Universitas Internasional Batam
Fakultas Hukum
Jl. Gadjah Mada, Batam, 29442, Indonesia
Phone : (0778) 743 7111 Ext, 140.
Email: admin_jlpt@gmail.com

Journal of Law and Policy Transformation
Website : https://journal.uib.ac.id/index.php/jlpt | E-ISSN : 2541-3139
JLPT Vol 8, No. 2-December 2023

JUDGE INDEPENDENCE PUNISHMENT BELOW SPECIAL MINIMUM CASE OF THE CRIMINAL ACT OF CORRUPTION

Maya Shafira*, Deni Achmad, Diva Pitaloka***, Joko Jumadi****, Rahmawati Silvia Riani*****, Ninin Ernawati******
Faculty of Law, Universitas Lampung, Indonesia*
Faculty of Law, Universitas Lampung, Indonesia**
Faculty of Law, Universitas Mataram, Indonesia***
Faculty of Law, Universitas Mataram, Indonesia****
Faculty of Law, Universitas Gadjah Mada, Indonesia*****
Faculty of Law, Universitas Padjadjaran, Indonesia******

Abstract

The inclusion of a specific minimum crime in the Law on the Eradication of Criminal Acts of Corruption is intended to prevent a very striking disparity of sentencing, both for the same case in the context of deelneming, as well as for different cases but the types of offenses involved. the ratio decidendi of the judge's decision that imposes a criminal under a special minimum in corruption cases. Judges who impose criminal penalties under the special minimum criminal threat on decisions on corruption cases, the authors of the analysis assume that the degree of guilt of the accused is not directly proportional to its dangerous act and will be very disproportionate between the act and the punishment that will be given to the defendant of a criminal act of corruption, so that in the name of "Justice" the judge carries out contra legem or legal breakthroughs against the provisions of the special minimum criminal threat in the Law on the Eradication of Criminal Acts of Corruption. The independence of judges and the conviction of judges in imposing criminal penalties under a special minimum penalty in cases of criminal acts of corruption are reflected in legal reasoning in the judge's decision.

Keywords: *corruption, independence of judges, special minimum*

A. Background

Law in the context of the state is generally a basic reference and guide in state life. The law also actually provides security (order), welfare (welfare) and happiness (happiness) for the community within the scope of the rule of law.[1] Philosophically, law has goals which are divided into 3 (three) schools, namely: utilitarianism, which believes that the law must be useful (useful of law), legal positivism, which is oriented to the principle of legal certainty and legal predictability. legal predictability), and the last is the flow of natural law that is oriented to the principle of justice (substantial justice).[2]

Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is an article that regulates the independence and

* maya.shafira@fh.unila.ac.id

[1] Satjipto Rahardjo. A Rule of Law that Makes Its People Happy, (Yogyakarta: Genta Publishing, 2008), 94.

[2] Gustav Redbuch in Satjipto Rahardjo, Legal Studies, (Jakarta: CV. Rajawali, 2014), 91.

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Website : https://journal.uib.ac.id/index.php/jlpt | E-ISSN : 2541-3139
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freedom of judicial power in Indonesia, a power that is independent and free from any interests to synergize the principle of benefit, the principle of certainty and the principle of justice. Judges as executor of judicial power in Indonesia have free and independent powers. Judges only obey the constitution and the law and are not subject to orders from the judicial or other non-judicial institutions.[3]

Judges in carrying out their functions as law enforcers are not only for the purpose of legal certainty as in the decisions handed down, but fair legal certainty in those decisions.[4] Judges in giving decisions not only act as law enforcers but also as holders of applicable policies because the applicative policies come from "the formulation of the mind of the legislators as outlined in the legislation will also determine how law enforcement will be carried out".[5]

In the criminal code, the specific minimum penalty is unknown, the criminal code only recognizes the general minimum penalty, namely 1 (one) day which applies to all criminal acts, both crimes and violations.[6] The maximum general punishment is 15 (fifteen) years in prison and may not exceed 20 (twenty) years in prison, and the special maximum is in accordance with the threat of sanctions in each article.[7] Theoretically, the discussion on criminal matters includes three things, namely the type of crime (straafsoort), the duration of criminal sanctions (strafmaat), and the rules of criminal implementation (straafmodus). The specific minimum penalty is included in the category of the duration of the criminal threat, which is basically related to the minimum threat for each criminal act formulated in a certain article.

