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An effective model of decision-making by judges in preventing disparity of sentencing in criminal acts in corruption cases in Indonesia

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Abstract
The purpose of this article was written, namely: (1) analyze the problem of disparity of sentencingbetween the decision of the Supreme Court of the Republic of Indonesia and the decision of the judge of the District Court and the High Court of Corruption in Manado Indonesia; (2) analyzing the model of effective decision-making by judges in preventing disparity of sentencingin the case of corruption in Indonesia. The type of approach is socio-juridical. Data collection techniques are carried out by reading and examining the laws and regulations, specifically the Act (Corruption Act) of Corruption and various relevant literature. Data processing is done by grouping data according to its type, and data are analyzed using qualitative descriptive analysis. The results of the study are: (1) There has been a disparity of sentencingbetween the decision of the Supreme Court and the decisions of the District Court and the High Court of Manado Indonesia, relating to the application of the provisions of the articles in the Anti-Corruption Law, the length of imprisonment and the severity of criminal fines. (2) One model of effective decision-making by judges in preventing disparity of sentencing is the "rational decision" model with a positivistic approach, which is an approach that emphasizes the formal measures of the text of laws and regulations in exploring legal truth.

Keywords: decision-making model, disparity of sentencing; corruption

1. Introduction

Judge's decision is essentially a struggle of a judge in understanding reality, both with himself and other judges and their environment. Through its verdict, a judge can transfer someone's ownership, revoke the freedom of citizens, declare illegitimate government arbitrary acts against the community, and can even deprive someone of their right to live. One of the things that often happens in judges' decisions is the issue of disparity of sentencing [1].

According to Cheang Molly, the disparity of sentencing is the imposition of unequal sentences for the same offence, or offences or comparable seriousness, without a visible justification. [2]According to Jackson, as quoted by Muladi, criminal disparities can occur in unequal punishment of those who commit a criminal offence [3]. Thus, criminal disparity is the application of an unequal criminal act to the same crime or to a criminal offense whose nature can be compared without a clear justification.

In connection with that, Harkristuti Harkrisnowo [4] stressed that sentencing disparities can occur in several categories, namely: (1) disparities between similar crimes; (2) disparities between criminal acts that have the same level of seriousness imposed by a panel of judges; (3) disparities between criminal sentences by different judges for the same crime.

Disparity of sentencingis an interesting thing to study, because on one hand disparity is considered as one of the rational contradictions. Oemar Seno Adji [5] emphasized that disparity is justifiable as long as it is done properly. Disparity in this matter is in line with the principle of freedom of judges in passing verdicts on cases submitted to them. The Disparity also aims to maintain the authority of judges, but on the other hand, the disparity can be seen as a disruption and inconvenience to aspects of legal certainty.

To prevent disparities in criminal convictions that are very striking between one judge's decision and another, the Indonesian Republic Law on Corruption regulates specific minimum penalties, namely the minimum and maximum criminal limits set in the Act. In its implementation, the provisions did not work effectively to prevent sentencing disparities. This can be seen from the number of judges' decisions that impose a crime below the minimum crime, while in other cases it is a fairly severe crime. In this regard, this paper will discuss the model of effective decision-making for judges in preventing disparity of sentencing in corruption cases in Indonesia.

In connection with that, the issues discussed in this paper are: (1) What is the problem of disparity of sentencing between the decision ofthe Supreme Court of the Republic of Indonesia and the decision of the judge of the District Court and the High Court of Corruption in Manado Indonesia? (2) What is the model of effective decision-making by judges in preventing disparity of sentencing in the case of corruption in Indonesia?

[1] [1] H. Dudu Duswara Machmudin, Peranan Keyakinan Hakim dalam Memutuskan Perkara di Pengadilan, Majalah Hukum Varia PeradilanEdisi 251 Bulan Oktober 2006, Jakarta, p. 51.
[2] Molly Cheang, Disparity of Sentencing, Singapore Malaya Law Journal, PTE Ltd, 1977; p. 2.
[3] Muladi dan Barda Nawawi Arief, Teori dan Kebakan Pidana,Bandung, Alumni, Ibid. p. 53.
[4] Harkristuti Harkrsnowo, 2003, *Rekonstruksi Konsep Pemidanaan: Suatu Gugatan terhadap Proses Legislasi dan Pemidanaan di Indonesia*", dalam majalah KHN Newsletter, Edisi April, Jakarta. p. 28.
[5] Oemar Seno Adji, Hukum (Acara) Pidana dalam Prospeksi, PT. Erlangga,Jakarta, 1984.

