit to the suspect or defendant and the community, then the sentence does not need to be imposed.[31] While the aim to be achieved by the political-right revocation in the law on eradicating corruption is to keep the public morality, Fuller mentions two types of legal morality, namely internal morality and external morality. The former refers to the issues of human rights, solidarity and empathy for the oppressed, while the latter is about good legal principles.[32]

D. DISPARITY OF CORRUPTION COURT'S DECISIONS WITH DECISIONS OF THE CONSTITUTIONAL COURT RELATED TO THE APPLICATION OF THE REVOCATION OF POLITICAL RIGHTS

If we closely observe the news reported by the mass media regarding the recent verdict of corruption in Indonesia, the differences

31 Romli Atmasasmita, *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan*, (PT. Gramedia, Jakarta, 2017), at 22

32 Yovita A. Mangesti dan Bernard L. Tanya , *Moralitas Hukum*, (GentaPublishing, Yogyakarta, 2014), at 36

of the court decisions are obviously shown, even though the cases are similar and the same article is applied (same offences).

Is there anything wrong with the judge's verdict on similar cases? The answer to that question may be justified by the law. As long as these different decisions are the result of the maximum effort of the judge based on the results of the examination and the evidence in the court. Certainly, it is based on the law and the validity of the law that can be accounted for.

In deciding the case, the judges are governed and limited by the rules of law and the principles of law in order for the decision that is made to have legal certainty, in addition to be fair. Don't we know that the legal principle states *similia similibus* (same cases must be decided the same, while different cases must be decided differently)? Nevertheless, why in almost equal cases, such as in corruption cases, the judges decide differently? This is according to the literature called criminal disparity. Roem Dhamsudi, Senior Judge from Thailand, has stated that *in recent years more criticism has been directed at disparities of sentences.*[33] Court ruling becomes unpredictable, because all people want is certainty and predictability if the problem is in the court.

The disparity of punishment has a profound effect, because it contains a constitutional balance between the individual freedom and the right of the state to punish.[34]

By praxis, there are at least three causes or sources of criminal disparity.

First, the formulation of criminal provisions contained in Law Number 31 year 1999 on Eradication of Corruption. Some of the articles and criminal provisions referred to are as follows:

> Article 2 (1 and 2) states that any person who unlawfully commits an act of enrichment of himself or another person or a corporation that may harm the state finance or economy of the country will be punished with a life imprisonment or a minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200.000.000, - (two hundred million rupiah) and at most Rp. 1.000.000.000, - (one billion rupiah). And in the case of a criminal act of corruption committed under certain

33 Wahyudi Husen and Hufron, *Hukum Politik dan Kepentingan*, (LaksbangPressindo, Yogyakarta, 2008),at 134.

34 Muladiand Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, (Penerbit Alumni, Bandung, 1992).

circumstances, capital punishment may be imposed.

The provision of Article 2 of the PTPK Law has given tolerance of criminal disparity of 4 to 20 years imprisonment, even death sentence. For the fine penalty, there is a tolerance of fines disparity between Rp. 200.000.000, - (two hundred million) - Rp.1.000.000.000, - (one billion rupiah), which allows the judge to decide among them, whether at the minimum 4 (four) years, between 4 - 20 years or a maximum sentence of 20 (twenty) years imprisonment or death sentence. Similarly, for a fine penalty, starting the lowest value of two hundred million rupiah, between two hundred million rupiah – one billion rupiah, and a maximum of one billion.

> Article 3 also stipulates that any person who has a purpose of profiting himself or others or a corporation, misuses the authority, opportunity or means which is available to him because of a position which can be detrimental to the state's finances or the economy of the state, is punished with a life time imprison mentor at least 1 (one) year and a maximum of 20 (twenty) years or a fine of at least Rp. 50.000.000, - (fifty million rupiah) and at most Rp. 1.000.000.000, - (one billion rupiah).