Policies in the context of eradicating criminal acts of corruption are reflected in Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001, which contains criminal provisions that are different from the previous law, namely determining the minimum criminal threat. specifically, higher fines, and the threat of the death penalty which is a criminal offense. In addition, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 also contains imprisonment for perpetrators of criminal acts of corruption who cannot pay additional penalties in the form of compensation for state losses.[8]

The inclusion of a specific minimum crime in the Law on the Eradication of Criminal Acts of Corruption is intended to prevent a very striking disparity of sentencing, both for the same case in the context of

[3]Dahlan Sinaga, Independence and Freedom of Judges to Decide Criminal Cases in a Pancasila Law State: A Perspective on the Theory of Dignified Justice, (Jakarta: Nusamedia, First Edition, 2015), 229.
[4]Amirul Faqih Amza, Judge's Freedom in Special Minimum Criminal Sanctions, (Yogyakarta: Genta Publishing, 2021), 5.
[5] *Ibid.*
[6] Mahrus Ali, Corruption Criminal Law, (Yogyakarta: UII Press, 2016), 51.
[7] *Ibid.*
[8]Law Number 39 of 1999 in conjunction with 20 of 2001 concerning Eradication of Corruption Crimes Undang-Undang Nomor 39 Tahun 1999 Juncto Undang-Undang No 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi.

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deelneming (addition), as well as for different cases but the types of offenses involved. violated by the perpetrator is the same or essentially does not differ in quality.[9] According to Molly Cheang, criminal disparity (disparity of sentencing) is the application of unequal punishments to the same offense (the same offense) or to criminal acts whose dangerous nature can be compared (offences of comparable seriousness) without a clear justification.[10]

B. Identified Problems

With the problem of legal uncertainty related to the imposition of a criminal under a special minimum in corruption, this study raises two problems, namely:

1. What is the ratio decidendi of the judge's decision that imposes a crime below the special minimum in the case of a criminal act of corruption?
2. How is the sentence imposed below the special minimum in cases of corruption in terms of the principle of independence of judges?

C. Research Methods

This type of research is a descriptive normative legal research. The data used in this research is secondary data consisting of primary, secondary, and tertiary legal materials. However, this research is also supported by primary data obtained directly from sources. Methods and tools obtained in this study using library research and interviews. The data analysis in this study used a qualitative approach to the data that had been collected and obtained through document studies and interviews. The analysis was carried out using qualitative analysis methods.

D. Research Findings and Discussion

1. Ratio Decidendi of Judges Sentencing Criminals Below the Special Minimum in Cases of Criminal Acts of Corruption

a. Decision Number 1 Pid.Sus-TPK/2019/PN Yyk on Behalf of the Defendant Supriyono

The defendant Supriyono was indicted by the Public Prosecutor with a single indictment where the Public Prosecutor was very sure that the defendant was proven guilty of committing a criminal act of corruption as regulated in Article 12 letter *juncto* Law Number. 20 of 2001 concerning Amendments to Law No. 31 of 2001. 1999 concerning the Eradication of Corruption Crimes.

In the formulation in Article 12 letter of the Law on the Eradication of Criminal Acts of Corruption, there are elements:

a) Civil servants or state administrators

[9]The Politics of Law Enforcement in Corruption Crimes, (Jakarta: Solusi Publishing), 204.
[10] *Ibid*.

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b) By abusing power to force (someone) to give something, pay, or receive payment with a discount, or to do something for yourself.
c) With the intention of unlawfully benefiting oneself or others.

The threat of imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000 (one billion rupiah).

