

UNDERSTANDING JUDGE'S DECISION DISPARITY IN INDONESIAN CORRUPTION CASES

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Abstract—One of the biggest weapons in law enforcement to deal with rampant corruption is the judges. Judges are considerably independent and their authorities are guaranteed by the constitution. A judge's decision ought to reflect justice for all, both in terms of benefit and legal certainty. Disparity is not an exclusive practice, but rather something commonly found in many states. It is impossible to truly eradicate disparity in every judge's decision; however, one should try to minimize it since disparity can significantly harm the court system. Not to mention, it is also publicly regarded as an evidence of legal injustice, thus it can also lead to the increase of public distrust towards the law in general and the court system in particular.

This study aims to analyze the construction of corruption cases and the punishments involved according to the Indonesian Acts. We also intend to describe the various ways the judges decided on corruption cases in Indonesia and granted punishments to the perpetrators to find out if there are evidences for disparity. This study can be categorized as a dogmatic legal research or normative legal research. It is a dogmatic legal research since it regards the law as a whole system that comprises legal principles, legal norms, and rules. It is also a normative legal research since we mainly analyzed normative law that involves both primary legal materials and secondary legal materials. We also used a combined research approaches between case approach and conceptual approach to analyze our research result through induction-interpretation conceptualization method.

Keyword: corruption, disparity, judge decision

Introduction

Judges have the independence guaranteed by the constitution in carrying out their authority. The decision must reflect justice for all parties and provide benefits and legal certainty (Girsang, 2014: 412).

Criminal disparity is a criminal inequality between same offense in comparable circumstances (Litbang Mahkamah Agung, 2010: 6). Normatively, criminal disparity is a form of judge discretion in the form of a judge's conviction which is guaranteed by law. Judges have independence so that disparities can occur in their decisions. With their independence, judges can impose sentences differently for certain crimes on a priority scale. Sometimes legal

certainty must be prioritized; on the other hand justice and protection of community interests must be prioritized. Individual cultivation of criminal offender can be a consideration for judges (Lasmadi, et al, 2014: 183).

Research statement

1. How is the trend of corruption in Indonesia?
2. How to understand the judge corruption's decision?

Literature review

1. Judge's Decision

Judge's Decision is the judge's statements which are set in written form and the judges will speak it to the public in court as a result of examining a lawsuit. Judges as state officials are given the authority to make decisions to settle cases. Judges' decisions must be obeyed by the parties because they have forced power. Another term used to refer to a judge's decision is a court decision. Judges' decision or court decision is also a work of finding a law (Mulyadi, 2007: 34).

Article 1 point 11 of the Criminal Procedure Code states that a court decision is a judge's statement which is spoken in an open court. Judges' decisions can be in the form of imprisonment or free from all lawsuits regulated by the Law. The legal requirement for a judge's decision is very important because it will be seen whether a decision has legal force or not. Article 195 states that all court decision is valid and has legal force if it is spoken in open court for the public. The contents of court decisions are regulated by Law No. 48 of 2009 on Judicial Power: all court decisions must contain the reasons and bases for the decision. The court decision must contain relevant certain articles to the regulations or unwritten legal sources which are used to judge. By the judge's decision or court decision, there will be decision on how to live in a state with law. Judge's decision is considered a way to resolve a dispute or legal conflict in the community.

2. Disparity

Sometimes judge's or court decision is different for the same case. The difference in decision is called disparity or ambiguity. The judge's decision is an open text that can be interpreted by anyone, even though the binding power is only for the parties (Komisi Yudisial, 2014: 9).

Disparity in judges' decisions is a problem that attracts experts' attention in long period. Judicial decision disparity does not only occur in Indonesia, but it can be found in many countries (Ashworth, 2005: 72).

Judicial decision disparity can be an issue that disturbs the justice system. In addition, disparity will be viewed by the community as a form of legal injustice that has implications for community pessimism in viewing legal cases held by the judiciary.

