

The Existence of Sentencing Guidelines for Bribery Crimes after the Criminal Code in Safeguarding Judicial Independence

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Abstract

This study aims to analyze the existence of regulations concerning sentencing guidelines for bribery cases in Indonesia and their influence on judicial decisions concerning the principle of judicial independence. The research employs a normative legal research method with statutory, conceptual, cases, and comparative approaches. The research findings indicate that the regulation of sentencing guidelines in Indonesia is still not specifically mandated. While the Supreme Court has issued a Supreme Court Regulation on Sentencing Guidelines for State Financial Corruption, which is limited to state financial corruption cases, no specific rules yet exist for bribery cases. Following the enactment of the National Criminal Code which takes effect in 2026, Indonesia will possess sentencing guidelines that apply to all criminal offenses, including bribery cases. This regulation appears to be general in nature in order to uphold the independence of judges when adjudicating cases. Judges are granted the authority to determine the severity or leniency of the sentence for the perpetrator by considering the standards set forth in Article 54 of the National Criminal Code, which is expected to provide rational justification in sentencing, thus achieving legal certainty.

1. Introduction

The principle of the judicial freedom is regulated in the 1945 Constitution of the Republic of Indonesia of 1945 (hereafter Indonesian Constitution) through Article 24 paragraph (1). This provision expressly states that the judiciary must be an independent power in order to administer justice and uphold law and justice. Historically, the formulation of the article was intended by the framers of the constitution to ensure the full independence of the judiciary from all forms of intervention from the executive and legislative institutions. Therefore, the principles contained in this formulation emphasize independence, freedom, or independence for

the entire judicial system¹ including for judges in carrying out their duties to adjudicate cases.

The principle of judicial independence or freedom of judges has also been explicitly regulated in various regulations in Indonesia. This provision is contained in Article 32 paragraph (5) of Law Number 14 of 1985 (as last amended through Law No. 3 of 2009 concerning the Supreme Court), as well as in Article 39 paragraph (4) of Law Number 48 of 2009 concerning Judicial Power (Judicial Power Law). In addition, the position of judges as part of the judicial system is emphasized to operate within the scope of independence, as affirmed in Article 3 paragraph (1) of the Judicial Power Law.

However, the judge's *ex officio* authority in deciding cases should not be interpreted as unlimited or free will. This freedom should be interpreted and applied in harmony with the philosophical and legal framework of the state, namely *Pancasila*, the 1945 Constitution of the Republic of Indonesia, and the State Policy Guidelines. This implementation is expected to support the development of the nation in various sectors. Furthermore, in every decision-making, judges are always obliged to account for it to God Almighty.²

In principle, the criminalization of the perpetrator of the crime of bribery requires the fulfillment of two essential elements: the formulation regulated in the Eradication of Criminal Act of Corruption (Law No. 31 of 1999 jo. Law No. 20 of 2001) and the existence of guilt attached to the perpetrator. The fulfillment of the elements of the offence is proven is realized through the evidentiary process at trial. This process must be based on at least two valid evidence and strengthened by the judge's belief that the criminal act has really been committed by the defendant. This evidentiary approach is known as the Theory of Proof According to the Law Negatively (*Negatief Wettelijke Bewijstheorie*).³

The regulation of the bribery crime is specifically in Article 5, Article 6, Article 11, Article 12 letters a, b, c, and d and Article 13 of Law No. 31 of 1999 jo. Law No. 20 of 2001, which contains the range of minimum and maximum criminal threats called the determinate sentence system. Based on this provision, judges in deciding bribery cases have been limited to the criminal range set by the law.

The formulation of the minimum and maximum criminal ranges has a crucial dual function in the penal system. First, the determination of this range aims to be a proactive mechanism to minimize the emergence of the issue of sentencing disparity. By setting clear boundaries, the range provides a basic standard that limits the discretion of judges, thereby encouraging consistency of decisions. Second, the criminal

¹ Firman Floranta Adonara, "The Principle of Judges' Freedom in Deciding Cases as a Constitutional Mandate," *Jurnal Konstitusi* 12, no. 2 (2015): 217–36.

² MaPPI FH UI, *Buku Saku Peraturan Mahkamah Agung Nomor 1 Tahun 2020 Tentang Pedoman Pemidanaan Pasal 2 Dan Pasal 3 Undang-Undang Pemberantasan Tindak Pidana Korupsi*, Jakarta, Mahkamah Agung Republik Indonesia Bersama Masyarakat Pemantau Peradilan Indonesia, Fakultas Hu (MaPPI FH UI, 2021), 26.

³ Kana Martin (2021) "Analisis Yuridis Pembuktian Dalam Tindak Pidana Yang Dapat Dikenakan Sanksi Pemutusan Hubungan Kerja," *Dharmasisya*: Vol. 1 , Article 20. <https://scholarhub.ui.ac.id/dharmasisya/vol1/iss2/20>.

range also serves to allow the imposition of criminal sanctions (aggravated sentencing). This is realized by granting the court the authority to impose sentences at the maximum range for criminal acts that are considered very dangerous or cause significant losses to the public interest. Essentially, this sentencing range framework seeks to balance the need for procedural consistency with the ability to apply strict proportionality based on the degree of harm and impact of crime.

