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DISPARITY IN SENTENCES OVER CORRUPTION CASES AT COURT OF CASSATION

Ukar Priyambodo[1]
[1](PhD Candidate, Faculty of Law, University of Brawijaya, Indonesia))

Abstract: *In imposing sentences on corruption cases, there is often a disparity in decisions. This is because the laws and regulations do not mention the exact type and level of punishment for crimes and the exitance of the judge's discretion to decide the concrete case that is not completely regulated in legislation. This raises the issue of legal certainty. This paper aims to minimize the disparity in judges' decisions in corruption cases, especially at the cassation level. This article elaborates on the meaning of disparity in the context of imposing corruption in a cassation decision based on its ontology, epistemology, and axiology perspective. Furthermore, the authors identify the factors that cause the disparity in the judge's decision, which is based on the principles of judicial power which include: (1) the principle of fast, low cost, and simple; (2) the principle of ius curia novit; and (3) the principle of "Res Judicata Pro Veritate Habetur". To minimize the disparity in sentences over corruption cases, it is carried out by: (1) establishing a special minimum system which constitutes special offenses beyond Criminal Code; (2) equal understanding about mission and vision among judges in investigating a case; (3) and a judicial body other than judges that is authorised to decide the severity of criminal punishment or the consideration regarding the criminal sentencing needs to be established.*

Keywords: Disparity in Sentences, Corruption, Court, Cassation
Research Area: Criminal Law
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1. INTRODUCTION

Criminal corruption is deemed an extraordinary crime [1] always fought against by countries worldwide[2] due to its serious impacts that could lead to the initial phase of the downfall of a state either in moral or material aspects.[3] Corruption is like a giant tree that has been rooted deeply into the earth with its resistance to total eradication. An international organisation called Transparency org. found out that the Corruption Perceptions Index (CPI) in several countries did not show significant change throughout the years.

The highest value of CPI 2016 was represented by Denmark and New Zealand, accounting for 90. It indicates that out of 176 countries, according to the analysis of Transparency Org, Denmark and New Zealand represented the lowest cases of corruption. Somalia represented the lowest value, accounting for 10. This indicates that Somalia was run under bad governance since the tendency of corruption was high. With the average CPI in 2016 accounting for 43, the Transparency Org. concludes that most countries in 176 countries were still under the average number of CPI. This indicates that corruption was considered a dangerous epidemic infecting most countries worldwide.

Indonesia is the country with a high incidence of corruption. The lowest CPI value of Indonesia shows that the corruption cases in Indonesia are threatening, especially when it is referred to the trend shown in CPI Indonesia from 2012-16. It is clear that the CPI value of

Indonesia slowly rose from 32 in 2012, 32 in 2013, 34 in 2014, to 36 and 37 in 2015 and 2016 respectively.[4] This low value and slow progress explain that measures taken to eradicate corruption in Indonesia are not working since it is the tradition that has been rooted deeply.

The flaw in the current system should not only be taken as a drawback since building a system should take many aspects into account. A flaw in the system exists when it is not optimally implemented. With this, the blame is often addressed to the flawed system.

A factor involved to run the system, or commonly called as criminal law enforcement, is the scope of knowledge that has a wide domain of topic. Mohammad Hatta[5] argues that criminal law enforcement can be performed through the following four stages: 1) setting a policy/authority of "enquiry"; 2) setting a policy/authority of "prosecution"; 3) setting a policy/authority "to sentence"; and 4) setting a policy/authority for "criminal execution".

Todung Mulya Lubis and Alexander Lay[6] state that sentencing is aimed to raise legal awareness and to deter the criminal according to the offenses committed. Yesmil Anwar and Adang[7] add that sentencing should be given appropriately since a sentence is an instrument that determines the appropriateness and implementation of the sentence per se.

As mentioned earlier, sentencing is one of the stages in criminal law enforcement held by a body that is judicially authorised or called as judicial power. Judges who are authorised to sentence have to consider both juridical and non-juridical aspects to decide appropriate level of punishment.[8] The considerations are essential to deliver deterring effects to criminal, not aimed to impose retaliation.[9] Therefore, it is unfair for judges to only consider the accusation and impacts of the offenses committed, but they also have to learn the personality of the defendant regarding his/her good and bad personal characteristics.

