



Disparity of prison sentence and substitutional money for corruption convicts

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Abstract

The provision of a substitute money sentence can cause new problems if the convict is unable to pay the substitute money within a certain period. Therefore, the Public Prosecutor in his indictment and charges charges the defendant with a substitute prison sentence if the person concerned is unable to pay the substitute money, where the prison sentence does not exceed the maximum threat of the principal sentence. Furthermore, the Panel of Judges considers the facts revealed in the trial to pass a verdict for the Defendant. In imposing the length of the substitute money sentence, a disparity was found due to the absence of a reference in formulating the substitute money sentence not paid within the specified period. The disparity in sentences is also often associated with the independence of judges who refer to the sentencing model regulated in laws and regulations, especially regarding the formulation of maximum criminal sanctions. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power emphasizes that judges are required to explore, follow, and understand legal values and a sense of justice in society. Therefore, judges cannot be intervened by any party.

Keywords: Uang pengganti, tindak pidana korupsi

Introduction

The provision of substitute money can cause new problems if the convict is unable to pay the substitute money within a certain period. Therefore, the Public Prosecutor in his indictment and charges charges the defendant with a substitute prison sentence if the person concerned is unable to pay the substitute money, where the prison sentence does not exceed the maximum threat of the principal sentence. Furthermore, the Panel of Judges considers the facts revealed in the trial to pass a verdict for the Defendant.

In imposing the length of the substitute money prison sentence, a disparity was found due to the absence of a reference in formulating the substitute money prison sentence not paid within the specified period. The disparity in sentences is also often associated with the independence of judges who refer to the sentencing model regulated in laws and regulations, especially regarding the formulation of maximum criminal sanctions. Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power emphasizes that judges are required to explore, follow, and understand legal values and a sense of justice in society. Therefore, judges cannot be intervened by any party.

On the other hand, the independence of judges can be considered as something that is disturbing in the criminal justice system, if it causes disparity in sentencing. This disparity in sentencing occurs because of the judge's consideration of the good and evil nature of the defendant, as well as the impact caused by the defendant. On the one hand, the judge is obliged to impose a sentence in accordance with the provisions of the laws and regulations, but on the other hand he must also be sensitive to the sense of justice of the community. So, this is what causes the disparity in the judge's decision to appear.

The Supreme Court defines disparity as inequality of punishment between similar crimes (same offense) in similar conditions or situations (comparable circumstances). Theoretically, the concept of disparity is a state of the concept of parity which means equality of amount or value.

This parity itself is an inseparable unity of the principle of proportionality, namely a principle of punishment proposed by Cesare Beccaria where a law imposed on a criminal must be proportional to the crime he committed. (Tama S Langkun: 2014).

Disparity is the existence of a difference or distance in the judge's decision regarding the same case. In other words, the existence of a disparity in the judge's decision towards the perpetrator of a crime creates an injustice towards other perpetrators of a crime, which in this research case is the defendant in a corruption crime. (Ryan Chandra Sukma: 2023)

If we look further, disparity in sentencing can occur for perpetrators who commit crimes of different levels, for example the length of the prison sentence and substitute money. This disparity can basically be said to be reasonable, because there are almost no cases that have absolute similarities. This becomes a problem if the range of differences in sentences imposed between the same cases causes a sense of injustice and suspicion in society. Disparity in sentencing, especially prison sentences and substitute money, was never intended to eliminate differences in the amount of punishment for perpetrators of crimes, but rather to reduce the range of differences in sentencing. (Indonesia Corruption Watch: 2014).

In the implementation of the judicial function, judges are required to respect truth and justice as well as human rights in every decision, however, the balance of respect is very difficult to implement. It is almost undeniable that there are variations in the decision of imprisonment in lieu of money even though each case has almost the same characteristics. Therefore, it is necessary and interesting to examine the disparity in the sentence of imprisonment in lieu of money for convicts of corruption crimes in the jurisdiction of the Banda Aceh Corruption Court.

Research method

The type of research used in this thesis is normative juridical, research in a normative juridical manner where law is conceptualized as what is written in laws and regulations (law in books) or law is conceptualized as a rule or norm that is a benchmark for human behavior that is considered appropriate. This research uses a descriptive research method and when viewed from its purpose is included in normative legal studies. Normative studies are conducted to obtain secondary data through a series of activities of reading, quoting, and reviewing laws and regulations, court decisions, legal theories, and doctrines in relation to the object of research.

Discussions

Criminal consequences of replacement money for defendants in corruption crimes from the perspective of justice.