The judge who tried the a quo case sentenced him to imprisonment for 1 (one) year and 3 (three) months and a fine of Rp. 200,000,000 (two hundred million rupiah), provided that if the defendant does not pay the fine, it must be replaced with imprisonment for 1 (one) month.

According to the panel of judges, the defendant's ratio decidendi was sentenced to a special minimum because the amount of money that caused the occurrence/arising of the corruption crime committed by the defendant in this case was Rp. 58,090,000 (fifty eight million ninety thousand rupiah), which was later confiscated to be used as evidence in this case, is very small below Rp 100,000,000 (one hundred million rupiah).

The judge who tried the case on behalf of the defendant Supriyono did not only look at the value of the loss of corruption committed by the defendant but also took into account and considered the nature, form and ways in which the crime was committed, the circumstances which included the actions before him as well as the sense of justice that was imposed on him. Living in society, in addition to these external factors, it is also necessary to pay attention to internal factors, namely in the form of the personality of the perpetrator by looking at his age, education level, gender, environment, background of life, bad talent or not and so on so that in imposing a sentence on the assembly the judge pays attention to and considers the sense of justice he believes in, not only considering juridical factors but also psychological, sociological and philosophical factors.

According to the author, the judge who tried Supriyono's case had thorough considerations not only centered on the elements fulfilled in Article 12 letter e of the PTPK Law but also looked at the condition of the defendant when he committed a criminal act of corruption. This is as regulated in the Draft Law in Article 54 concerning Guidelines for Sentencing.

In the New Indonesian Criminal Code (*ius constituendum*) which regulates the Guidelines for Criminalization, Article 54 states.[11] (1) In sentencing, it is obligatory to consider:

a) the form of guilt of the perpetrator of the crime;
b) the motive and purpose of committing the crime;
c) the inner attitude of the perpetrator of the crime;
d) the crime was committed with a planned or unplanned action;
e) how to commit a crime;
f) the attitude and actions of the perpetrator after committing the crime;
g) curriculum vitae, social condition, and economic condition of the perpetrator of the crime;
h) criminal influence on the future of the perpetrators of the crime;
i) the influence of the crime on the victim or the victim's family;
j) forgiveness from the victim and/or his family; and/or
k) values of law and justice that live in society.

In addition, the judge does not only include juridical considerations as contained in Article 5 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power, which reads: "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society.[12] "The sociological reason in the consideration states*: "In addition to imposing the sentence, the Panel of Judges will pay attention to and consider the nature, form and ways in which the crime is committed, the circumstances which include the actions faced against him and the sense of justice that lives in society"*. And the philosophical reason "*In this case the defendant has been proven to have committed a criminal act of corruption as threatened with Article 12 letter e of Law no. 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, which carries a minimum penalty of 4 (four) years in prison and a minimum fine of Rp. 200,000,000 (two hundred million rupiah, where) according to the panel of judges, if this minimal threat is applied to the defendant in full as the Public Prosecutor's Claims against the defendant, it would not touch the sense of injustice to society in general and to the defendant in particular".*

[11]Law Number 1 of 2023 concerning the Criminal Code. Undang-Undang No 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana.
[12] Article 5 Paragraph (1) Of Law Number 48 of 2009 concerning Judicial Power Pasal 5 Ayat (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman.

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The judge's juridical considerations are related to the principle of legality as regulated in Article 1 paragraph (1) of the criminal code, namely that no act may be punished, but on the criminal provisions in the existing law before the act. The meaning of Article 1 Paragraph (1) of the criminal code in relation to the reluctance of judges to be free is that an independent and objective judge must ask whether the act that has been charged against the defendant has a law that regulates it or not.[13]

The judge's philosophical considerations consider whether the decision to be handed down to the defendant has fulfilled the sense of justice of various parties, especially the victim's sense of justice, the defendant's own sense of justice and the community's sense of justice. Meanwhile, in sociological considerations, the judge considers whether the sentence imposed can achieve the legal objectives in general, namely to create order in society or create public order.[14]