This consideration often sparks disparity in type and level of punishment imposed on defendants by different judges.[10] According to Larry K. Gaines and Roger LeRoy Miller,[11]the disparity in sentencing is a condition in which a defendant is sentenced with the level of punishment different from another defendant. This disparity is due to the fact that several laws and regulations do not mention the exact type and level of punishment for crimes, but they only mention a range of length of punishment imposed. Moreover, this disparity is inextricable from the judge's discretion, authority to determine the policy or to decide the concrete case that is not completely regulated in legislation.[12]

With such discretion, the verdict passed by the judge sometimes fails to meet the expectation of certain parties. In other words, a criminal offender is sometimes imposed with a punishment deemed too lenient or too severe compared to what is prosecuted, or the decision given by a judge is often found different from that of another judge. Discretion is an aspect that opens a wide chance for the disparity in sentencing to take place.

2. THEORETICAL FRAMEWORK

2.1. Philosophy of Law

According to Jan Hendrik Rapar, philosophy of law is a branch of philosophy that analyses legal issues through the following questions: what is the principle of law? what and how is the structure of characteristics of law? what is law for? What is the objective of law?

what is justice? And why do humans have to comply with law?[13] All those questions can be answered in reference to the following three branches of philosophy:[14]

1) Ontology

Etymologically, the word ontology is derived from Greek *onto* that means the truth of the existence of an object (fact); and *logos* meaning a science that studies a theory.[15] In a simple definition, ontology can also be understood as a branch of philosophy that studies the existence of something[16] based on the scope of an object, law, and related system.[17]

2) Epistemology

Etymologically, epistemology is derived from Latin *episte* that means knowledge; and logos meaning theory. In other words, epistemology is defined as a theory of knowledge; it explains how knowledge is obtained, what is the basis, extent, and object of knowledge, and whether knowledge is truth.[18] In brief, the branch of epistemology is a branch of philosophy that studies the origin, requirement, structure, method, and validity of knowledge.[19]

3) Axiology

Etymologically, axiology is derived from Greek *axios* meaning merit or value; and *logos* meaning knowledge. In other words, axiology is defined as a branch of philosophy that studies merit. In a more detailed explanation,[20] axiology is a science that studies the value contained in knowledge regarding its principles, criteria, and metaphysics.[21]

2.2. Theory of Justice

Aristotle defined the concept of justice into two types: corrective and distributive. Corrective justice is also called rectificatory justice existing in human relationship accepted among humans involved in an interaction. Distributive justice is concerning with allocation of appreciation.[22] The concept of justice also comes from Aquinas who classifies justice into general and specific scope. General justice is intended to provide well for society in terms of the relationship between the state and its citizens, or it is commonly called legal justice. Legal justice creates common good by making regulations that govern human's behaviour to be wise and compliant with the law, which is expected to lead to creating a peaceful and secured feeling in every member of society.[23] In brief, general justice can be understood as a justice that is more related to set of rules regulated by law that is intended to create good among members of society.[24]

2.3. Theory of Criminal Policy

The policy is specifically defined to resolve crime as one of the social issues. Criminal policy or commonly known as political criminalisation, which is principally a unity aimed to provide protection for the members of the public and to bring social welfare. Therefore, the primary objective of criminal policy is to protect the members of public for the happiness of the citizens, a wholesome and cultural living, social welfare, and equality.[25]

2.4. Theory of Criminal Legal Politics

The term criminal policy is also called as criminal legal politics. Several sources also use the term penal policy, criminal law policy or *strafrect politiek*. To define the term of the criminal policy or criminal legal politics, it needs to be seen from the perspective of legal politics or criminal politics. Criminalisation is a central issue in criminal policy with the penal approach. Criminal policy with penal approach involves two questions: (a) what offense should be seen as a crime; and what sanction should be imposed on the offender.[26]

2.5. Criminal Offense and Sentence

Understanding the definition of criminal offenses should initially take the understanding of the term 'criminal' as an adjective to gain a whole and appropriate perspective regarding criminal offenses. Generally, the main reference to understanding the definition of 'criminal' is the word *straf* derived from Dutch that is defined as "suffering or sorrow intentionally imposed on someone committing a crime". *Straf* can also be defined as a punishment, but since the term, 'punishment' carries broader meaning suitable for almost several contexts such as civil law, disciplinary law, administrative law, and criminal law itself, the term 'criminal' is used in the context of criminal law.[27]

3. RESULTS AND DISCUSSION

3.1. Definition of Disparity in Criminal Sentences over Judgement at Court of Cassation

3.1.1. Meaning based on Philosophy of Ontology

The philosophy of the system used in sentencing as the philosophical fundamental is to formulate the size and the principle of justice in case of criminal violation. In this context, criminal sentencing is closely related to the enforcement of criminal law. As a system, analysis of sentencing can be seen from two different perspectives such as functional and substantive.[28]