Although judges have independence but it has a limit. There is a principle of *nulla poena sine lege* that gives a limit to the judges to decide the punishment based on the measurement that has been determined in the legislation. However, even though there is a measurement, disparity problems will still occur if there is a wide gap between the minimum and maximum punishment (Zulfa, 2011: 33).

As stated by R Medem (cited in Frisch, 2017), "disparity in the apportionment of sentences was not a transitional phenomenon on the way to a soon-to-be-achieved uniformity but rather a permanent state of affairs in criminal sentencing practice" (p. 438). Hence, the problem of disparate sentences is not exclusively found in corruption cases. A study of South Australia's District and Supreme Courts sentences highlighted the direct and interactive effect of sex in sentencing (Jeffries & Bond, 2010). Kim and Kiesel (2018) used arrest data from New York State to prove racial disparity in sentencing that is established before the criminal case proceedings. In a study of administrative data of drug arrest in California, Nicosia et. al (2013) found significant disparities in prison and diversion for Blacks and Hispanics relative to Whites. In Light's study (2014), it indicates a considerable punishment gap between US citizens and non citizens that is larger than minority-white disparity. Johnston and Flynn's study (2017), on the other hand, scrutinized sentencing disparities between mental health and traditional criminal courts.

Frisch (2017) asserted that the reason why disparity is fundamentally unacceptable is because it is "incompatible with the constitutional rights to equal treatment and to justice" (p. 444). Disparity of sentence also sends inconsistent and irrational signals to the public, hence "they are serious impediments to positive general prevention by reinforcing respect for the law" (p. 444). Moreover, disparity of sentence makes reintegration of offenders more challenging. Unjustified sentence can heighten the offender's antagonism toward society and distrust toward the administration of legal system. Thus, disparity considerably harms the prisoner and the prison system. Responding to this, Corruption

The behavioural definition of corruption as *the misuse of entrusted public office for private gain* is a commonly used explanation of corruption ("USAID Anticorruption Strategy", 2005, p. 8). It refers to "the proactive behaviours of public officials to extort or seek bribes for activities and services that they have been entrusted to perform, the use of personal influence or connections to get something accomplished outside of the legally sanctioned channels, and the breach of standards of conduct that may result in personal conflicts of interest" (Spector, 2012, p. 5). As Spector (2012) further explained "simply, corruption can be viewed as wealth-seeking-power or power-seeking-wealth. In the first case, the economic elite can use its money to seek public power and influence over the state's resources. The result is a form of *state capture* by which economic elites attempt to grab powerful positions to control the state to suit their private

interests or "buy" the political elite to do their bidding. In the second case, political leaders try to take advantage of their positions to accumulate personal wealth for themselves, their families, and their kin. This can be seen as *state predation*, where political power is used to extract private financial benefits from a country's economic resources." (p. 6).

The phenomenon of corruption, in many cases, is regarded as cultural or customary to get things done. Those practicing such cultures rarely see real harm in their actions. But, often, small acts of corruption can accumulate to a major harm that endangers life. In August 1999, an earthquake in western Turkey left very few building stands. The death toll of this man-made catastrophe has passed 17,000. In 2003, an earthquake in eastern Turkey caused a school dormitory building to collapse in which 85 people lost their lives ("Corruption and Earthquake Destruction", 2010).

Upon investigation, Spector's study (2012) found the following: "construction codes may be adequate, but they are not enforced, or there are insufficient controls to ensure their effective implementation. Bribes or kickbacks are paid to get permits despite defective plans, materials, or building techniques. Building inspectors are bribed to turn a blind eye at construction shortcuts, omissions, or mistakes. Together, these practices make the general public a serious victim of corruption and its deadly consequences". According to one estimate, 75% of all deaths in earthquake zones can be attributed to corruption. Of all the earthquakes between 1990 and 2005, if all corrupt practices had been eliminated, 6.5 million people would still have their homes, 7,750 would not have been injured, and 20,750 would still be alive." (p. 3).