The provision of Article 3 also provides tolerance for the disparity of imprisonment from one year to twenty years, even if it is necessary, life imprisonment is needed. Similarly, for the disparity of fines, starting from at least fifty million rupiah to one billion rupiah. Minimum and maximum criminal formulation as well as in the next articles are regulated in Article 4 to Article 12 of the PTPK Law.

Legal Loophole can be utilized by judges to decide "the right tone" in accordance with the evidence, the weight of the crime, and the conviction of the judge and the demands / expectations of the community. It is also undeniable that the legal loophole also allows judges to flirt or play on their own with the litigants, including the defendants.

Second, it comes from the judge himself. The credo of freedom and independence of judges may cause criminal disparity. For instance, for the sake of and on behalf of those, they may decide the case according to their desire, as long as it is within the internal limits of the penalty imposed by the law; although the freedom and independence of judges is freedom of

responsibility – Responsible to God, conscience and society especially to the legal communities, such as litigants, academics/experts, and legal practitioners.

Judges' ruling often depends on "judgment of the judge". It has also become a duty for the judge to hand down his verdict not only to the facts (*judex factie*), but also to give legal consideration. This is in accordance with Article 25 of Law Number 4 Year 2004 which states: "All court decisions, in addition to containing the reasons and the basis of the decision, must also contain certain articles of the relevant regulations or sources the unwritten law on which to judge". Additionally, Article 28 paragraph (2) of Law Number 4 Year 2004 states that in dropping the severity of punishment, the judges all pay attention to the good and evil qualities of the accused. The good and evil qualities according to the explanation of Chapter 28 are the personal circumstances of a person. Personal circumstances can be obtained from information of people around him/her, expert information, etc. This needs to be taken into account in order to give a fair and equitable penalty for the defendant.

However, in reality, the question arises; how can judges behave differently over a similar case? Schubert in an attitudinal approach responded that judges differ in their attitudes because they ultimately choose some of the things they believe to be the result of their life experiences. What a judge believes depends on his political, religious and ethnic affiliations, his wife, economic certainty and social status, the kind of education he receives, whether formal or informal, and his legal career before he becomes a judge. Affiliations related to marriage, socio-economic status, education and career, and finally, for the most part, is greatly influenced by whom, where and when he was born.[35]

Schubert[36]simply and explicitly formulated the different attitudes of judges in deciding the real equivalent case by two approaches: (a) the structure of the conversion (the judge's decision is influenced by the interaction with the other party); and (b) attributes and orientation of judges, including the judge's personal experiences, political appointments, political party affiliations. Thus, the orientation of judges relates to economics, morality, culture, etc.

It is not too difficult to predict the judge's decision to be handed down in relation to the case of corruption, if we know how the intensity of interaction

35 Satjipto Rahardjo, *Ilmu Hukum*, (Citra Aditya Bakti, Bandung, 1991), at 317 – 318.
36 *Ibid.*

between the parties, such as the defendant/legal counsel, his family, etc., with the judge examining the case. In addition to the intensity of interaction between the parties with the judge, it also comes from the judge's orientation to economic matters, moral/cultural values, etc. Whether the judge is a strict person against his/her moral/cultural values or otherwise, whether the judge including the people quickly or withstands the temptations of wealth and worldliness. From these statements, it can be predicted how the verdict of corruption will be given.

Third, the cause of political disparity might be from the condition of the accused. Article 28 paragraph (2) gives the judge a clue that in dropping the weight of the punishment, the judge must also consider the good and evil qualities of the accused. It cannot be denied in the empirical fact that in addition to observing the good and evil qualities of the accused, the judge's decision is often influenced by the socio-economic status of the accused.

It is true about the words of the wise; downward law is greater than upward (law leads to lower/poorer people than leads to upper/rich people). The legal reality shows that for people "the have", the law is softer (soft law) than for the people "the have not", the law is harder. The law runs behind the poor, but the law runs in front of the rich, politely.