In the consideration of the panel of judges also considering the application of Supreme Court Circular Number 7 of 2012 concerning the Legal Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber as a Guide to the Implementation of Duties for the Court is the formulation of the problem of the minimum provisions in the imposition of the main criminal (imprisonment) in the application of article 2 and article 3 of the Corruption Eridication Law. The Supreme Court Circular States: “If the element of enriching oneself, other people, or corporations in Article 2 is not proven, then Article 3 is imposed, with a minimum threshold of Rp. 100,000,000 (one hundred million rupiah). It is unfair to impose a sentence on the defendant who only harms the state's finances under Rp. 100,000,000 subject to a minimum sanction of Article 2, namely a 4 year sentence and a fine of Rp. 200,000,000”.[15]

In the consideration of the Panel of Judges, although SEMA No. 7 of 2012 Legal Formulation of the Criminal Section Point C regarding special crimes for Articles 2 and 3 of the PTPK Law, it is not article 12 letter e, but according to the Panel of Judges the formulation in SEMA No. 7 of 2012, it is appropriate to be taken into consideration for decisions in certain cases that are casuistic in nature, such as this case, where in the SEMA Formula No. 7 of 2012 above which is the basis of reference is the value of state

[13]Dahlan Sinaga, Independence and Freedom of Judges to Decide Criminal Cases in a Pancasila Law State (A Perspective on the Theory of Dignified Justice), (Bandung: Nusa Media 2020,), 231.
[14] *Ibid.*
[15]SEMA No. 7 of 2012 concerning Legal Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber as a Guide to the Implementation of Duties for the Court, Criminal Law Section, 21. SEMA No 7 Tahun 2012 tentang Rumusan Hukum Hasil Rapat Pleno Kamar Mahkamah Agung Sebagai Pedoman Pelaksaan Tugas Bagi Pengadilan.

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financial losses for the actions of the defendant which is less than Rp. 100,000,000 (one hundred million rupiah) where in the amount of money that caused the occurrence/arising of the corruption crime committed by the defendant in this case was Rp. 58,090,000 (fifty eight million ninety thousand rupiah), while in this case the people who are harmed are the people, where the community's losses are also the state's losses, besides that the actions are both criminal acts."

Legal discovery in the criminal justice process in Indonesia is something as commonplace as legal discovery in other legal fields. One example of legal discovery in the criminal justice process can be found in the legal realm of criminal acts of corruption. It is not uncommon for law enforcement officers, especially judges, in their decisions to use the interpretation method as a method of legal discovery because according to the judge there are abstract legal rules to be applied so that according to the judge's perception this requires concrete interpretation in assessing, adjudicating and deciding a criminal case of corruption.[16]

In the opinion of the author, the panel of judges in their considerations uses systematic interpretation or interpretation. Systematic interpretation is a method of finding law by interpreting statutory regulations by relating them to other laws or regulations or to the entire legal system.[17]

One way that judges can take in exploring the law is by finding the law (rechtvinding). According to Sudikno Mertokusumo, legal discovery is defined as the process of law formation by judges or other legal officers who are given the task of implementing the law on concrete legal events.[18]

The panel of judges in imposing a sentence below the specific minimum for the corruption case on behalf of the defendant Supriyono really considered not only the juridical aspect, but also the sociological and philosophical aspects, so as to produce a fair decision. Ideally, the law enforcement process will essentially provide a sense of security, peace, and justice for all parties so that it will then end or at least reduce disputes between all litigants, as well as reduce the rate of crime. Court institutions as a forum for implementing the law enforcement process are required to always produce decisions that are based on justice.[19]

[16]Suwito, "Corruption Court Decision that Breaks Special Minimum Criminal Provisions as a Form of Legal Discovery by Judges" Khoirun Law Journal Vol 1 No. 1 (September 2017): 5
[17] Sudikno Mertokusumo dan A. Pitlo, Chapters Concerning Legal Discovery, (Bandung: Citra Aditya Bakti, 1993), 17.
[18] *Ibid*, 32.
[19] Dahlan Sinaga, *Op.Cit*, 273

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b. Decision Number 9/Pid.Sus-TPK/2018/PN.Mtr on Behalf of the Defendant Lalu Ahmad Yudni

The panel of judges who tried the defendant Lalu Ahmad Yudni sentenced him to imprisonment for 1 (one) year and 2 (two) months and a fine of Rp. 50,000,000 (fifty million rupiah), provided that if the defendant does not pay the fine, it must be replaced with imprisonment for 2 (two) months.