Practically, the determination of the minimum and maximum penalty ranges in Indonesia Law is considered to have not reached optimal effectiveness, especially seen in the case of bribery. One significant example of criminal disparities can be observed in the bribery case related to the election of the Senior Deputy Governor of Bank Indonesia, which involved at least 29 members of the House of Representatives of the Republic of Indonesia. Although the role of the bribe recipient in the case is relatively identical—namely receiving rewards (money or promises) as an effort to win Miranda Gultom as Senior Deputy Governor of Bank Indonesia—In fact, the prison sentences handed down to convicts show non-uniform variations.⁴ This condition is considered contrary to the legal principle of *Similia Similibus Solvuntur* (similar cases must be resolved with a similar decision). This principle obliges judges to follow judicial precedents established in previous decisions when dealing with cases that share similar or identical characteristics.

In addition, the author traced and analyzed criminal verdicts handed down by the Palangkaraya District Court from 2019 to 2023, and found that there is an issue of disparity in criminal verdicts for bribery cases (limited and only found in the use of Article 11 of Law No. 31 of 1999 jo. Law No. 20 of 2001) as in the following table:

Table 1. Criminal Verdicts in Article 11 Bribery Cases at the Palangka Raya District Court

No	Case Number	Defendant's Name and Occupation	Article applied/ decided	Prison Sentences and Fines Imposed	Information
1	44/Pid.Sus-TPK/2021/PN Plk	YESTISSIA alias YEYES binti GONEDY Civil servants at the Regional Financial and Asset Management Agency (BPKAD) of Kapuas Regency	Article 11	Imprisonment of 1 (one) year and a fine of 50,000,000.00	Received money of Rp50,000.00 to Rp350,000.00 per village to 70% of Village Heads as many as 214 villages
2	14/Pid.Sus-TPK/2019/	Ir. IKA REZEKI HAWINI anak	Article 11	Imprisonment 1 (one) year 4	Received money of IDR

⁴ Yohana Maria Theresia, "Disparitas Hukuman Perkara Tindak Pidana Korupsi dan Pedoman Pemidanaan Tindak Pidana Korupsi Oleh Mahkamah Agung,," *Journal of Syntax Literate* 9, no. 2 (2024): 719-27, <https://doi.org/http://dx.doi.org/10.36418/syntax-literate.v9i2>.

	PN Plk	dari PERLIN		(four) months	13,500,000.00
		Civil servants		and a fine of IDR 50,000,000.00	
3	8/Pid.Sus- TPK/2019/ PN Plk	DOMINGGUS AMPUNG DWIJAYANTO	Article 11	imprisonment 1 (one) year and a fine of Rp50,000,000.00	Received money of IDR 5,600,000.00
		Civil servants		0	
4	4/Pid.Sus- TPK/2019/ PN Plk	STEPANUS alias BAPAK DAGAN alias LOBY bin DAHEN SAHULUS	Article 11	imprisonment of 2 (two) years and a fine of IDR 50,000,000.00	Received money of IDR 15,000,000.00
		Civil servants			

Source: The Supreme Court's decision directory and processed on December 14, 2024

Four cases (cases number 1 to 4) have been decided based on Article 11 which stipulates "criminal sanctions of imprisonment for a minimum of one (1) year and a maximum of five (5) years, accompanied by a minimum fine of Rp50,000,000.00 (fifty million rupiah) and a maximum of Rp250,000,000.00 (two hundred and fifty million rupiah)." The formulation of Article 11 includes two main elements that must be met:

- a. "Special Legal Subject: The perpetrator must be a civil servant or state administrator;
- b. Elements of Acts and Knowledge: The perpetrator receives a gift or promise even though it is known or reasonably suspected that the gift or promise was given: Because of the power or authority related to his position; or Which in the mind of the giver of the gift or promise is related to his position."

In the context of this study, the element of receiving a "gift or promise" is narrowly interpreted as receiving a sum of money. This article essentially regulates the form of gratuity that is considered bribery because it is related to the authority of the position.

Furthermore, if it is related to case number 1 to 4, where the money obtained by the Defendant in each case is different, however the Defendant in case number 1 gets the greatest profit, but the penalty imposed is relatively small and only a minimum prison sentence of 1 (one) prison. While in cases number 2, 3, and 4, the Defendant got a smaller profit but the prison sentence imposed was greater than the sentence for the Defendant in case number 1. Based on this, it is necessary to conduct research to see the justification of judges in criminal prosecution, because if the justification does not provide rational consideration, it can cause criminal disparities that create legal uncertainty.

Criminal disparity is defined as the phenomenon of varying sentences imposed by courts on cases that fundamentally have similar or identical characteristics. Etymologically, the term disparity is a negation of the concept of parity, which means

equality of number or value. In the context of the penal system, the principle of parity refers to the equality of punishment that must be applied to similar crimes committed under similar circumstances and conditions. Therefore, the disparity in punishment shows a failure to realize the ideal equality of punishment.⁵

Harkristuti Harkrisnowo argues that criminal disparity is interpreted as a condition that reflects differences in the imposition of criminal sanctions on a series of cases that have similar characteristics or seriousness. She emphasized that the difference in punishment arose without being supported by a clear legal reason or justification.⁶ Harkristuti Harkrisnowo classifies sentencing disparity into four main categories that highlight the various dimensions of inconsistency in criminal sentencing:⁷

- a. *Intra-Crime Disparity*: Differences in sentences imposed for the same offense. This happens when the perpetrators of similar crimes receive different sanctions;
- b. *Equivalence Disparity*: Differences in sanctions imposed on criminal acts that, although of different types, have a *comparable or interchangeable* level of seriousness;
- c. *Intra-Panel Disparity*: Variations in sentences handed down by *the same panel of judges* in handling similar cases over time;
- d. *Inter-Panel Disparity*: Differences in sanctions imposed by different panels of judges for cases involving the same criminal act. This category most often refers to inter-court or inter-jurisdictional inconsistencies.