2. Discussion Methods

The type of approach is socio juridical. Data collection techniques are carried out by reading and examining laws, especially the Anti-Corruption Law and various relevant literature. Data processing is done by grouping data according to its type, and data are analyzed using qualitative descriptive analysis.

3. Results and Discussion

3.1 The Problem of Disparity Of Sentencingbetween the Decision of the Supreme Court of the Republic of Indonesia with the judgment of the district court and the high court of corruption in Manado Indonesia

There are some examples of decisions that can be used as references by researchers that illustrate the disparity between the decisions of the Indonesian Supreme Court and the decisions of the District Court and the Tipkor Manado High Court (See Table 1).

Based on the analysis of the decision, a description of the disparity between the Supreme Court decision and the decision of the District Court and the High Court is obtained. The disparity is related to the application of the provisions of the article in the Anti-Corruption Law, the disparity is related to the length of the sentence, the disparity is related to criminal fines and the disparity is related to additional penalties. This will be described as follows.

Table 1: Disparity of Sentencing between the Decision of the Supreme Court and the Judges of theDistrict Court and the High Court of Corruption in Manado Indonesia

No. Decision	Type of Indictment	Decision of the Corruption District Court	Decision of the Corruption High Court	Court Verdict
Decision No.2036K/Pid.Sus/2016	Primary: Violating Article 2 Paragraph (1) of the Corruption Eradication Act 1999 jo Law No. 20 of 2001 in conjunction with Article 55 Paragraph (1) of the 1st Criminal Code; Subsidiary: Violating Article 3 of RI Law No. 31 of 1999 concerning Eradication of Corruption in 1999 jo Law RI No. 20 of 2001 Jo Article 55 Paragraph (1) of the 1st Criminal Code; More Subsidair: violating article 9 of Law No. 31 of 1999 concerning Corruption Eradication in 1999 in conjunction with Law No. 20 of 2001 Jo Article 55 Paragraph (1) of the 1st Criminal Code.	Not proven Primair indictment. Legally proven charges of a subsidiary with imprisonment for 1 year and 4 months, and a fine of Rp. 50,000,000, provided that if the fine is not paid then it is replaced with 1-year imprisonment.	Improving the verdict of the Manado District Court related to the length of imprisonment, namely imposing a criminal sentence on the Defendant for 1 year 6 months imprisonment and a penalty of Rp.50,000,000 with the stipulation that if the fine is not paid then it will be replaced with 1-month imprisonment.	Repaired the verdict of PN and PT Tipikor Manado, so the verdict changed to The defendant was sentenced to imprisonment for 6 years and a fine of Rp. 200,000,000, provided that if the penalties were not paid then they were replaced with imprisonment for 6 months;
Decision No.1065K/ Pid.Sus/ 2017	Primary: Article 2 Paragraph (1) Jo. Article 18 Paragraphs (1), (2) and (3) RI Law Number 31 of 1999 concerning Eradication of Corruption in 1999 in conjunction with Law of the Republic of Indonesia Number 20 of 2001 Jo Article 55 Paragraph (1) of the 1st Criminal Code; Subsidiary: Article 3 Article No. 18 Paragraph (1), (2), and (3)Law No. 31 of 1999 concerning Eradication of Corruption in conjunction with RI Law Number 20 of 2001 Jo. Article 55 Paragraph (1) of the 1st Criminal Code.	Proven legally and convincingly in the Primair indictment article 2 paragraph (1) with imprisonment of 1 year & 6 months; Determine the period of detention that had been served by the Defendant deducted entirely from the criminal sentence imposed on him; Punish the Defendant with a fine of IDR 50,000,000 if not paid, replaced with a 2-month sentence of imprisonment; pay a replacement fee of Rp150,000,000.	Not proven primary indictment and Proved subsidiary indictment Article 3 of the Anti-Corruption Law with imprisonment of 3 years and 6 months; Imposing criminal fines to the Defendant of Rp 50,000,000, an alternative to2-month imprisonment sentence; paymoneyRp150.000,000 substitute. Imposing criminal fines to the Defendant of Rp 50,000,000, an alternative to a 2-month imprisonment sentence;	Strengthening the decision of the Court of Appeal, namely by imprisonment for 3 years and 6 months; Imposing fines of Rp 50,000,000, an alternative sentence of imprisonment for 2 months; Paying a replacement of Rp 150,000,000.
Decision No.1579K/Pid.Sus/ 2016	Primary: Violating Article 2 paragraph (1) Jo Article 18 of RI Law No. 31 of 1999 concerning Eradication of Corruption in 1999 jo Law RI No. 20 of 2001 Jo. Article 55 Paragraph (1) of	Proven subsidiary charge is violating Article 3 Jo Article 18 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended and supplemented by Law	It is proven that the subsidiary indictment violates Article 3 of the Criminal Corruption Act 1 year and 6 months imprisonment.	Cancel the decision of the Corruption Judge at PT Manado No: 03/Pid.Sus/2016/PT.MND, dated May 20, 2016, which corroborates the decision of the Manado City Corruption