The imposition of criminal penalties for perpetrators of corruption has now shifted from the original idea of retributive justice to economic justice with the ratification of the United Nations Convention Against Corruption and the existence of complementary criminal regulations as an effort to recover state losses from corruptors, but the return of state losses does not eliminate the criminal responsibility of the perpetrators. This shows that the lawmakers want to maintain the purpose of criminal punishment by providing a deterrent effect in imposing sanctions.

The imposition of sanctions in corruption cases is intended to provide a deterrent effect through the main punishment (imprisonment and fines) and to recover state losses. These two ideas must be reflected in the judge's decision, a judge must be able to translate the will of the lawmakers in punishing corruptors, so that there is synchronization of the idea of punishment with its implementation.

The imposition of criminal sanctions is the end of a long judicial process as an effort to hold the perpetrators of corruption crimes legally accountable that can be proven. On that side, punishment is given as a form of atonement for mistakes made in the past, but in modern times the purpose of punishment is no longer directed at revenge but to achieve greater benefits in the form of correcting the perpetrator's mistakes and restoring the interests of the victim that have been violated, which is why the purpose of punishment has shifted. Barda Nawawi Arief views that the strategy of punishment policy in new-dimensional crimes needs to pay attention to the nature of the problem. If the typology of the crime has an economic dimension, then the form of sanctions should follow the typology of the crime, namely that material sanctions are given so that the perpetrator cannot enjoy the proceeds of the crime and this is expected to provide deterrence.

This opinion is quite rational because if the sanctions given do not match the motivation of the crime, then there will be disorientation of the sanctions towards what is aspired to. Based on this opinion, then the policy of determining sanctions should refer to the objectives to be achieved from the imposition of the sanctions on the perpetrators of the crime.

The idea of the formulation policy that stipulates the obligation of replacement money in the regulation of eradicating corruption is (1) implementing the spirit (asset recovery) to cover state losses in accordance with the assets obtained by the convict (2) efforts to provide a deterrent

effect for the convict (special prevention) as a means for the convict to realize the mistake. Both ideas are very much determined by the authority of the court to decide the case.

If the judge's decision requiring replacement money for the convict is more subsidiary to the substitute prison sentence, the author views that such a decision is unlikely to provide a deterrent effect for the convict. Moreover, the subsidiary does not show a balanced value, so that corporal punishment as a substitute becomes a type of punishment that is widely favored by corruption perpetrators to escape the obligation to pay replacement money so that state losses cannot be returned in full.

So, if the phenomenon of disparity between substitute money and subsidiary punishment continues to roll in corruption criminal trials, it can be simulated that the sanction of the obligation to pay substitute money does not provide a deterrent effect and the corruption index in Indonesia is difficult to reduce.

The Ideal Criminal System to Overcome the Disparity between Substitute Money and Subsidiary Punishment in Corruption Cases Criminal law has harsh characteristics because it intersects with the right to freedom and independence if someone is faced with criminal law, then their right to freedom is threatened to be revoked, meaning that punishment is identical to suffering, therefore, the discourse of criminal law will not be separated from the type and severity of sanctions that will be received by perpetrators of crimes who violate criminal law stipulated by the state. This makes law enforcers need to be careful in implementing criminal law so as not to violate essential human rights that are protected in a state of law.

The imposition of criminal sanctions is a last resort if other areas of law cannot resolve it (*ultimum remedium*) or the last weapon in overcoming crime. Punishment is aimed at creating two important things, first, to deter perpetrators of crimes so that they do not repeat their actions in the future or do not become recidivists. This goal is known as special prevention. Second, to provide fear to the public so that they do not commit crimes or to prevent individual members of society from becoming perpetrators of crimes. This goal is called general prevention.

To achieve an ideal criminal justice system in the sense of providing a sense of justice for the parties (perpetrators and victims), sentencing people who have been found guilty often raises pros and cons, especially if the judge's decision contains a disparity in sentencing between one decision and another without any justifiable reason that can be explained. Criminal disparities can occur due to many factors as expressed by Beccaria in the adage "let punishment fit the crime", which explains that each case has different characteristics because it is influenced by various conditions that surround it such as the motives of the perpetrator, the condition of the victim, the value of the losses incurred and the reaction of the community so that the judge cannot ignore these factors.

Various reasons that can encourage the emergence of a disparity such as gender, race, social status, political views and others that can influence judges in imposing criminal sanctions, such as in America the difference between white citizens will receive different treatment from those who are black, differences in sex, social class or gender especially in cases of sexual crimes a female judge tends to decide with a heavy sentence against the perpetrator of rape when compared to a male judge.