Sentencing disparity is often associated with judicial independence, where judges have discretionary authority to assess morality (good and evil) and determine the appropriate severity of criminal sanctions for defendants. However, in the political framework of criminal law, there is an urgency to develop sentencing guidelines as a mechanism to reduce the subjectivity of judges. This need arises from the potential for abuse of broad judicial discretion. Therefore, sentencing guidelines are seen as the optimal solution to limit the freedom of judges in order to achieve more consistent and objective verdicts, while minimizing irrational disparities.⁸

The concept of criminal guidelines is not a new instrument in judicial practice in Indonesia. The Supreme Court has taken the initiative by issuing Supreme Court Regulation Number 1 of 2020 concerning Criminal Guidelines Article 2 and Article 3 of the Eradication of Criminal Act of Corruption. The regulation, known as the Supreme Court Regulation of the State Financial Corruption Crime Guidelines, serves as a preventive measure to mitigate the issue of criminal disparity in corruption cases that harm the state's finances. In substance, the Supreme Court Regulation requires judges to consider three main aspects before imposing criminal sanctions, namely: the level of state losses, the level of culpability of the defendant, and the characteristics of his

⁵ Indonesia Corruption Watch, *Studi Atas Putusan Pemidanaan Perkara Tindak Pidana Korupsi*, Lembaga Pelaksana Indonesia Corruption Watch, 2014, h. 9.

⁶ MaPPI FH UI, *Op.Cit.* h. 13.

⁷ Lilik Mulyadi et.al, *Urgensi Pedoman Pemidanaan Dalam Rangka Mewujudkan Keadilan Dan Kepastian Hukum* (Jakarta: Kencana, 2019), 23.

⁸ Zuhrah, Adi Sulistiyono, Ridwan, Syamsuddin, & Iksan. "Judge Independence In Various Disparities In Corruption Case Decisions At The Supreme Court," *Fundamental: Jurnal Ilmiah Hukum* 13, no. 1 (2024): 47-70.

actions.⁹ Based on a source's statement, this Supreme Court Regulation aims to improve the quality of criminal justice by strengthening aspects of legal certainty and justice.¹⁰

There are several previous studies that can be used as a comparison. The research by Marfuatul Latifah and Prianter Jaya Hairi, entitled "The Regulation of the New Criminal Code Guidelines and Its Implications on Judges' Decisions" this study examines the concept of criminal guidelines regulated in the new Criminal Code and discusses the implications of the regulation of these criminal guidelines for future criminal decisions.¹¹ Research by Prija Djatmika et al, entitled "Legal Policy of Disparity in Sentencing as a Ground for Judicial Review in Indonesia Corruption Cases" This research aims to establish an ideal concept for using sentencing disparity as a valid ground for judicial review in resolving corruption cases at the Supreme Court.¹² Furthermore, the research by M. Ilham Wira Pratama and Donis Daviska entitled "The Application of Criminal Guidelines for Judges Before the Promulgation of the New Criminal Code" discusses the application of criminal guidelines by judges before the enactment of the New Criminal Code.¹³ This research is different from previous studies and can be said to have novelty which is in this study discusses the existence of the regulation of guidelines for the criminalization of bribery cases in Indonesia and the implications of the existence of guidelines for the criminalization of perpetrators of bribery crimes in maintaining the independence of judges.

Legally, there are no guidelines for sentencing perpetrators of bribery crimes, necessitating research into Law Number 1 of 2023 concerning the Criminal Code (National Criminal Code), which came into effect on January 2, 2026. This law regulates the concept of Sentencing Guidelines and their existence in relation to the principle of judicial independence.

The purpose of this paper is to explain and analysed the existence of the regulation of guidelines for the criminalization of bribery cases in Indonesia and the implications of the guidelines for the criminalization of perpetrators of bribery crimes on the judge's decision. This research also aims to provide advice to legal experts, legal practitioners, and legislators in drafting and implementing the law itself.

⁹ Rifki Auliya, Selamat Lumban Gaol, and Nurlery Darwis, "Pandangan Mahkamah Agung Republik Indonesia Tentang Disparitas Putusan Pemidanaan Perbuatan Melanggar Hukum Yang Merugikan Keuangan Negara," *Iblam Law Review* 4, no. 1 (2024): 99-112.

¹⁰ Andi Muhammad Alief, "Reconstruction of Special Penal Guidelines for State Losses in the Indonesian Criminal Code, Integrity," *Anti-Corruption Journal* 10, no. 1 (2024): 149-60, <https://doi.org/https://doi.org/10.32697/integritas.v10i1.1069>.

¹¹ Marfuatul Latifah and Prianter Jaya Hairi, "Pengaturan Pedoman Pemidanaan KUHP Baru Dan Implikasinya Pada Putusan Hakim," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 15, no. 2 (2025).

¹² Prija Djatmika et al., "Legal Policy of Disparity in Sentencing as a Ground for Judicial Review in Indonesia Corruption Cases," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 2025, 503-520.

¹³ M Ilham Wira Pratama and Donis Daviska, "Penerapan Pedoman Pemidanaan Bagi Hakim Sebelum Diundangkannya KUHP Baru," *Jurnal Fakta Hukum* 4, no. 1 (2025): 13-20.

2. Research Methods

An article based on library research, which in Indonesia is often referred to as normative juridical research, the focus is not on the type of data or how legal materials are obtained, but rather on how the legal materials are analyzed. In other words, normative juridical research emphasizes the process of interpreting, reviewing, and understanding legal norms contained in legislation, case law, legal literature, and other legal documents.¹⁴ Terry Hutchinson states that research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development.¹⁵ This study uses normative legal research methods because the focus of the study starts from the vague of norm¹⁶ with the following approaches: statute, conceptual, and comparison approaches. The sources of law used for the study are primary and secondary legal sources. Furthermore, the problem formulation is solved by collecting several legal materials and then analysing them with descriptive, systematic techniques, and including arguments.