	the Criminal Code; Subsidiary: Article 3 Jo. Article 18 of the Republic of Indonesia Law No. 31 of 1999 concerning Eradication of Corruption 1999 in conjunction with Law No.20 of 2001 Jo. Article 55 Paragraph (1) of the 1stCriminal Code.	Number 20 of 2001 Jo of Article 55 paragraph (1) of the 1st KUHP with a criminal the jail was reduced for 4 years while the Defendant was in custody, while with an order that the Defendant remain detained in detention and pay a fine of Rp. 200,000 subsidiary 2 months in captivity.		Court No:44/Pid.Sus. TPK/2015/PN.Mnd, dated March 3, 2016. Judge using Article 2 of the Corruption Act in the form of a 4-year prison sentence and a fine of Rp.200,000,000, provided that if the fine is not paid then it will be replaced with 6-month imprisonment. The defendant paid a replacement fee of Rp. 659,492,200, an alternative of 2 years in prison.

Data source: Directory of Supreme Court Decisions of the Republic of Indonesia, 2019.

3.1.1. Disparities in the application of the provisions of Article 2 and Article 3 of the Anti-Corruption Law

In the decision of the Supreme Court Number 1065K/PID.SUS/2017, the panel of judges rejected the appeal made by the defendant or his attorney who said that the Judex Factie court (especially the Court of Appeals) had wrongly applied the law using Article 3 of the Corruption Law, which should according to the defendant that the judge must apply Article 2 of the Anti-Corruption Law as in the District Court's decision. While in the judgment of the cassation judge who upheld the appeal decision argued, based on the facts of the trial it was revealed that the Defendant as the Budget User Authority (KPA) at the Revenue Service of Financial Management and Regional Assets in the Implementation of Computer Procurement Activities had committed a deviation by abusing authority that was contrary to his duties and its obligations.

In the Supreme Court's Decision Number: 1579K/PID.SUS/2016, the cassation judge thought that the Court of Appeals for Corruption at the North Sulawesi High Court in Manado made a mistake in his decision. Therefore, the cassation filed by the Public Prosecutor at the District Court was accepted and deemed to have fulfilled the elements of Article 2 of the Anti-Corruption Law as stated in the indictment and decision of the District Court judge.

3.1.2. Disparity in terms of the length of the sentence

In decisionNo. 2036K/PID.SUS/2016 there is a disparity in sentences between the district court and the High Court and the Supreme Court's Decision. In the District Court, the defendant was sentenced to prison for 1 (one) year 4 (four) months, in the High Court in the form of a prison of 1 year and 6 months and in the Cassation Court was sentenced to prison for 6 years.

In decision No. 1065K/PID.SUS/2017 there is a disparity in imposing prison sanctions between the District Court and the Cassation Court. At the District Court, the defendant was only sentenced to prison for 1 year and 6 months, while in the appeal verdict the defendant was sentenced to 3 years and 6 months in prison.

Indecision No. 1579K/PID.SUS/2016, there is a disparity in imposing criminal sanctions between the appellate court and the cassation court. In the appeal decision, the defendant was sentenced to 1 year 6 months imprisonment, while in the cassation ruling that upheld the district court's decision was sentenced to 4 years in prison.

3.1.3. Disparities in terms of imposing fines

As in the decision No. 2036K/PID.SUS/2016 there is a disparity between the decision of the District Court and the High Court and the Supreme Court Decision concerning the imposition of a criminal fine. In the decision of the District Court and the Court of Appeal, the amount of the criminal fine is Rp. 50,000,000 (fifty million rupiahs), while in the Cassation Court Decision, the amount of criminal fines is Rp.200,000,000 (two Hundred Million Rupiah).