Although judges have the freedom to decide cases in a country of law, this freedom is not without limits, judges must still refer to the legal regulations governing the severity of the criminal offense being examined, including in corruption cases. Article 18 paragraph (3) of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001 concerning the Eradication of Corruption stipulates that if the replacement money is not paid after 1 (one) month of the court's decision being inkracht, the prosecutor is required to seize and auction the convict's assets, but if the convict's assets are insufficient, the obligation to pay the replacement money is subsidiary to a prison sentence that does not exceed the maximum principal sentence. The legal question that then arises is how long the replacement prison sentence must be served by the convict if he does not pay all the replacement money or only pays part of it.

The Supreme Court responded to this issue by issuing Perma No. 5 of 2014 concerning Additional Criminal Penalties in the Form of Replacement Money in Corruption Crimes. For convicts who do not pay all the replacement money, they must serve a replacement prison sentence whose length has been determined in the judge's decision, but regarding the determination of the length of the replacement prison sentence, it is not regulated in Perma and is returned to the judge's discretion. Furthermore, if the convict only pays part of the replacement money, Article 11 paragraph (4) of Perma stipulates that if the convict pays part of the replacement money imposed on him, the payment of the replacement money will be calculated proportionally as a reduction in the length of the replacement prison sentence that must be served.

Perma only states that the prosecutor will calculate the reduction in the replacement prison sentence proportionally without determining exactly how long. This condition is understandable because each corruption case has different characteristics and variables, but if there are no clear sentencing guidelines, there is concern that the problem of calculating the reduction in the replacement prison sentence will be misused by law enforcement officers.

There is no reference that serves as a guide for judges or prosecutors in deciding how long subsidiary sentences should be served, especially with the large amount of substitute money and the absence of definite guidelines, abuse of power is feared to occur due to the large discretionary power due to the guarantee given by the Law on the freedom of judges and prosecutors in converting substitute money to substitute imprisonment. When conducting comparative studies in various countries, many countries have created a new policy in determining the mechanism that serves as a guideline for judges in measuring the number of sanctions imposed so that the dynamics of imposing criminal sanctions can be minimized. Countries such as the United States, Finland, Sweden, Canada and New Zealand have formed sentencing guidelines which are stated in the form of regulations and must be used as a guideline for judges in deciding cases.

The problem of disparity in substitute punishment must be addressed by creating a sentencing guideline that serves as a reference for judges to determine the length of subsidiary punishment, the guideline must make it easier for judges to determine the minimum and maximum range for substitute punishment and its subsidiary punishment.

The determination of substitute punishment in a decision uses a class that is in accordance with its level of magnitude.

Determining the range of substitute punishment with subsidiary punishment is based on the idea of proportionality of punishment. The idea of balanced punishment states that the imposition of criminal sanctions must be balanced with the guilt of the perpetrator, this idea is correlated with the adage "only the guilty ought to be punished" or in criminal law known as the principle of no punishment without fault or (*geen straf zonder schuld*). Therefore, the imposition of punishment must be measured based on the magnitude of the error proportionally.

The issue of proportionality is an issue that is often forgotten (the forgotten issue) both in the policy of formulating criminal sanctions and in the discourse of Indonesian criminal law. The idea of proportional punishment requires a balance between guilt and punishment, but assessing guilt is something that is difficult to measure because it is abstract, however, at least to determine the level of guilt of the perpetrator of corruption can be seen from 2 (two) aspects, namely the value of material losses suffered by the state due to corruption and the public's view or assessment of the act of corruption at the time it was committed.

Both measures can at least be used as a reference to determine the level of guilt of the perpetrator of the crime. Therefore, policy makers should be able to record every change in the public's view of corruption so that they can measure the size of the sanctions that must be undergone by the perpetrator. The urgency of the importance of making guidelines for punishment for replacement money as a form of control over judicial power while minimizing disparities between one decision and another.

The theory of proportionality in punishment aims to minimize injustice caused by differences in the imposition of sanctions or the number of criminal sanctions. In a particular case, the judge may consider that the light sentence imposed is balanced with the guilt of a perpetrator, while in another case it is only said to be proportional if the type of the heaviest or maximum sentence is imposed.

Determining the proportionality measure is indeed a difficult job for judges because it is related to the issue of justice. As a representative of God, judges must be able to measure the level of proportionality of the substitute money sentence with the subsidiary sentence to obtain justice according to what they believe.