3. Result and Discussion

3.1. The Existence of Sentencing Guidelines for Bribery Crimes in Indonesia

Sudarto defines sentencing guidelines as an instructive framework formulated by lawmakers (legislators).¹⁷ This framework contains fundamental principles that must be used as a reference and consideration by judges in the process of imposing criminal sentences. This definition emphasizes that the penal guidelines function as a normative instrument to direct judicial discretion to be in harmony with established legal principles. The definition of the penal guidelines is different from the concept of Roeslan Saleh, although with the same goal, which is to provide an overview of the rationality of criminal imposition. Roeslan Saleh interprets the sentencing guidelines as a perspective that provides guidance for the judge to take into account all incidents, namely the severity of the crime, the manner in which the crime was committed, the personality of the perpetrator, age, level of intelligence, and the atmosphere at the time the criminal act was committed.¹⁸

In principle, Law Number 1 of 1946 concerning Regulations on Criminal Law (Criminal Code) does not explicitly regulate penal guidelines, therefore that the crimes imposed are in accordance with the judge's discretion. However, in another opinion, the regulation of sentencing guidelines already exists in the Criminal Code by considering the contribution of the perpetrator in the crime as the main perpetrator, assistance, participation, and instigator. In addition, it is also regulated by the justification that abolishes the element of unlawful acts, and the excuse of forgiveness

¹⁴ Wibisana, Andri Gunawan, "Menulis di Jurnal Hukum: Gagasan, Struktur, Dan Gaya," *Jurnal Hukum & Pembangunan*, 2019, Vol. 49: No. 2.

¹⁵ Terry Hutchinson in Aarce Tehupeiory, *Metode Penelitian Hukum*, (Jakarta: Pusat Penerbitan dan Pencetakan Buku Perguruan Tinggi Universitas Kristen Indonesia, 2021), h.42.

¹⁶ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Kencana Prenadamedia Group, 2019), 156.

¹⁷ Sudarto, *Kapita Selekta Hukum Pidana*, (Bandung:Alumni: 1996), h. 109-110.

¹⁸ Ruslan Saleh, 1978, *Stelsel Pidana Indonesia*, Jakarta, h. 5

that removes the element of the wrongdoing of the perpetrator.¹⁹ In practice, the provisions in the Criminal Code still have a very wide scope of interpretation for judges in assessing criminal acts and elements of guilt in the perpetrators until the imposition of a criminal sentence, therefore it has not become a systematic guide in the Criminal Code. The new Criminal Code has addressed the weaknesses of the previous code by explicitly setting out the objectives and guidelines for sentencing. However, in practice, these provisions still allow a broad scope for judicial interpretation, and therefore have not yet fully functioned as a systematic and measurable sentencing guide.

Law Number 8 of 1981 concerning the Criminal Procedural Code stipulates the formal requirements that must be met in a criminal decision, as specifically stipulated in Article 197 paragraph (1). In particular, letter (f) of Article 197 paragraph (1) emphasizes the fundamental obligation for judges to explicitly state in their decision:

- a. "Criminal Law Basis: Articles in laws and regulations that are the basis for criminal or legal action imposed.
- b. Legal Basis of Judgment: Articles of laws and regulations that are the legal basis of the overall decision.
- c. Determinative Factors of Punishment: Consideration of the aggravating circumstances and mitigating circumstances of the defendant."

The inclusion of these elements is essential and imperative. The juridical consequence of the absence or omission to include these considerations is that the decision can be declared null and void. This shows that the disclosure of factors that affect the severity of the sentence is a component of the validity of the verdict required by procedural law.

The obligation to consider mitigating and aggravating circumstances in the Criminal Procedural Code is actually regulated in Article 8 paragraph (2) of the Judicial Power Law which "states that in considering the severity of the crime, the judge is also obliged to pay attention to the good and evil nature of the defendant." This formulation is broader than that stipulated in the Criminal Procedural Code because the judge in imposing a sentence not only pays attention to the aggravating and mitigating circumstances which are objective elements or elements of external situations that encourage the commission of criminal acts, it's also to the good and evil nature of the defendant which is part of the subjective element with an internal dimension.²⁰

In the legal system in some jurisdictions, the factors considered to determine the severity of a crime are classified as aggravating circumstances and mitigating or extenuating circumstances. According to Hessick, an aggravating sentencing factor refers to any fact or condition that is the rational basis for imposing a heavier sanction. On the other hand, mitigating factor is defined as any fact or condition that is used as a basis to reduce or mitigate the crime imposed.²¹

¹⁹ Lilik Mulyadi et.al, *Op.Cit.*, h. 20-21.

²⁰ *Ibid.*

²¹ Carissa Byrne Hessick dalam Dwi Hananta, "Aggravating and Mitigating Circumstances Consideration on Sentencing," *J. Huk. Dan Peradil* 7, no. 1 (2018): 87.

Basically, aggravating circumstances and mitigating circumstances are characteristics, conditions, atmospheres, or factual situations that are relevant to a criminal act, however are external to the constitutive elements of the criminal act itself. These factors serve to indicate the seriousness of a crime committed or the level of dangerousness inherent in the perpetrator. Substantially, these circumstances affect the discretion of the judge in determining the severity or lightness of the criminal sanction to be imposed.²²

Furthermore, for the good and evil nature of the Defendant as mandated by the Judicial Power Law, it is often interpreted as his attitude in the trial to behave politely, admit his actions, or be convoluted in delivering evidence. There is no basic guide to interpret the nature and good referred to in the law.