The judge was of the opinion that the reason the defendant was sentenced to a criminal sentence under the special minimum provisions of article 8 of the Corruption Eradication Act was because the value of corruption enjoyed by the defendant was only Rp. 7.050.000 and due to philosophical reasons for imposing a criminal sentence, that the imposition of a criminal sentence is not an arena for revenge but the defendant from the criminal imposition can then reflect on and improve himself in the future, therefore the sentencing of the crime must be in accordance with the values of justice, in accordance with the degree and degree of guilt of the accused.

According to the authors of the panel of judges, in their consideration of applying the utilitarian theory of punishment or the relative theory, where the emphasis is on the perpetrator (dader) not on the actions (daad) of the defendant, the purpose of the punishment is not imposed because people commit crimes (quia peccatum est) but so that people do not commit crimes. (nepeccatur).

The judge in his judgment applies the theory of relative punishment so that imposing a sentence below the special minimum according to the author's opinion can be justified, this is because the panel of judges has a loss of Rp. 7.050.000 and due to philosophical reasons for imposing a criminal sentence, that criminal imposition is not an arena for revenge but the defendant from the criminal imposition can then reflect on and improve himself in the future, therefore judges in sentencing a crime prioritize justice, according to the level and degree of wrong doing defendant.

In imposing criminal penalties below the minimum threat for perpetrators of criminal acts of corruption, the judge always relies on the desert theory or proportionality theory, namely that the sentence or sentence imposed by the judge takes into account the size of the state financial losses caused by the defendant accompanied by the facts revealed at trial and other mitigating circumstances for the defendant during the examination process at trial[20].

[20]Arianus Harefa, "Legal Analysis of Sentencing Under Minimum Threat for Perpetrators of Corruption Crimes" Journal of Education and Development Vol 8 No.1 (February 2020): 438.

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According to Bagir Manan, the formulation of laws that are general in nature never accurately accommodates every legal event. It is the judge who plays the role of connecting or connecting concrete legal events with abstract provisions, therefore judges in carrying out their duties are not only trumpets of law.[21] Satjipto Rahardjo stated that it is not unlawful for a judge to deviate from the law if justice itself is obtained by deviating from the law and the injustice that will arise if the provisions in the statutory regulations are implemented[22].

According to Sudikno Mertokusumo, the three principles must be implemented in a compromise manner, namely by applying all three in a balanced or proportional manner, so that there is no need to follow the priority principle as stated by Gustav Radbruch. However, it should follow the principle of casuistic priority and in accordance with the case at hand.[23] According to the author's view, the judge in the case of the defendant Lalu Ahmad Yudni, the judge prioritized the principle of justice compared to the principle of expediency and the principle of legal certainty, because the sentence was imposed below a special minimum by reason of the value of the loss to the defendant who only enjoyed corruption of Rp. 7,050,000. The judge's decision must be considered correct until it has permanent legal force or is decided otherwise by a higher court (res judicata pro veritate habetur).

c. Decision Number 38/Pid.Sus-TPK/2019/PN.Mtr on Behalf of the Defendant Sahyan

The Panel of Judges stated that defendant Sahyan was legally and convincingly proven guilty of committing a crime as charged in the subsidiary indictment. The judge who tried the a quo case sentenced the defendant Sahyan to imprisonment for 6 (six) month and 22 days and sentenced the defendant to pay a replacement fee of Rp. 5.000.000 (five million rupiah) provided that the defendant does not pay the replacement money within a maximum period of 1 month.