The criminal disparity will be fatal when associated with correction admitration[37]. The convict after comparing the criminal will feel to be the victim of "the judicial caprice" then he/she will be the one who does not respect the law, whereas respect for the law is one of the targets in the purpose of crime.

The occurrence of criminal disparity, especially in corruption, will be a very serious problem. It will be an indicator or manifestation rather than the failure of a system to achieve equality of justice within the state law. At the same time, it can weaken public confidence in the system of criminal-law implementation carried out by the law enforcement officers in the criminal justice system.

The Conflict of the Corruption Decision which imposed a conviction on the political-rights revocation is based on the consideration that it is necessary to maintain public morality, to ensure that state officials had high integrity, to provide opportunities for other citizens in contestation, to protect democracy, and to prevent recurrence of corruption. The decree of the Corruption Court which negates the revocation of political

37 Muladiand Barda Nawawi Arief,at54.

rights in its decision is based on the consideration that it is a form of dehumanization and will leave the moral stigma of the former inmate. Although political rights are an unrestricted-basic right, the restriction of political rights can only be determined by the people as sovereign holders.

Several things affect the contradiction between the Corruption Court's verdicts, causing the disparity of the Corruption Court's decision. It might be caused by each judge's different philosophical thoughts, experiences, knowledge and the absence of standard norm for the revocation of political rights. Nevertheless, the sanction of revoking political rights considerably remains unclear. In order to prevent such disparity, a guideline for revoking political rights which can be used as a reference for judges in their application is needed.

The conflict between the Corruption Court and the Constitutional Court Decision Number 42 / PUU-XIII / 2015 also narrates the legal problem. The Constitutional Court has determined that the former prisoner has the opportunity to be a candidate for the regional head on the condition that the convicted person openly and honestly informs the public that he/she is a formerly convicted person. The Constitutional Court's ruling implies that the revocation or limitation of political rights is not permitted, especially in the case of corruption.

The decision of the Constitutional Court is final and binding, but in practice, some of the judges' decisions still apply the penalty by revoking political rights. The conflict of verdict clearly gives the legal questions that need to be answered. Firstly, which one is more binding whether the verdict of the Constitutional Court or the Corruption Court verdict. Secondly, if the verdict of the Constitutional Court that is followed, isn't the verdict of the Corruption Court also valid, then what mechanism should be followed to cancel it because there is a principle "*presemtionlistycausa"* which means that as long as there is no cancellation, the decision is considered to be valid. Thirdly, what is the mechanism for the recovery of convicted persons who have been revoked their political rights?

First, there is no legal solution to the conflict. However, in order to establish the truth of the law, the thing that can be done is to see the applicable power and binding power over a conflicting decision, so we need to use the hierarchical principles of legislation. The Constitutional Court has the authority to examine the law against the constitution since the Corruption

Court only examines the law. In addition, the Constitutional Court examines abstractly when the law is contradictory to the 1945 Constitution while the Corruption Court verdict only decides and examines concrete events. The argument indicates that the court's verdict is stronger. *Second*, the Corruption Court's verdict that is contrary to the decision of the Constitutional Court remains valid and legally binding because, although it is unconstitucional, the verdict is issued by a legitimate and authoritative institution. *Third*, the recovery mechanism of a court judgment can refer to ordinary remedies and extraordinary remedies. Ordinary legal remedies may be made by appealing, and appealing against a higher court as provided in Article 233 and Article 244 of Law Number 8 Year 1981 concerning the Criminal Procedure Code, called (Penal Code). Extraordinary legal remedies include a juridical review as it may be possible only if there are moral reasons as referred to the provisions of Article 263 Paragraph (2) of the Criminal Procedure Code.

The mechanism of political-rights restoration given by the Corruption Court not only refers to the legal space provided by the Criminal Procedure Code, but can also be attempted through a constitutional mechanism through Article 14 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia on Amnesty and Abolition. It is a part of the prerogative rights of the President. This prerogative right is more politically dimensional, although the President in granting amnesty and abolition needs to pay attention to the consideration of the legislature. The President also has the right of granting pardon and amnesty with the consideration of the Supreme Court as referred to the provision of Article 14 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Granting clemency is intended to reduce and eliminate some and all offences that have been imposed by the court including the revocation of political rights. While rehabilitation is intended as a form of restoration of part and overall rights because it has been found the legal fact that parties revoked their rights including political rights are proved to be victims of a regime and not guilty.