The concept of penal guidelines regulated in the law mentioned above seems to be more abstract when compared to the penal guidelines issued by the Supreme Court through the Supreme Court Regulation on Sentencing Guidelines for Corruption of State Finances. This regulation is the only one sentencing guideline, although it is only limited to perpetrators of state financial corruption. This regulation separates what is meant by mitigating and aggravating circumstances with the concept of sentencing guidelines, although the two cannot be separated as an obligation of the Judge in prosecuting cases of state financial corruption.

If referring to Article 13 and Appendix IV of the Supreme Court Regulation on Sentencing Guidelines for Corruption of State Finances it is implicitly stipulated that the good and evil nature of the defendant are integral components of the consideration of mitigating and aggravating circumstances imposed by the judge. This provision directs the judge to assess the caustic factors in the criminal process.

Aggravating factors are factors that can aggravate the crime including the defendant's criminal history (recidivist), which is that he has committed a previous criminal act. In addition, the defendant's behavior during the judicial process is also a consideration, especially if they are uncooperative, trying to eliminate, hide, or damage evidence. The aggravating factors also include the use of the acquisition of crimes and the status of the defendant as a law enforcement officer or state civil servant, showing abuse of authority and public trust.

Mitigating factors are circumstances that can mitigate crimes, emphasizing rehabilitation efforts and confession of guilt. This includes having never been convicted (non-recidivist), a cooperative attitude in the judicial process, remorse and promise not to repeat the act, as well as frank testimony in court. Other factors that are also considered are the surrender or reporting of criminal acts, the condition of the defendant who has not enjoyed the proceeds of the crime, the factor of old age or illness, and the voluntary return of assets resulting from corruption before the verdict is pronounced. The defendant's poor economic or financial condition can also be a mitigating factor. In addition to the above list, Government regulations gives

²² *Ibid.*

discretion to the judge to consider other aggravating and mitigating factors of a caustic nature based on the facts revealed during the trial.

Article 5 of the Supreme Court Regulation on Sentencing Guidelines for Corruption of State Finances establishes a mandatory sequential framework that must be followed by judges in formulating criminal sanctions. These guidelines explicitly require judges to consider a series of essential factors before determining a final sentence. These stages are:

- a. "Loss Category: Determining the amount of state financial losses or the losses to the state economy
- b. Culpability: Assessing the degree of guilt and malicious intent (*mens rea*) of the perpetrator;
- c. Impact and Profit: Analysing the social impact of criminal acts as well as the financial benefits obtained by the perpetrators;
- d. Sentencing Range: Identifies the recommended sentencing range based on an assessment of the above factors.
- e. Aggravating and Mitigating Circumstances: Considering aggravating and mitigating factors relevant to the case and the perpetrator;
- f. Final Sentence Imposition: Determining the final criminal verdict and other relevant additional sanctions, in accordance with relevant legal provisions."

This framework aims to ensure consistency and rationality in corruption decisions through a structured and transparent decision-making process, thereby limiting unjustified discretion. The development of these structured indicators is intended to achieve several key objectives of sentencing. These guidelines aim to facilitate judges in adjudicating cases, prevent significant disparities in sentencing ranges, and require the presentation of rationale in determining the severity of sentences. Overall, this framework aims to achieve legal certainty, justice, and proportional benefit.

3.1.1 Absence of Sentencing Guidelines in the Netherlands

Historically, the absence of explicit sentencing guidelines in the Indonesian Criminal Code is rooted in the application of the principle of concordance and the legacy of Dutch Colonial Law. The Dutch legal system, which is the main reference, also does not recognize structured sentencing guidelines, a feature commonly found in common law jurisdictions (such as the United Kingdom and the United States). In the Dutch Criminal Code, each offense specifies a specific maximum criminal threat in the law, however does not set a minimum penalty limit for each offense. This characteristic shows similarities with the Indonesian Criminal Code, where the maximum penalty limit is set, however the minimum threat is not set specifically for each crime. However, in the realm of criminal acts outside the Criminal Code (Special Law), the penal system in Indonesia generally adopts a determinate sentence system, which broadly determines both the minimum and maximum threat for each regulated criminal act.

The problem of sentencing disparity that arises in the Netherlands due to the absence of sentencing guidelines is addressed through the initiative of the prosecution. The solution is the issuance of the Prosecutor Sentencing Guidelines prepared by the Board of Prosecutor General. In principle, this guideline is binding for the Prosecutor in

formulating the severity of criminal charges filed at trial. Although juridically this guideline does not bind the Judge in making the final decision, in judicial practice, the Guidelines for Demands have been proven to have a strong influence on the decisions handed down by the judge. This step demonstrates the legal system's efforts to achieve consistency of judgments through standardization at the prosecution level, which then de facto guides judicial discretion.