In terms of functional perspective, criminal sentencing system can be defined as a whole system (legislation) to function/conduct operation/ concretise criminal law and the whole system (legislation) that regulates how criminal law is enforced and operates in a concrete way.[29]

In terms of normative-substantive perspective (only restricted to the norms of substantive criminal law), criminal sentencing can also be defined as a whole system of regulations/norms of procedural criminal law for criminal sentencing; or a whole system of regulations/norms of procedural criminal law to sentence and to run criminal execution. Therefore, all statutory rules in Criminal Code or special law beyond the Criminal Code is principally a set of the system used to deliver criminal sentence consisting of general rules and special rules.[30]

Seen from all the three fundamental issues in criminal law such as crime, criminal offense, and criminal liability, the legal content of criminal law in Criminal Code that needs to be given attention includes[31];

1. Criminal Sentencing

Criminal Code does not mention the objective and guideline of criminal sentencing. Therefore, sentencing is often based on the interpretation and perspective of law enforcers and judges that have different views. The criminal sentencing in the Criminal Code is also considered rigid, meaning it does not give any room for a criminal modification that is based on any change or improvement of the offender. The system of criminal sentencing based on Criminal Code clearly does not give independence for judges to decide which appropriate punishment is to be imposed on criminal offenders. Sentencing can be in the form of the death sentence, fine, imprisonment, or sentence for juveniles.

In terms of criminal sentencing, Criminal Code does not govern special minimum criminal sentencing. However, in terms of providing special minimum criminal sentencing in special criminal law as in-law beyond Criminal Code, the amendment to Criminal Code must take place; specifically, the related articles in Criminal Code need to be amended before the law beyond Criminal Code comes into effect. This is aimed to embed this special rule to Criminal Code that serves as a general provision of criminal law in Indonesia.

2. Criminal Offense

To decide if an offense deserves a sentence, the Criminal Code is positive, meaning that it has to be attached to the law (the principle of procedural legality). Therefore, the Criminal Code does not give any room for law unwritten in the legislation living in society. In other words, the Criminal Code is out-dated and irrelevant to the values existing in the society.

3. Criminal Liability

An issue arising in the aspect of criminal liability may involve culpability that is not clearly governed in Criminal Code but only mentioned in *Memorie van Teolichting* (MvT) as an explanatory part in *Wetboek van Strafrecht* (WvS). The principle of culpability serves as a counterbalance to legality principle enacted in Article 1 paragraph (1) that means that a person can be sentenced because he/she has objectively committed a crime (which meets legality principle) and subjectively carried elements of guilt (which meets the principle of culpability). Criminal Code also overlooks a corporate as a legal subject and the liability of a corporate. This absence of rule has led to different interpretations over who is liable for the violation of law involving corporate.

3.1.2. Meaning based on Philosophy of Epistemology

According to the theory of consequentialism, "criminal sentencing has deemed an act affecting a criminal offender. It can be justified morally that it is not imposed because someone is proven guilty, but the sentencing carries a positive consequence for the convict, victim, and the members of public". Based on the absolute theory, sanction is an absolute cause that must be present as a form of retaliation for an offender, but based on relative theory, sanction is emphasised on its objective, while Muladi, based on integrative theory, implies that "criminal offenses disrupt the balance and harmony in the society. This disruption leads to social disorder in the community. Sentencing is aimed to fix the disorder caused by criminal offenses".[32]

Criminal sentencing can be seen as a set of process and policies whose concretisation is intended to involve the following stages: legislative, applicative (judicative) and administrative (execution) policy. Because criminal sentencing is intended to enforce criminal law, law enforcement should not solely be the responsibility of law enforcers or judicative or executive body, but it is also the responsibility of lawmakers or legislative body.[33]

In a comparison of the three stages, the policy made by lawmakers (formulating policy) is the most strategic stage since its policy lines of criminal system and criminal sentencing formulated by legislative body serve as the fundamental of legality for criminal sentence enforcers (judicative body) and criminal sentence executor (executive/administrative body). When there is a flaw in the formulation of the system in criminal sentencing at the state of formulating policy, it will impact application and execution). In other words, the "*in abstracto*" flaw in criminal law enforcement will affect the weakness of "*in concreto*" law enforcement. Therefore, it is obvious how urgent the legislative policy is in terms of criminal law in a whole system of criminal law enforcement.[34]

To date, Indonesia does not have a national system of criminal sentencing that involves the "pattern and the guidelines of criminal sentencing", such as guidelines to make legislations that mention criminal sanction. The pattern of criminal sentencing is also called legislative or formulating guideline, while the guideline of sentencing is for judges (judicative guideline/applicative guideline). Seen from the function of its presence, criminal sentencing seems to exist earlier before the legislation was made, or even before the national Criminal Code.