E. MINIMIZING THE OCCURRENCE OF CRIMINAL DISPARITY OF THE REVOCATION OF POLITICAL RIGHTS

The issue of justice according to Amartya Kumar Sen is a complicated and never-ending problem that cannot be solved, but he encourages us to

be realistic and try to reduce the level of injustice.[38] Disparity is something that can cause injustice because it can have a negative impact on justice.

Paying attention to the negative impacts of criminal disparities is necessary by looking for efforts or strategies to minimize them. At least, four strategies can be done:

1. Statutory Guidelines for Sentencing (SGS)

The publication of guidelines for the imposition of a revocation of a political right may instruct the judge before passing his verdict to consider all data concerning the offences committed by the defendant, including criminal weight, modus operandi, the personality of offender, age, intelligence level, circumstance, and time of a criminal offense committed.[39] The data also includes the background of the defendant, records of violations ever committed, marital status, ability to adjust and repentance, defendant's attitude to imprisonment, personal traits, physical, emotional/mental health and community attitudes against the offence committed by the defendant.

Having regard to a number of objective restrictions or control points of criminal detention as described above, before giving punishment to the defendant, the judge is expected to minimize criminal disparity, at least able to eliminate a case of corruption in one case with another similar case of corruption.

In the United States, the publication of national criminal compliance guidelines is issued by the Advisory Council of the National Council on Crime and Deliquency, while regional ones, for example, are issued by the California Superior Court of the Sentencing Institute, and the district / local, for example, is issued by the Sentencing Institute in the Eastern District of Michigan US, and Northern District of Illinois[40].

Nationally, the Supreme Court, in fact, may publish the publication of guidelines for penalty as a guideline that must be noticed before judges impose criminal sanctions for various criminal offenses in general, including bribery, terrorism, human-rights abuses, as well as criminal acts of corruption.

In regional, law enforcement officers, Police, Prosecutors, Judges and Legal Counsel are part of an integrated criminal justice

38 Budiono Kusumohamidjojo, *Teori Hukum Dilema Antara Hukum Dan Kekuasaan,* (Penerbit Yrama Widya, Bandung, 2016).
39 Wahyudi Husen and Hufron, at139.
40 *Ibid.*

system. In relation to the handling and resolution of corruption cases, they conduct the meetings to equalize vision, mission and perception and the same spirit in preventing and eradicating corruption.

Therefore, the publication of guidelines is intended to seek an equal way of viewing and handling corruption cases. It is also expected to reduce unhealthy prejudices among law enforcement officers as they, at each level, often play eyes or affair with the parties involved in corruption cases. In the broader context, it can eliminate the odour of the judicial mafia (integrated corruption justice system).

2. Effective and Efficient Judicial Internal Supervision

Because the court as the last bastion for seeking justice has been questioned its effectivity nowadays, the need to increase the effectiveness of internal supervision within the judiciary by the Supreme Court is strongly expected. Its aim is to uphold a clean, strong, independent, impartial, and authoritative judiciary. Don't we know that in the structure of the Supreme Court, there is a Supervision and Development Division authorized to supervise the performance of judges. Unfortunately, we do not hear much its works or achievemens. In this reason, some people considerably doubt the effectiveness of internal control.

3. External Supervision of Judge Performance

In addition to the internal control of the judiciary, the external public control is also important. Public controls can be made through the development of networks among mass organizations, social politic organizations, non-governmental organizations (NGO), universities, and the press to oversee the performance of law enforcement officers including the performance of judges. If a case is in the public eyes, law enforcement officers will work carefully based on the procedure in law enforcement.