The Dutch Attorney General's Office has implemented a new framework for prosecution known as the Polaris Guidelines. The main advantage of this system lies in the specificity and clarity of the more detailed prosecution arrangements. In practice, the Public Prosecutor simply enters the chronological details of the case into this system, which will then automatically calculate the estimated range of the relevant charges. The process of calculating the charges begins with the determination of the initial criminal score (the starting point of the crime) based on the type of criminal act proven. Each offense has been assigned a base point weight; For example, bike theft has 10 points, motorcycle theft 35 points, and robbery 40 points. This initial score can then be adjusted – either added or subtracted – according to the level of culpability and seriousness of the criminal act committed by the defendant. For example, the starting point will be reduced if the act is classified as an attempted crime, while the recidivist status for the perpetrator will result in the addition of the starting point.²³

In addition to the Prosecutor Sentencing Guidelines, the Dutch legal system also recognizes Judicial Reference Points as an instrument used by judges in deciding a case. This instrument was developed by the national deliberative forum of the heads of the criminal sector, namely *LOVS (Landelijk Overleg van Voorzitters van de Strafsectoren)*. Although this instrument does not have a binding nature, it serves as a substantive reference material for the panel of judges. *LOVS* itself is an informal forum, operating independently without being under the authority of a single institution, as its mandate comes from the initiative of each court. The forum routinely responds to requests for clarification from various courts regarding the clarity of the application of a delicacy. To address these issues, the *LOVS* will set up a special team, known as the *Commission on Legal Unity (Commissie Rechtseenheid)*. This team is tasked with analysing existing judicial practices. This commission is filled by court judges who have specific expertise in related fields. If it is found that there are no clear implementation standards, the team will conduct a comparative study of the relevant decisions. After going through a careful analysis and comparison process, *LOVS* will then formulate and determine recommendations related to the standards for the implementation of the delicacy in question.²⁴ A mechanism like *LOVS* can be adaptively adopted in Indonesia as a judicial reference forum or a decision analysis commission, functioning to enhance consistency and proportionality in sentencing, without reducing judges' freedom to make decisions.

²³ Anugerah Rizki Akbari, Adery Ardhan Saputro, and Andreas Nathaniel Marbun, *Memaknai Dan Mengukur Disparitas: Studi Terhadap Praktik Pemidanaan Pada Tindak Pidana Korupsi*, (Depok: USAID, 2017), 140-141.

²⁴ *Ibid.*, h.144-145.

3.1.2 Sentencing Guidelines After the Enactment of the National Criminal Code

The 2015 Academic Paper expressly highlights the existence of a normative vacuum in Indonesian criminal law, stating that the previous Criminal Code did not explicitly formulate sentencing guidelines. This shortcoming is considered significant because, systemically the purpose of punishment has a central and fundamental position, acting as a “spirit” that gives meaning and direction to the entire criminal sentencing process. In response to these conditions, the National Criminal Code explicitly integrates the purpose and guidelines of punishment in the formulation of Articles 53 to 57. These arrangements cover the subject of individual and corporate offenders, ensuring that the modern criminal framework has a clear philosophical and procedural basis for achieving legal consistency and certainty.²⁵

Based on the explanation of Article 54 of the National Criminal Code, the main purpose of this sentencing guideline is to facilitate judges in determining the size or severity of the crime imposed. Through comprehensive consideration of the factors outlined in the guidelines, criminal verdicts are expected to be proportionate and can be accepted (understood) by the public and convicts. It should be noted that the details of the provisions in this sentencing guideline do not constitute limitations. In other words, the judge has the discretion to add other considerations beyond those already listed, the determination of which is based on the causistic nature or peculiarities of the case being handled.

Article 54 of the National Criminal Code establishes a framework of guidelines for judges in deciding criminal cases, which imperatively requires consideration of eleven key factors before passing a verdict. Consideration factors that must be analysed by judges include aspects related to the perpetrator, the crime itself, and the social impact it causes. In detail, these factors include:

- a. “Perpetrator and Psychological aspects are the form of the perpetrator's mistake, the motive and purpose of committing the crime, the inner attitude of the perpetrator, the attitude and actions of the perpetrator after committing the crime, the curriculum vitae, social justice, and economic condition of the perpetrator of the crime, and/or the influence of the crime on the future of the perpetrator;
- b. Aspects of Criminal Acts are criminal acts committed by planning or unplanned, and/or how to commit criminal acts (*modus operandi*);
- c. Social Impact Aspects are the influence of criminal acts on the victim or the victim's family, forgiveness from the victim and/or the victim's family, and/or the value of law and justice living in society.”

It is important to emphasize that these considerations are not cumulative, meaning that judges are not required to meet all eleven provisions simultaneously. On the contrary, the judge has the discretion to consider only one or several provisions in determining the amount and severity of the crime to be imposed. In line with that, Young and King gave their opinions on the four main objectives of the sentencing guidelines, namely:

²⁵ Badan Pembinaan Hukum Nasional, Hak Asasi Manusia, and Republik Indonesia, “Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana (KUHP),” *Badan Pembinaan Hukum Nasional*, 2015, h.20.

- a. "The sentencing guidelines are specifically designed to mitigate the potential for democratic deficits that may arise from the discretion of judges.
- b. The sentencing guideline system is designed to establish a consistent rational approach (consistency of approach) in imposing sanctions, which will fundamentally result in a coherent verdict.
- c. The sentencing guidelines serve to increase the transparency of the sanctions policy.
- d. The sentencing guidelines have a crucial role in considering cost-effectiveness and balancing the allocation of public resources. The purpose of this guideline is to ensure a rational balance between the costs allocated for the administration of sentences and the funding needs in other critical sectors."²⁶

Based on the analysis, in essence, the fundamental purpose of the sentencing guidelines is not to realize absolute uniformity (parity of sentencing) in the imposition of sanctions. Rather, the main goal of this guideline is to ensure the achievement of rational sentencing. This means that the guidelines serve as a framework that guides the discretion of judges so that any variation in punishment that arises is warranted disparity, has a clear justification, and is based on the consideration of objective factors relevant to the case and the perpetrator. The purpose is consistency in reasoning, not similarity in the results of the decision.²⁷

The enactment of the sentencing guidelines through the National Criminal Code, the judge in considering the imposition of the severity of the crime must consider the guidelines that have been set to provide rational justification in the penalty, therefore that legal certainty is achieved. However, it should be noted, the sentencing guidelines in the National Criminal Code are still very general, because they are intended for all criminal acts, so judges in prosecuting bribery must dig deeper into the facts comprehensively by paying attention to the fulfillment of all elements of the crime of bribery itself and the aspects of guilt in the perpetrator.