Several studies have also found a strong correlation on the impact of corruption on the economic well-being of a nation and its citizens. Using cross-national data and regression analysis, Tanzi and Davoodi (1997) asserted that 'grand' corruption that is political in nature, "distorts the decision-making process connected to the public investment project". Higher corruption is associated with "(1) higher public investment; (2) lower government revenues; (3) lower O & M expenditures; and (4) lower quality of infrastructure. The evidence also shows that corruption increase public investment while reducing its productivity, thus providing a possible reason for the negative impact of public investment on growth found in some studies." (p. 3). Furthermore, in another study of 35 countries (member of Organization for Economic Cooperation and Development), "it was hypothesized that corruption supports, stabilizes, and deepens inequality" (Karsted as cited in Spector, 2012, p. 31).

Typology and Research Approach

The typology of this research is normative legal research or dogmatical legal research. Normative legal research focuses its study on law as a whole system that covers a set of legal principles, legal norms, and legal rules (Soekanto & Mamudji, 2009: 17). This study is a normative study because the object studied is purely normative law with secondary data targets in the form of primary legal materials and secondary legal materials (Mezuk, 2006: 87). Data collection is done through literature study, so this research uses secondary data. The

data is grouped into primary legal materials and secondary legal materials. Data validation relies on level of confidence or credibility through deep observation and triangulation (Denzin and Lincoln, 2010: 2-3). Through triangulation techniques, data are compared and confirmed to their sources so that the data can valid. Triangulation is done by checking strategy in the form Focus Group Discussion (FGD) with competent parties with the concept of disparity. The data are analyzed into three steps: editing, coding, and tabulating. The writers categorized the answers or responses carefully, accurately, and orderly. Data analysis was carried out through conceptualization induction-interpretation. Furthermore, the writers arranged and categorized data into themes or patterns. After checking the validity, the writers conducted reconstruction and analyzed with inductive qualitative with legitimacy through the quality of legal norms.

Research Findings and Discussion

1. Sentencing Trend for Corruption Cases in Indonesia (2018)

In 2018, Indonesian Corruption Watch collected 1053 corruption cases with 1162 offenders. The data is collected from the District Court's, High Court's, and Supreme Court's court decisions. From this data, the average duration of imprisonment decided for corruption case offenders during 2018 is two-year and five-month long, as indicated by the table below (ICW, 2018):

No	Courts	The average sentence
1	District Court (with special judge for corruption case)	Two years and three months
2	High Court	Two years and eight months
3	Supreme Court	Five years and nine months

From 1053 cases with 1162 offenders in 2018, the District Court decided on 926 offenders (79,69%), the High Court decided on 208 offenders (17,90%), and the Supreme Court decided on 28 offenders (2,41%). While the total amount of the state financial loss is Rp 119.884.000.000,- (US\$ 8.565.293).

The table below shows more details on the variety of sentencing decided by each court:

		District Court		High Court		Supreme Court	
Sentencing Category	Total Offenders	Offenders	%	Offenders	%	Offenders	%
Light	918	749	81,59	159	17,32	10	1,09
Moderate	180	131	72,78	35	19,44	14	7,78
Heavy	9	3	33,33	3	33,33	3	33,33
Unproven	26	21	80,77	4	15,38	1	3,85
Mistaken	1	0	0,00	1	100,00	0	0,00
Unidentified	14	9	64,29	5	35,71	0	0,00
Under the minimum punishment	11	10	90,91	1	9,09	0	0,00
N.O	3	3	100,00	0	0,00	0	0,00

The table indicates that the majority of sentencing decision in the District Court and High Court levels for corruption cases are considered light (1-year – 4-year long imprisonment). While in the Supreme Court level, the majority of sentencing decided is in the moderate category (4-year – 10-year long imprisonment). According to ICW

(2018), generally, this trend is not significantly different from what happened in 2016 – 2017.