Public control may also be conducted through the examination of controversial decisions by involving public officials, academics and legal practitioners through scientific academic studies. The purpose is to assess the quality of decisions with all the shreds of evidence submitted with a clear, objective and impartial legal judgment (impartial). The examination also aims to provide the principles of prudence by the judge to encourage

the enhancement of judicial skills, knowledge and judicial knowledge with morality as the value of its size. The above strategies and steps are expected to eliminate or at least reduce the disparity of corruption verdicts between one court judge and another court judge in deciding on similar cases in the future.

The implementation of these principles will create a judge's fair, lawful, and useful verdict. In order to realize this, it is necessary to apply the criminal based on the principles of proportionality. The principles of proportionality are achievable if the imposition of criminal, especially in the revocation of political rights, will be noted in the crucial articles of the PTPK law. The principles of proportionality have actually been embodied in the Criminal Code with the level of punishment based on the deeds and consequences.

The initial conclusion is to minimize the occurrence of disparity in revoking political rights. Three criteria need to exist in establishing the good and right law. First, law criterion in the form of a punishment guidance for judges about the revocation of political rights should be existed. Second, the constitutional Legal Criterion on political rights in the democratic order should also be existed. Third, the criterion of public morality is still abstract.

F. PROPORTIONALITY OF REVOCATION OF POLITICAL RIGHT FOR THE CORRUPTION ACTS IN THE FUTURE

The provision of Article 17 of the Corruption Eradication Law states "In addition to be given the criminal sanction as referred to Article 2, 3, 5 to Article 14, the defendant may be punished with an additional criminal sanction as referred to Article 18." The provision of Article 17 clearly defines that all acts of the criminal corruption committed have the effect of revoking political rights.

In its implementation, the revocation of political rights as described in the preceding chapter in which its position is an optional additional penalty that can be conducted by the judges, as they have the authority to impose or not. From the human rights perspective, the revocation of political rights does not break the human rights because the meaning of the provision of Article 43 of Law Number 39 Year 1999 on Human Rights normatively is not substantially binding. It is because the protection of human rights is limited in that case –the right can be violated (derogable rights). If a person commits a criminal act that harms the state, the

revocation of political rights may be imposed through a criminal mechanism.

In the term of the legal system, the revocation of political rights is not only limited in corruption cases but also in general criminal acts as set in the provision of Article 317 of the Criminal Code, 318 of the Indonesian Criminal Code, Article 344 of the Criminal Code, Article 347 of the Criminal Code, Article 348 of the Criminal Code, Article 350 of the Criminal Code, Article 362 of the Criminal Code, Article 363 of the Criminal Code, Article 365 of the Criminal Code, Article 366 of the Criminal Code Article 372 of the Criminal Code, 374 of the Criminal Code, 375 of the Criminal Code and 377 of the Criminal Code. Besides, the revocation of political rights can be conducted in the case of violation of law against the Book of Military Criminal Law as stipulated in Article 6 of the Criminal Code, including in the provisions of Law no. 7 Drt 1955 on Economic Crime.

In the context of legal and criminal philosophy and punishment, the revocation of political rights aims to protect the public morality, to hinder the barriers and to enlarge the prevention of the corrupt practices. Its goal is also to provide opportunities for other nation's best children to work in politics because the corruption has given a bad image to the pillars of democracy and political education for citizens properly and reasonably. Besides, from the perspective of the purpose of criminalizing, revoking political rights gives the deterrent effect as the main objective of punishment namely preventive, deterrence and reformative.

Based on the aformentioned legal arguments, the writer keep seeing the unanswered problems regarding the principles of proportionality fulfilment in which political- rights punishment have not been reflected in the Corruption Law. The implication is that even though the similar act should be treated equally. In some cases, however, it is treated differently.