3.1.3. Meaning based on Philosophy of Axiology

In terms of the system of criminal sentencing, generally, criminal sentencing embarks on the behavior of the offender in the past for his/her interest in the future. When it embarks on the past, the criminal sentence seems to be addressed for retaliation. However, when the sentence is intended for the interest in the future, the criminal sentence should be intended to correct one's behavior.[35]

In terms of law enforcement in Indonesia, responsive law indicates that law enforcement must be performed with entire enthusiasm. Executing law is more than just executing legislation, but it should involve social awareness. Law is not restricted to rules (logic & rules), but there should be other logics to consider. Merely implementing jurisprudence is not enough, but law enforcement must be backed up with social knowledge.[36]

In a nutshell, there are two factors serving as the fundamentals of consideration in criminal sentencing such as juridical and non-juridical factor, in which the former has been governed in legislation concerning repeat offenders (Article 486 of Criminal Code), Attempt (Article 53 of Criminal Code), the latter is obtained from facts relating to offenses embedded to the condition of the offender, victim, and members of public.[37]

3.2. Ratio Decidendi of Sentencing in Corruption Cases at Cassation Level

Principally, the discretion of judges does not come without a cause, but it is due to the principle of independence of the judiciary in deciding a case. This is based on the principle of judicial power that considers (1) fast, affordable, and simple procedures; the principle of *ius curia novit*; and (3) the principle of "*Res Judicata Pro Veritate Habetur*". The definition of independence of the judiciary in deciding a case and each principle mentioned above are more clearly provided as the following:

1. Principle of fast, affordable, and simple procedures

Principles within the scope of judicial power that serves as the basis of discretion of a judge in delivering a decision are explained in Criminal Code Procedure that takes fast, affordable, and simple procedures into account. These principles are in line with the principle of the general court that is fundamental to the implementation and the services of judicial administration that leads to effective and efficient principle.[38] Fast, affordable, and simple procedures indicate that judicial process should be cost-efficient and easily accessible.(a) the principle of fast procedure is emphasised on fast process, result, and evaluation regarding the performance and level of productivity in judicial body; (b) simple indicates that investigation and dispute resolution must be performed efficiently and effectively (explanation of Article 2 paragraph (4) of Law Number 48 of 2009). Simple can also be understood as easily accessible, straightforward, clear and not interpretable, easily understood, easily performed, easily implemented, systematic, and concrete process either from the perspective of justice seekers or of law enforcers with varied level of qualifications in terms of education level, socio-economic condition, culture and so forth.[39] Low cost or affordability carries the meaning that the people's intention to come to court is not only restricted to seeking justice, but there is an expectation that the judicial process should be affordable. Justice should not be merely related to material matter and justice should be free from other interference that could harm the justice per se.[40]

2. Principle of *ius curia novit*

This principle can also serve as the basis of the judgement passed by a judge, where the judge is considered to know the law better concerning a case that is being investigated). This principle implies that refusing to investigate a case with the cause of unclear rules of law is not allowed. Therefore, a judge is allowed to decide a case based on his/her own consideration and faith.

3. *Res Judicata Pro Varitate Habetur* (Judge's decision is considered right)

This principle can be used when normative contradiction arises between Law and Judge's judgement. Black's Law Dictionary defines this term as an issue that has been definitively settled by judicial decision. Mertokusumo defines res *judicata pro veritate habetur* by implying what is decided by the judge must be acceptable. When false testimony is given and the judge delivered judicial decision based on the testimony, the decision should still be taken acceptable until it is reversed in appellate court or cassation.[41]

Juridically, according to Mukthie Fadjar, every decision should be taken as acceptable before it is reversed in a higher court (the principle of *res judicata pro veritate habetur*). This provision is aimed to guarantee the presence of legal certainty, not to imply that a dispute is fully settled. It should be understood that the decision passed by the judge is to indicate that a dispute between the parties concerned is temporarily settled.[42]