In 2018, ICW observed 1053 corruption cases with 1162 defendants with a total criminal fine of Rp. 119,884,000,000, with a total additional criminal reimbursement of Rp 838,547,394,511.34; US\$ 5,512,431; and RM 27,400. The average sentence in 2018 was two years and five months in prison. From 1053 corruption cases with 1162 defendants in 2018, The District Court tried 926 defendants (79.69%), the High Court tried 208 defendants (17.90%), and the Supreme Court tried 28 defendants (2.41%).

The total state financial losses from these corruption cases amounted to Rp.9.2 trillion, with a total bribe of Rp776 billion; US \$ 8,211,480; RM27,400; and SGD218,000, and extortion of Rp110,842,000.

The total corruption cases handled by the Supreme Court from 2016 to 2019 are 8087 cases, while cases that have been decided are 7729 cases. The total state financial losses from these corruption cases in 2018 amounted to Rp. 9.290.790.689.756,73,- with a total bribe of Rp. 776.895.013.114. US \$8,211.480 RM 27.400, SGD218.000, and extortion of Rp. 110.842.000. The total criminal penalty is Rp.119,884,000,000. The total additional criminal compensation is Rp. 838,547,394,511.34, US \$ 5,512,431 and RM27,400.

The Factors Causing Disparity in Criminal Decision of Corruption Cases in Indonesia

Legal system

Most Indonesian legal systems still adhere to the Continental European System (civil law system). So the disparity in the decision can occur, because the civil law system emphasizes the rules in the Regulation. This condition is certainly different from the Anglo Saxon legal system which emphasizes law on its jurisprudence. Although jurisprudence is a "persuasive precedent", it is not required to be followed or not formally binding on other judges in the Continental European System. It is different from jurisprudence in the Anglo Saxon system (common law system) which considers jurisprudence as a decision of the Supreme Court or the highest court that has been or is always followed by other judges under the Supreme Court. 31 precedents (jurisprudence) in the Anglo-Saxon legal system (Common law System) is "the binding force precedent". It means that the possibility of disparity can be prevented because the court's decision follows the previous judge's decision (ICW, 2014, p. 39).

Constitution

The use of criminal law as premium remedium in the Corruption Law is actually considered as a trigger for the occurrence of criminal disparities in corruption cases. For example in article 2 and article 3 of the Corruption Law, this article is often blamed for causing disparity in decisions. The problem lies in the difference in minimum punishment threats. Article 2 regulates a minimum of 4 years of criminal offenses, while article 3 provides a minimum of 1 year of criminal offenses. The problem arises when article 2 can be imposed on anyone including other parties outside the state administration. Whereas Article 3 is specifically addressed to state administrators, the question is why is the minimum punishment threat

against an article that is also intended for parties outside the state administration heavier than the article addressed at the state administration? Supposedly, the minimum punishment threat in Article 3 of the Anti-Corruption Law can be likened to Article 2 of the Anti-Corruption Law. In other practices, article 3 is often used as an excuse to defend oneself for state administrators who want to avoid article 2 because of a heavier sentence (ICW, 2014, p. 39-40).

Judges' Factors

Disparity problems can also come from judges. It can happen because of a variety of ideological understanding of the philosophy of punishment (basic values or the philosophy of punishment), at least in following the flow of criminal law in either classical or modern. Furthermore, in positive criminal law in Indonesia, the Judge has very broad freedom to choose the type of criminal (stafsoort) in connection with the use of an alternative system of criminal threats in the Law.

According to Cheang, the disparity of sentences referred to the application of unequal crimes against the same offenses or offence comparable seriousness without valid reason. Jackson further added that criminal disparity can also occur in different convictions of two or more defendants who commit a criminal act together (co-defendant). The factors that give disparities in criminal decisions are: Judge personality problems, such as mentality issues, religion, ethnicity, informal education and other factors that may influence separately or simultaneously. The second factor is the environmental problem. It deals with the social environment. This factor not only affects the personality of the Judge, but also the sentence imposed. In a very broad sense, the social environment can cover a very broad scope. The social environment may include political, economic, and so on (ICW, 2014, p. 40).