Furthermore, based on the analysis in the table of the decision table of the Criminal Decision of the Article 11 Bribery Case at the Palangkaraya District Court, it seems that there is a phenomenon that the judge does not have a uniform interpretation regarding the weight of the element of "gift or promise" as a criminal aggravating factor. In fact, the nominal amount of money that is the object of giving can be a crucial motivation for perpetrators to be willing to accept bribes. This condition certainly needs to be a special concern for judges in imposing criminal sentences. In line with that, the formulation of the crime of bribery in Article 11 of Law No. 31 of 1999 jo. Law No. 20 of 2001 has not undergone significant changes with its amendment through Article 606 paragraph 2 of the National Criminal Code.

²⁶ Warren Young and Andrea King dalam Andrew Ashworth dan Julian V. Roberts, "The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand," *Guidelines: Exploring the English Model*, Oxford University, 2016, h. 202-217.

²⁷ Heni Siswanto, *Hukum Pidana Menuju Pemikiran Positivistik Yang Berkeadilan Dan Berkebenaran* (Lampung: Pustaka Media, 2020), h. 35.

3.2. The Implications for the Existence of Sentencing Guidelines of Bribery Offenders in Safeguarding Judicial Independence

Sentencing disparity is defined by *Muladi* as the imposition of different penalties for crimes whose level of danger is proportional, without a transparent justification for criminalization. This view highlights the problem in the consistency of the application of legal sanctions.²⁸ The variations in court rulings are not always problematic. There is the concept of warranted disparity, which is considered valid as long as it is supported by a clear basis of justification. The premise is that each case has unique characteristics, so no case is completely identical. However, disparities become unwarranted if there are too significant differences in cases that have substantial similarities. Ultimately, while a variety of factors can contribute to the emergence of disparities, judge discretion remains a key determinant in criminal sentencing and, effectively, the end point for the emergence of criminal disparities.²⁹

Criminal disparities become substantially problematic when they arise without rational justification, a condition known as unwarranted disparity.³⁰ In addition, the significant differences in the range imposed for cases that have substantial similarities also pose a serious problem. This phenomenon can trigger injustice and foster public suspicion of the judicial process. A further consequence of unfounded disparities is the failure to achieve the fundamental goals of law enforcement, namely justice, certainty, and utility. Ultimately, this condition has the potential to undermine public trust in the integrity and effectiveness of the judiciary.

There are critical views that the implementation of sentencing guidelines is irrelevant when viewed from the perspective of judicial liberty. This argument is based on concerns that the guidelines effectively “lock up” judge discretion, limiting their independence in the criminal sentencing process. Although it is recognized that sentencing guidelines are developed proportionately with the aim of assisting judges in determining the appropriate duration and intensity of a crime, the implications raise a dilemma. While the goal of legal certainty can be achieved through criminal standardization, the main challenge is how the guidelines can simultaneously realize substantive justice in individual cases.³¹

The sentencing guidelines model adopted in the National Criminal Code implements a consistency of approach, similar to the Sentencing Guidelines model used in the UK. This model is designed to be not rigid or absolute binding. Rather, the guidelines explicitly maintain room for judicial independence through the provision of flexible criminal ranges. The substantive purpose of this sentencing guideline is to create consistency in criminal sanction decisions, and not absolute uniformity. This

²⁸ Muladi dalam Nimerodi Gulo, “Disparitas Dalam Penjatuhan Pidana,” *Masalah-Masalah Hukum* 47, no. 3 (2018): 215–227.

²⁹ Hamidah Abdurrachman, Rahmad Agung Nugraha, and Nayla Majestya, *Palu Hakim Versus Rasa Keadilan Sebuah Pengantar Disparitas Putusan Hakim Dalam Tindak Pidana Korupsi* (Yogyakarta: Deepublish Publisher, 2021), h. 15.

³⁰ *Ibid.*

³¹ Aman Ma’arij and Gufran Sanusi, “Pedoman Pemidanaan Hakim Perspektif Kebebasan Hakim Dalam Peradilan Pidana Terintegrasi,” *Fundamental: Jurnal Ilmiah Hukum* 13, no. 1 (2024): 222–235.

underscores efforts to balance the standardization of procedures with the discretion of individual judges.

There are arguments against the claim that the sentencing guidelines limit the independence of judges. Quoting Sudarto's opinion, asserts that the guidelines do not eliminate judicial autonomy, since they focus on objective factors relevant to perpetrators and criminal acts. By taking into account these objective factors, the criminal verdict handed down will be more proportionate and the Judge can provide a more comprehensive justification regarding the severity of sanctions imposed.³²

The main purpose of the guideline is not to achieve absolute elimination of disparities, however to ensure that the disparities that arise are rational and accountable (*warranted disparity*). This suggests that the guidelines serve as a framework for achieving reason-based consistency, rather than rigid uniformity. The rationale in question means that the judge's considerations in the decision must be accountable juridically, because it no longer contains subjective matters of the judge that are unfounded, but relevant and logical things so that they can provide legal certainty for the perpetrator and the society itself.