In the following paragraphs, the author will describe some formulations of law in the formation of legal policy in the future (*Ius Constitiedum*) especially related to the criminal revocation of political rights in the criminal act of corruption.

a. The existence of the absolute penalty with the revocation of political rights

The punishment with this absolute revocation of political rights comes from the criminal-based punishment-oriented thought derived from the

classicalism of criminal law. The revocation of absolute political rights is the permanent removal of political rights in order to guarantee the protection of society and the pillars of democracy. The thought of this absolute / permanent revocation of political right grows from the author's discovery of the reason for the *ratio decidenti* of judges in some cases which have permanent legal force as described in the fourth chapter and the provision contained in Article 35 of the Criminal Code. The absolute revocation of political rights can be made if the acts of corruption actors fulfill the following requirements:

1. Unlawful

Article 2 Paragraph (1) states that "any person who unlawfully commits an act of enrichment of himself or another person or a corporation that may harm the state finance or state reconstitution, is liable to a life imprisonment or a minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years and a fine of at least Rp 200,000,000.00 (two hundred million rupiah) and a maximum of Rp 1,000,000,000.00 (one billion rupiah)." Violating Article 2 paragraph (2) stipulates that if the criminal act of corruption as referred to paragraph (1) is conducted under certain circumstances, death sentence may be imposed.

Article 2 Paragraph (1) which means by "unlawfully" in this Article covers unlawful acts in the formal sense or in the material sense, although the act is not regulated in legislation. However, if the act is deemed disgraceful because it is not in accordance with the sense of justice or norms of social life in society, the act can be punished. In this provision, the word "can" before the phrase "harms the state's finances or economy" indicates that the criminal act of corruption is a formal offense, namely the existence of a corrupt of fense simply by the fulfillment of the deeds that have been formulated, not by the outcome.

In addition, the purpose of the provision of Article 2 Paragraph (2) referred to "certain circumstances", in this provision, is the circumstances that can be used as a reason for criminal liability for the perpetrators of corruption, e.g. if the crime is committed against funds intended for the prevention of circumstances hazards, national natural disasters, prevention due to wide spread social unrest, the prevention

of economic and monetary crisis, and the repetition of corruption. Revocation of political rights may automatically apply for life if the provision of Article 2 Paragraph (1) is highly permissible for the absolute/permanent revocation of political rights. If the judge imposes maximum penalty for life imprisonment, the repeal of political rights will be automatically valid for life. This is in line with the provision of Article 38 of the Criminal Code, and the provision of Article 2 paragraph (2). For the writer, the violation of Article 2 paragraph (2) of Corruption Law is mandatory to revoke a lifetime of political rights, despite not imposing a life-long penalty or capital punishment. It is based on the act of the offender that has violated fundamentalism of humanity. In this case, because it is unusual circumstances and seen from various aspects of life and knowledge, no excuses of forgiveness or justification are considered for such act.

2. Recidivist

Referring to the Decision of the Constitutional Court Number 4 / PUU-VII / 2009 stipulates that the revocation of political rights may be conducted if the perpetrator repeats his/her acts. The writer is aware that not all recidivists can be punished by absolute revocation of political rights except for special recidivists. The special recidivist refers to the same criminal act that is done previously.

This recidivist must meet the following requirements:

i. The offender is the same person.
ii. The prejudice of criminal offences and previous crimes has been criminalized by a judge.
iii. The convicted person has served the sentence.
iv. Repeated criminal act is committed within a certain period of time.
v. The perpetrator was sentenced to imprisonment and confinement.
vi. The perpetrator performs the same error or that sort of act.