3.3. Regulation of Sentencing to minimise potential of disparity at cassation level

Prior to the formulation of rules of law to minimise disparity in criminal sentencing in corruption cases, "pattern of criminal sentencing" and guidelines of criminal sentencing" at cassation level must be differentiated. The former is defined as a reference or a guideline to make legislation that contains the system regulating criminal sentence (legislative guideline). The guidelines of criminal sentencing are more for the judge to deliver judicial decision or to implement criminal sentence (judicative guideline).[43]

In addition, to resolve the disparity in criminal sentencing, a special minimum system that involves special offenses beyond Criminal Code needs to be considered. This is not only applicable for *lex specialis* (special law), but also for *lex generalis* (Criminal Code). Equal thoughts are required among judges investigating a case since disparity in criminal sentencing is part of law enforcement. Law enforcement ranges from investigation, enquiry, prosecution, hearing at court, and court decision or execution. Judicial body other than judges also needs to be established to determine the severity of the criminal punishment or to take consideration to the sentence in a criminal case.[44]

The judicial decision that leads to disparity also considers the criminal justice system ranging from the investigation, enquiry by police members, prosecution by general prosecutors, justice by judges and execution body by executors. This system should be integrated and should not stand independently. It is common to find that investigation and judgement in a case must be conducted independently. It is almost impossible to bring justice for the people when judicial decision passed by judges is strongly influenced and receives tension from parties outside judicative authority. Inappropriate decision diverted from the principle of justice will erode the trust of the people in the judicial system.[45]

Principally, the independence held by a judge is aimed to give more space for a judge to give judgement without any conflict of interest coming from economic, political, social, and cultural dimension. It is expected that judges pass judgement with objectivity and that judges seriously consider transparency. With this, it is expected that every party involved in the judicial process is contented with the judicial decision at court, and justice is also expected for other parties and people in general. It is inevitable that independence of the judiciary is not the only provision that can guarantee the objectivity in the judicial process. Other principles of procedural law can also significantly contribute to creating objectivity such as the principle of "*Audi et Alteram Partem*". In terms of refusal right, the decision has to come with reasons and hearing process must be held open for public or it probably involves investigation into a case carried out at two different levels of court.

It can be concluded that there has been a shift in the structure from executive scope into the judicative scope. This shift is intended to encourage independent judicial power separated

from government authorities, which is intended to separate judicative and executive bodies. In the future, judicative power is no longer under the influence and intervention of executive power or legislative power (subordinate). In other words, judicial power in Indonesia will be independent.

4. CONCLUSION

Based on results and discussion elaborated earlier, it can be concluded that:

1. Ontologically, criminal sentencing over corruption cases at cassation level can be reviewed based on two perspectives: functional as a whole system (legislation) for criminal functionality/operation/concretisation and the whole system (legislation). Meanwhile, based on the three sides of issues concerning criminal legal basis, criminal sentencing can be seen based on three perspectives involving crime or criminal sentencing, criminal offense and criminal liability.
2. Epistemologically, the system of criminal sentencing for corruption cases at the cassation level refers to two essential aspects to enforce criminal law: substantive justice and procedural justice. The legislation is also related to stages required in formulating (legislative), applicative, and administrative policy.
3. In axiological perspective, the system of criminal sentencing over corruption cases at cassation level can principally be seen in two factors serving as the basis of consideration and the main value in criminal sentencing such as juridical and non-juridical factor.
4. In terms of *Ratio decidendi*, criminal sentencing over corruption cases at cassation is reflected from the principle of judicial independence in delivering a decision that is based on the principles of judicial power. The principle of the independence of the judiciary in passing a judgement over a case is based on the principles of judicial power such as (1) fast, affordable, and simple procedures; (2) the principle of *ius curia novit*; and (3) the principle of "*Res Judicata Pro Veritate Habetur*". In terms of implementation of the cases with a disparity in a judicial decision, the characters of the judicial decision include (1) judges' basic consideration, (2) elements of judges' consideration (*Ratio Decidendi*) and (3) independence in deciding punishment.

To minimise the potential of disparity in criminal sentencing at cassation level, the special minimum system is required, and this system is concerning with special offenses beyond Criminal Code. This rule is not only for *lex specialis* (special law), but it should also be applicable for *lex generalis* (Criminal Code). Moreover, equal understanding about mission and vision among judges in investigating a case is required since the disparity is part of law enforcement that begins with investigation, enquiry, prosecution, hearing at court, and judgement or execution. Judicial body other than judges that sssare authorised to decide the severity of criminal punishment or the consideration regarding the criminal sentencing needs to be established.

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