The concept of proportionality in sentencing must be analysed through two main dimensions. The first dimension focuses on the relationship between the punishment imposed and the level of culpability inherent in the perpetrator. In essence, the crime must be a consequence commensurate with the level of error committed by the defendant. The second dimension is comparative, measuring the equality of treatment between different cases. This principle requires that the criminal sanctions imposed on an offender must be compared with those imposed on other events that have a comparable level of offender guilt. Based on this, this proportionality concerns the balance between the crime imposed and the level of seriousness of the crime committed and also concerns the disparity of the verdict. A proportionate verdict provides justice to the perpetrator, society, and the state.

Reviewed from the purpose of sentencing, namely the theory of retribution, crime prevention, and combination, the existence of sentencing guidelines for judges' decisions is to carry out the purpose of sentencing itself. In *ius consitututum*, although the objectives of criminal punishment in Indonesia are not explicitly regulated, they play a central and fundamental role as the essence of sentencing. Article 51 of the National Criminal Code stipulates four main objectives that are multi-perspective for sentencing, including general and special prevention aspects, rehabilitation, restorative justice, and perpetrator psychology, namely:

- a. Prevention and Social Protection: sentencing aims to prevent the occurrence of criminal acts (*general deterrence*) by enforcing legal norms. This is crucial to protect and protect the community from the dangers of crime;
- b. Rehabilitation and Resocialization of Perpetrators: Aims to resocialize convicts through coaching and guidance. The purpose is that convicts can be reformed into good and useful individuals (*specific deterrence and rehabilitation*);

³² Wijayanto, I, "Disparitas Pidana Dalam Perkara Tindak Pidana Biasa Di Pengadilan Negeri Kota Semarang," *Pandecta Research Law Journal* 7, no. 2 (2012),209-214.

- c. Restorative Justice and Community Reconciliation: Sentencing is directed at resolving conflicts resulting from criminal acts. This includes restoring social balance and bringing a sense of security and peace in society (*restorative justice*);
- d. Repentance and Psychological Recovery of the Perpetrator: Aims to foster a genuine sense of remorse and release guilt in the convict. This aspect focuses on the psychological and moral dimensions of the perpetrators as part of the reform process.

Based on the formulation described, it can be seen that Indonesia tends to adopt a relative *theory* and integrative theory approaches in the criminal justice system. This theoretical view expressly advocates the articulation or unification of various criminal theories to achieve a comprehensive goal. Integrative theory combines several main functions simultaneously:

- a. Retribution and Utilitarianism: This integration includes elements of retribution—as a commensurate retribution for wrongdoing—with the principle of utilitarianism.
- b. Prevention and Rehabilitation: In a utilitarian context, criminal sanctions are directed at achieving practical goals such as general and special deterrence and rehabilitation of offenders.³³

Sentencing is seen as a plan that must achieve various goals at once, including socially benefit-oriented retribution, crime prevention, and recovery of offenders. The judge in imposing a sentence is not only for the purpose of retaliation and fostering remorse for the perpetrator, however it must be considered whether the crime provides a deterrent for the community not to commit similar acts, and resolves conflicts by providing a sense of security and peace for the community for the criminal acts committed by the perpetrators.

Between the two, the approach that is more relevant and dominant for determining matters in sentencing is prevention and rehabilitation. Retribution primarily serves to determine the basis and limits of proportional punishment, namely the offender's culpability and the gravity of the offense. Prevention and rehabilitation serve to determine the direction, objectives, and concrete form of sentencing, particularly in relation to social interests and future-oriented considerations.

In sentencing practice, Judges use retribution as a starting point to ensure justice through proportionality. However, considerations of general deterrence, special deterrence, and rehabilitation play a greater role in addressing the practical issues faced in sentencing, such as the effectiveness of punishment, social protection, and offender reform. Therefore, prevention and rehabilitation is the more compatible approach, without negating the role of retribution as the foundation of justice.

The existence of the sentencing guidelines of bribery cases here is expected to have implications for the Judge's decision in enforcing the purpose of the sentencing that reflects legal certainty and justice. Reviewed from the aspect of legal certainty is to overcome differences in interpretation of the ratio of criminal imposition. Sentencing

³³ Noveria Devy Irmawanti and Barda Nawawi Arief, "Urgensi Tujuan Dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021): 217–227.

guidelines can be an instrument to carry out law enforcement used by the Judge, regularly and consistently, to minimize the subjective circumstances of the Judge. Viewed from the aspect of justice is to provide the severity of the sentencing imposed whether it is appropriate and proportionate to the acts committed by the perpetrator, and for the community. The sentencing guidelines still provide room for the Judge to impose the severity of the crime without limiting his rational independence, which means the existence of philosophical, sociological, and juridical considerations with the aim of still providing a sense of justice itself.

4. Conclusion

In positive law (*ius constitutum*) the sentencing guidelines for perpetrators of bribery crimes have not been specifically regulated. However, judges remain bound by general considerations in issuing decisions, as mandated by Article 197 paragraph (1) letter f of the Criminal Procedure Code and Article 8 paragraph (2) of the Judicial Power Law. This obligation requires judges to explicitly consider: Aggravating circumstances and mitigating circumstances, as well as an assessment of the defendant's good and bad character. With the enactment of the Criminal Code, judges will be bound by the sentencing guidelines framework formulated in Article 54. The existence of these sentencing guidelines is not interpreted as a limitation on the independence of judges in imposing sanctions. Instead, these guidelines function as structured guidance that directs judges to consider relevant factors in order to achieve a proportional decision. These guidelines require criminal decisions to include comprehensive considerations, including philosophical, sociological, and juridical dimensions. Through this explicit rational justification, the criminal justice system is expected to simultaneously realize justice and legal certainty, both for the perpetrator, society and the state.

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