For judges who have good morality and personality, they will be able to see every situation wisely and judiciously, including in terms of reviewing the facts of evidence in court. However, the birth of belief is not enough by not being enough by wisely assessing the defendant's condition and the facts in court but must be supported by legal arguments as a form of reasoning that involves the intellectual process of legal personnel in justifying rationality, consistency, logic, and doctrinal consistency to reach conclusions in deciding the problems of the case at hand. Efforts to achieve ideal punishment in subsidizing substitute money with imprisonment seem to require guidelines that can help judges determine the proportional measure, considering that this is in the subjective area of the judge.

Judges can choose how much substitute prison is appropriate for the case they are handling but not more than the maximum prison amount in each range of the replacement money amount. This model of guidelines for determining the amount of substitute imprisonment can be

made through a Circular of the Supreme Court or a Supreme Court Regulation or can also be regulated in the form of other laws and regulations. Furthermore, in the future, research that leads to efforts to minimize disparities in sentencing in principal sentences must begin to be developed more seriously by the Government. These efforts, for example, can start by regularly creating statistical data on corruption cases every year.

This sentencing guideline will produce legal certainty between one convict and another if the convict does not pay the substitute monetary penalty. This system can minimize the disparity between substitute monetary penalties and substitute imprisonment.

Some arguments that can be used to create sentencing guidelines are the principle of the sentencing approach, must emphasize the application of appropriate or appropriate punishment. Must emphasize justice; Punishment must be fair/in accordance with the sanctions imposed on violators of the law or perpetrators. Regarding the urgency of sentencing guidelines, Berda Nawawi assessed that the determination of sentencing objectives and guidelines becomes a control as a basis for judges to sentence guilty defendants.

Larry Mays and Thimas Winfree assessed the importance of sentencing guidelines as providing convenience for court task bearers. The independence of judges encourages the emergence of "sentencing disparities" so that sentencing guidelines become urgent to spur uniformity of sentencing and limit the possibility of judges using "inappropriate" sentencing authority, sentencing guidelines ensure that several important factors are considered in the sentencing, especially the distinction between novice and recidivists and Sentencing guidelines encourage consistency in giving sentences according to their type and weight.

In practice, it is rare to find legal arguments that form the basis for judges to determine the severity of subsidiary sentences or substitute imprisonment. With the existence of sentencing guidelines, the principle of transparency and consistency in determining the amount of subsidiary criminal penalties can be implemented in real terms in the world of justice, especially in corruption cases. As has been implemented in various countries, the government, in this case the Supreme Court, can learn from the use of sentencing guidelines in other countries that make the judge's job easier and minimize disparities in decisions.

Conclusion

The disparity between substitute money and substitute imprisonment has a direct impact on efforts to recover losses in the form of (a) the amount of substitute money is not paid in full, resulting in efforts to recover losses in corruption cases not being realized optimally (b) causing legal uncertainty and disproportionality in determining the length of substitute imprisonment when the convict does not pay all or only part of it (c) the disparity between substitute money and subsidiary imprisonment has an impact on the failure to achieve the purpose of punishment in the form of a small deterrent effect because the subsidiary sentence served is relatively light.

The appropriate sentencing system in overcoming the problem of substitute money and subsidiary imprisonment is to create sentencing guidelines in the form of classifying the range/class of substitute money with the substitute imprisonment that must be served, the idea is that the

greater the substitute money that must be paid, the longer the substitute imprisonment.

This guideline will be a guide for judges to create uniformity and conformity between substitute money and substitute imprisonment and minimize disparities between one verdict and another without clear justification.

Suggestions

Judges as the last bastion in upholding justice must have a clear and accountable basis for consideration. In deciding on a substitute monetary sentence that is subsidiary to imprisonment, judges should provide a measure of consideration that is commensurate between the value of the substitute money that is not paid and the subsidiary sentence served by the convict so as to show comparability and legal certainty. Determination of a commensurate measure can refer to the average tendency in previous judges' decisions and consider the level of seriousness of the corruption crime to be decided.

The absence of guidelines for substitute monetary sentences that explain concrete calculations if they are subsidiary to a substitute prison sentence results in judges having the freedom to determine the maximum and minimum limits of subsidiary sentences. Therefore, the Supreme Court is advised to create guidelines for substitutionary monetary sentences with subsidiary sentences in the form of a range/class classification that determines the minimum and maximum limits, because Perma No. 5 of 2014 concerning Additional Substitute Financial Sentences does not regulate it explicitly.

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