There is no joint guide

After it is reviewed, the factors causing criminal disparity comes from the law itself. In one hand, it is ideologically justified but in other hands, it contains the weaknesses related to the existence of "judicial discretion" that is too broad due to the absence of "sentencing standards".

Based on the temporary observation, the Supreme Court is the only agency that has a policy to prevent the disparity in decisions. Meanwhile, other law enforcement agencies, such as the Attorney General's Office and the Corruption Eradication Commission (KPK), do not have an internal policy related to efforts to prevent disparity in decisions.

In December 29, 2009 the Supreme Court issued a circular letter of the Supreme Court of the Republic of Indonesia, Number 14 of 2009 on the Development of Judge Personnel. Substantively, this Circular contains three things. First, periodic discussions are held about legal issues as an effort to foster the High Judges. Secondly, there is guidance for first-rate judges. And third, the steps referred to the first and second points do not limit the judge in finding new innovations in development.

Interestingly, in the second point related to the development of first-rate Judges, it was also ordered that the Heads of Appellate Courts should maintain the disparity in decisions. Maintaining disparity means that, the request to the Heads of Appellate Courts to reduce the

occurrence of criminal disparities in decision. This circular letter should be used as an entry point to avoid disparity in decisions. But, Technically there is no regulation on statutory guidelines for sentencing or *strafvoormetingsheidsraad*) (ICW, 2014, p. 42).

References:

- Indonesian Corruption Watch. 2014. Studi Atas Disparitas Putusan Pidana Perkara Tindak Pidana Korupsi. Policy Paper. Indonesia: Jakarta. Retrieved from <https://antikorupsi.org/id/news/studi-atas-disparitas-putusan-pemidanaan-perkara-tindak-pidana-korupsi>
- Ramadhana, Kurnia. 2019. Tren Kejahatan Korupsi dan Putusan Ringan Pengadilan [Power Point Slides]. Retrieved from www.antikorupsi.org
- Anshworth, A. 2005. Sentencing and Criminal Justice. Cambridge University Press. New York.
- Denzin, N.K., dan Y.S. Lincoln. 2010. Handbook of Qualitative Research. Terjemah, Pustaka Pelajar. Yogyakarta.
- Girsang, H. 2014. "Disparitas Putusan Hakim Dan Faktor Penyebab Terjadinya Disparitas Dalam Putusan Hakim Pengadilan Tindak Pidana Korupsi Di Pengadilan Negeri Kelas Ia Jayapura Terhadap Tuntutan Pasal 3 UU TIPIKOR". Jurnal Hukum dan Masyarakat, XIII (3): 387-405.
- Lasmadi, S. 2014. "Disparitas Pidana Putusan Hakim tentang Tindak Pidana Korupsi". dalam Komisi Yudisial Republik Indonesia. Disparitas Putusan Hakim; Identifikasi dan Implikasi. Sekretaris Jenderal Komisi Yudisial Republik Indonesia. Jakarta.
- Leawoods, H. 2000. "Gustav Radbruch: An Extraordinary Legal Philosopher". Journal of Law and Policy, II (1): 489-515.
- Litbang Mahkamah Agung. 2010. Kedudukan dan Relevansi Yurisprudensi untuk Mengurangi Disparitas Putusan Pengadilan. Puslitbang Hukum dan Peradilan Mahkamah Agung Republik Indonesia. Jakarta.
- Mezuk, M.H. 2006. "Jenis, Metode dan Pendekatan dalam Penelitian Hukum". Jurnal Law Review, V (3): 85-97.
- Soekanto, S. dan Sri Mamudji. 2009. Penelitian Hukum Normatif Suatu Tinjauan Singkat. Cetakan ke - 11. PT Raja Grafindo Persada. Jakarta.
- Zulfa, A. 2011. Pergeseran Paradigma Pemidanaan. Lubuk Agung. Bandung.