3.1.4. Disparity in the imposition of additional crimes due to state financial losses

In the decision Number: 1579K/PID.SUS/2016, the panel of cassation judges differed from the judge in the Judex Factie court. The judges' panel of judges argued that judges at the judex factie court had mistakenly applied the law. The cassation panel of judges is of the opinion that the Defendant in the facts of the trial has committed a criminal act of corruption as stipulated in Article 3 of the Anti-Corruption Law, in which the elements are: (1) Everyone; (2) With the aim of benefiting oneself, or another person or a corporation; (3) Abusing the authority, opportunity or means available to him because of his position or position; (4) Can be detrimental to the country's finances or the country's economy.

As for the State financial losses incurred in the amount ofRp.912,892,200 (nine hundred twelve million eight hundred ninety-two thousand two hundred rupiahs). Therefore, the defendant was sentenced not only to the principal in the form of prison but also to an additional criminal in the form of recovering state financial losses ofRp. 659,492,200 (six hundred fifty-nine million four hundred ninety-two thousand two hundred rupiahs).

3.2. Factors Influencing Disparity of Sentencingin Corruption Cases

In making a decision, several factors influence the judge; which will be explained in this discussion are only two aspects namely, the aspects of the judge itself and the legal aspects.

3.2.1. Aspect of Judges

In deciding cases, the judge is very dependent on the school of thought held by the judges. There are more or less two approaches that can be used, namely the traditional approach and the non-traditional approach. The traditional

approach is a legal study and court decision or judge's decision from a normative point of view only. The Traditional Approach includes the approach taken by adherents of juridic legs and positivism. Adherents ofLegism emphasize that the nature of law is written law (the law). Outside the law does not include the law; whereas for adherents of juridical positivism or analytical jurisprudence emphasizes that law should be viewed in terms of positive law. This approach has the disadvantage of not beingable to express reality and ignoring the human and judge elements as human beings.

In addition to the traditional approach, another approach that can be used to assess judges' decisions is the non-traditional approach. What is meant by a non-traditional approach is the sociological and psychological study of law. This non-traditional approach is further divided into three namely the approaches used by sociological jurisprudence, legal realism, and behavioural jurisprudence. First, sociological jurisprudence. Adherents of this school emphasize the legal reality rather than what is formally regulated in the law. Therefore the law must be worked out well to match the reality in society. Second, legal realism. Those who embrace this school have ruled out the normative nature of law. For them, the law is essentially a pattern of the actual behaviour of the judge in the trial. What is decided by the judge is the law. Third, behavioural jurisprudence, which is an approach by studying the behaviour or actual behaviour of judges in the judicial process. The behaviour is studied in the interactions and interrelations between people involved in the stages of decision-making. Thus the focus is not printed on written law or judges' decisions that are formal but on the personal judge and people involved in certain social roles in making legal decisions.

3.2.2. Legal or statutory aspects

Romli Atmasasmita stressed that the strategy to eradicate corruption in Indonesia must use four approaches, namely the legal approach, the moralistic and faith approach, the educational approach and the socio-cultural approach. Furthermore, Romli Atmasasmita [6] stressed that the legal approach plays a strategic role in combating corruption. However, the conventional legal approach is inadequate in dealing with the modus operandi of corruption which is systemic, widespread and is an extraordinary crime. A legal approach is needed that places the interests of the nation and state or the economic and social rights of the people above the interests and rights of individual suspects or defendants; and that the new legal approach is in line with the provisions of Article 29 of the Universal Declaration of Human Rights of the United Nations which affirms that limitation of individual human rights can be justified as long as it aims to protect broader human rights as long as it is regulated in the form of law.

While the legal approach consists of three stages, namely (1) the stage of the policy of determining the criminal law in legislation by the legislative body (formulation policy); (2) the stage of criminal application by a court body (application policy); and (3) the stage of criminal implementation by the implementing apparatus (execution policy). [7] It can also be stated that formulation policy is the most strategic stage because this stage forms the basis, foundation and guidelines for the next stages, namely the application stage and the execution stage.[8]

One part of the formulation policy in eradicating corruption in Indonesia, especially in the context of preventing corruption is, through Law No. 31 of 1999 concerning Eradication of Corruption Criminal Acts which was renewed by Law No. 20 of 2001. In that law, specific minimum penalties are stated; however, these provisions appear to be arranged haphazardly and without a clear concept in the context of overcoming Corruption in Indonesia, specifically in the context of preventing disparity in criminal proceedings.