Based on the writer's understanding of the permanent revocation of political rights, referring to the provision of Article 486, Article 487, and Article 488 of the Criminal Code, recidivist may be added to the penalty of one-third of the criminal sanctioned against him.

a. The Cessation of the relative Revocation of Political Rights is by imposing the revocation of political rights with the duration of five years and after the conviction, the punishment should be announced to the public in which the provisions of the offender meets the following requirements:
    1. Main actors of crime corruption; See Article 55 of the Criminal Code;
    2. State losses are above one billion;
    3. There is an act of disguising the proceeds of crime obtained by money laundering;
    4. He/ she comes from a political party;
    5. He/ she is a public official;
    6. Committing a criminal offense continually; and
    7. Not applicable to the elected officials.

b. Revoking political rights which holds the principle of equilibrium that is by imposing the decision of revocation of political rights by not fulfilling the decision of punishment of the revocation of political rights is enough to announce to the public on condition that the perpetrator must meet the following requirements:
    1. He/ she is not a recidivist;
    2. There is no attempt to disguise the proceeds of crime through the money laundering;
    3. He/ she comes from a political party;
    4. He/ she is a government official; and
    5. He/ she does not committee a crime continually.

c. Elimination of the political-rights revocation should meet the following conditions:
    1. The action is an administrative mall;
    2. The state losses are not great;
    3. He/ she is not the main actor;
    4. He/ she is not from political party; and
    5. He/ she is not a government official.

The purpose of the existence of the qualification of the revocation of political rights is that the judges in applying the law have the standard of norm so that the principle of proportionality is fulfilled. In addition, an action that has the same character should be treated equally so that the aims of legal axiology can be achieved and the judge has a common view in deciding a law suit. The standard of political-rights revocation in corruption cases to minimize the occurrence of bribery in the Supreme Court is necessary. The revocation of

political rights in criminal prosecution is also intended to provide protection to society from acts contrary to the moral of democracy. Public announcement by former convicts is also intended to provide political education for the perpetrators and the community even if the community can build its own reproach against the former convicted of corruption. The most important thing is that the presence of public relations will encourage a great noble commitment to improve oneself through the development of people's justice.

G. CONCLUSION

Criminalization of political rights for the convicted corruption is not a violation of human rights because it is derogable rights or restricted rights, but its implementation should be proportional. Article 2 has given a clear basis for the state that has sovereignty to give the certain restriction on the right as long as it is applied to the basis of state legitimacy and it is not discrimination. Human rights especially civil and political rights have some traits that should be understood as a thing and not be fullfilled without any restriction. Political right is included into a derogable right that can be reduced or restricted in giving the right by the state. The reduction and limitation of the right are based on "Claw Back" procedure formulated by Rosalyn Higgins. This procedure regulates the requirement of the reduction and restriction of the right which can only be done if the deviation equals to the threat that will be faced and it is not discrimination. Constitution of the Republic of Indonesia in 1945 states that political rights are human rights but it does not mean that political rights have no restriction. It must be understood that the concept of human rights which is always directly proportional to basic obligations must be applied in accordance with the Article 28J. The provision of restrictions in Article 28J can be interpreted as an effort to maintain orderly community and state. In the context of the 1945 Constitution, because Article 28J paragraph (1) and (2) provides space for the revocation of political rights against convicted corruption through the judicial mechanism, its application must be commensurate, logical and still pay attention to the basic principles of human rights in the political field. However, revoking political rights to a convicted of corruption without a judicial mechanism is a form of human-right violations as referred to the Article 28I paragraph (4) and (5) of the

1945 Constitution and Article 43 of the Human Rights Law. Thus, in the implementation of political-right revocation, it needs to be carried out with the principle of proportional equality so that the revocation of political rights is not arbitrarily applied in the name of absolute criminal objectives, namely "entrapment and retaliation". Revoking political rights to the convicted person as a punishment should not be considered as a goal but a tool to achieve that goal. Thus, to realize the criminalization of the right of the ideal political penalty is required as a reference for judges in deciding cases of corruption.

Criminalization of political rights in the judge's decision in its implementation has led to disparity. The problem of disparity is caused by several things such as (1) substance, in this case there is no provision of law revocation of political rights in the PTPK Law supported by its facultative criminal nature, (3) Institutional Legal as conflict between Supreme Court decisions and Decisions of the Constitutional Court, (4) Attributes and relations of judges, including personal experiences of judges, political appointments, political rights parties singing judges and the flow of judges with morality, socio-cultural, socio-economic values.