According to the panel of judges, the defendant's ratio decidendi was sentenced to less than a special minimum because the corruption value was only Rp. 5.000.000 (five million rupiah), besides that the panel of judges also considers that philosophically the purpose of the enactment of the law lies not

[21]Ahmad Rifai, Legal Discovery by Judges in a Progressive Legal Perspective,(Jakarta: Sinar Graphics, 2010), 47.
[22]Wasito Bagus Mursyid, Margo Hadi Pura, "Judicial Analysis of Imposing Criminal Fines Under Special Minimum Provisions by Judges in Corruption Crime Cases (Study of Medan High Court Decision Number 12/PID.SUS-TPK/2017/PT.MDN" Jurnal Darma Agung, Vol. 30. No. 2, (2022): 1043.
[23] Sudikno Mertokusumo dan A. Pitlo, *Op.Cit*, 2.

only in the existence of legal certainty but must also be in accordance with the principles of justice and the benefit of law in a synergistic manner. The formulation of Article 3 of the Law of the Republic of Indonesia. No. 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by the Law of the Republic of Indonesia. No. 20 of 2001 concerning amendments to the Law of the Republic of Indonesia. No. 31 of 1999 concerning the Eradication of Corruption Crimes: "*Every person who with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunity or facilities available to him because of a position or position that can harm state finances or the state economy, shall be punished with life imprisonment or with a minimum imprisonment of 1 (one) year and a maximum of 20 years and or a fine of at least Rp. 50,000,000 (fifty million rupiah) and a maximum of Rp 1,000,000,000 (one billion rupiah)*".

The panel of judges in their consideration connected the value of corruption, which was small in value of Rp. 5,000,000 (five million rupiah) by linking it with Article 12A of the PTPK Law. Article 12 A of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption stipulates special provisions for imposing criminal penalties for defendants who commit corruption under Rp. 5,000,000 (five million rupiah).

Article 12 A:

a) Provisions regarding imprisonment and fines as referred to in Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 11 and Article 12 do not apply to criminal acts of corruption whose value is less than Rp. 5,000,000 (five million rupiah).
b) For perpetrators of criminal acts of corruption whose value is less than Rp. 5,000,000 (five million rupiahs) as referred to in paragraph (1) shall be punished with imprisonment for a maximum of 3 (three) years and a fine of not more than Rp. 50,000,000 (fifty million rupiah).

In the formulation of Article 12A of the PTPK Law, it does not explicitly include Article 3 as a condition for the reduction of the criminal threat imposed, only specifically for Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 11 and Article 12 the judge connected with Article 12A of the PTPK Law with the aim of achieving progressive law, as in its consideration explained: "*Progressive law, the function of the panel of judges in adjudicating cases is not merely carrying out the law, but the assembly can play a role in creating laws and creating laws, therefore Article 3 of the Anti-Corruption Law is an exception to*

be juxtaposed with 12A of the Anti-Corruption Law, but will remember If the state loss is small, then according to the purpose of the law, which is not solely due to legal certainty, it must be fair and beneficial to the community, especially the defendant".

Routine subjects leave the routine to make paradigmatic mistakes in dealing with the law. The way of thinking that must determine positive goals for the sake of the goal itself. Paradigm directs progressive subjects to be dialectical, creative and unconventional. This need aims to activate the law not as something final and finished. Due to progress, the subject understands that the positivists are quite adamant in their assumption that law is a logical-rational order. So, at the extreme we often know the expression "law is only about applying the law", and we are not allowed to deviate from artificial ways of law.[24]

According to Satjipto Rahardjo, progressive law enforcement is carrying out the law not just black-and-white words from regulations (according to letters), but according to the spirit and deeper meaning (to very meaning) of laws or laws. Law enforcement is not only intellectual intelligence, but also spiritual intelligence. In other words, law enforcement is carried out with determination, empathy, dedication, commitment to the suffering of the nation and the courage to find other ways than what is usually done.[25]

Sometimes in applying the law, judges find it difficult because sometimes the laws and regulations do not regulate the case at hand. Thus, the judge must make legal discoveries. The discovery of the law is very important, a reflection of freedom and the freedom to decide cases in a state of law, considering that laws and regulations often have inherent weaknesses.[26]

Weaknesses in these laws and regulations are:[27]

a) As a man-made, statutory regulations are never complete, sometimes vacancies are found. Various legal events or problems that occur in society are not or have not been accommodated in the legislation.
b) The descriptions contained in the laws and regulations generally reflect the conditions, views, desires at the time of their making, while the society where these laws and regulations apply is constantly changing so that sometimes there is a gap between the community and the laws and regulations.