The Anti-Corruption Act does not regulate criminal guidelines. [9] While the rules regarding criminal penalties are important for operationalizing minimal criminal threats. This is following the concept of the New Criminal Code, in certain cases, the minimum criminal threat can be reduced/ alleviated if there are things that alleviate criminal punishment. [10] In this case, the criminal guideline is the basis for the judge in the application of special minimum crimes.

By not stipulating provisions on criminal guidelines, the judge will have difficulty in deciding on concrete cases that are being handled by him; especially in dealing with cases that have elements of criminal mitigation both subjective and objective elements. As for the objective elements that mitigate the crime, for example, the defendant has returned all losses/state finances, or the amount of state financial losses due to corruption is relatively small and not comparable with the relatively severe minimum criminal threat.

If criminal guidelines are not regulated, the potential for the disparity in punishment is enormous. In this case, the judge easily postulates the principle of "judge's freedom" so that he freely handed down the verdict to the defendant without considering the basis for criminal weighting and mitigation as well as the amount or value of the state's loss caused by criminal acts of corruption.

3.3. An Effective model of decision-making by judges in preventing disparity of sentencing in criminal acts in corruption

Decision-making is a process of thinking and behaviour that results in a choice. The basis for decision-making is thinking. Simply stated, thinking can be divided into two namely automatic thinking and controlled thinking [11]. One of automatic thinking is an association, that is, something in the environment that gives rise to an idea in the mind or an idea that gives rise to another idea or another memory. Locke [12] said that most forms ofhuman thought are associations. An example of automatic thinking is if someone who is already proficient in driving a car, he can respond to the surrounding environment even though while listening to music. In contrast, controlled thinking is scientific thinking, that is, individuals hypothesize all objects and experiences, observing and proposing possible hypotheses. So, in explaining a phenomenon requires

[6] Ermansjah Djaja, 2010, *Memberantas Korupsi Bersama KPK*, Jakarta, Sinar Grafika, Ibid. p. 3.

[7] Barda Nawawi Arief, 1996, *Bunga Rampai Kebijakan Hukum Pidana*, Bandung, Citra Aditya Bakti, Loc. Cit. p.2.

[8] Muladi dan Barda Nawawi Arief, 1992, *Bunga Rampai Hukum Pidana*, Bandung, Alumni, p. 158

[9] Vide Antonius Sudirman, "Specific minimum criminal and prevention of disparity of sentencing: Legislative policy analysis in the law of the republic of Indonesia on corruption", International Journal of Law. 2017; 3(6):82-91

[10] Barda Nawawi Arief, Op.Cit. p.139.

[11] Yusti Prabowati Rahayu, Di Balik Putusan Hakim, PT Diesta Persada, 2005, p. 52.

[12] Yusti Prabowati Rahayu….Ibid. p. 52-53.

serious investigation such as using experiments, observation or mathematical reasoning.

The decision-making process requires a controlled way of thinking to produce the right decision. Decision-making like this is called rational decision-making. Rational decision-making theory is a decision-making theory that is based on rational principles.

In connection with the tendency of judges 'decisions in cases of corruption that contain disparities, researchers offer a rational model of judges' decisions with a positivistic approach, namely an approach focusing on formal measures of the text of the legislation in digging out the truth of the law. In this positivistic view, the law is considered the ablest to bring order to society. For this reason, it is necessary to be supported by the formulation of accurate criminal sanctions in the Corruption Law. In this case, it must be determined in the Anti-Corruption Law that the specific minimum criminal provisions contained in the law are obligatory to be obeyed by judges in deciding corruption cases. In addition, it is necessary to include in the law on the provisions of criminal guidelines so that they can be used as a guide for judges in criminal offenses [13].

4. Conclusions

Based on the results of the discussion it can be concluded: (1) There has been a disparity of sentencingbetween the decision of the Supreme Court and the decisions of the District Court and the High Court of Manado Indonesia, relating to the application of the provisions of the articles in the Anti-Corruption Law, the length of imprisonment and the severity of criminal fines. (2) One model of effective decision-making by judges in preventing disparity of sentencing is the "rational decision" model with a positivistic approach, which is an approach that emphasizes the formal measures of the text of laws and regulations in exploring legal truth.

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