[24] Faisal,Understanding Progressive Law, (Yogyakarta: Thafa Media, Yogyakarta, 2014), 47.
[25] Satjipto Rahardjo, Law Enforcement A Sociological Review, (Yogyakarta: Genta Publishing, 2009), xiii.
[26] Dahlan Sinaga, *Op.Cit*., 174.
[27] *Ibid*.

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c) As a form of written law, the legislation is not flexible.
d) Sometimes the formulation of laws and regulations is not clear or allows various meanings so that there is no or reduces certainty.

Roscoe Pound proposes three steps that judges can take in adjudicating a case in order to obtain a fair decision or reflect the implementation of the independence and freedom of judges.

a) Find out which law will be applied among the many rules in the legal system, or if none is applied, reach a rule for that case which may or may not be used as a rule for other cases afterward or based on existing materials according to a way that the legal system dictates.
b) Interpreting the rules that are chosen or determined in this way, namely determining their meaning as when the rules were formed and with respect to their intended power.
c) Applying to the case being faced the rules found and interpreted as such.[28]

One way that judges can take in exploring the law is by finding the law (rechtvinding). According to Sudikno Mertokusumo, legal discovery is defined as the process of law formation by judges or other legal officers who are given the task of implementing the law on concrete legal events.[29] There are 3 (three) methods of legal discovery that can be used by judges, namely:

a) Method of interpretation or interpretation
b) Legal construction method
c) Legal refinement.

Interpretation or interpretation is the discovery of the law by means of interpretation taken by the judge if the contents of the law are not clear. So that the purpose of the interpretation is to give a fair decision and in accordance with the intent and purpose of the law.[30] The legal construction used by the judge aims to fill the legal vacuum (rechtsvacuum) or in other words that the legal construction is used if the judge is faced with a case that turns out there are no rules (leemtenin het rechts). Therefore, although there are no positive rules governing the case, the judge must explore and find the law in the life or reality of society. [31]

[28] Roscoe pound, *Pengantar Filsafat Hukum*, translated by Drs. Mohammad Rodjab, (Jakarta: Bharata, 1996), 52.
[29] Sudikno Mertokusumo dan A. Pitlo, *Op. Cit*. 32.
[30] Dahlan Sinaga, Op.Cit., 178.
[31] *Ibid*, 188.

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Legal narrowing is the establishment of new exceptions or deviations from laws and regulations of a general nature applied to special legal events or relationships with explanations or constructions by giving characteristics. An example of legal narrowing is the law does not explain whether the loss must also be replaced by the injured party who is also guilty of causing the loss (Article 1365 of the Civil Code) but jurisprudence stipulates that if there is an error in the injured party then he can only claim a part of the loss caused by it. [32]

In the opinion of the authors, the panel of judges linking Article 3 of the PTPK Law with Article 12A of the PTPK Law cannot be said to be part of progressive law or a method of legal discovery, because the formulation of Article 12A of the PTPK Law excludes Article 3 and Article 2 of the Republic of Indonesia Law. No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption as amended by the Law of the Republic of Indonesia. No. 20 of 2001 concerning amendments to the Law of the Republic of Indonesia. No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption. And the defendant's actions have been proven guilty of "Misuse of Authority, Opportunity or Facilities of Position or Position" as regulated in 3 PTPK Laws, meaning that the rules already exist and are clear.

Examples of sections of progressive law such as the Medan High Court Decision No. 144/PID/1983/PT.Mdn where the Panel of Judges is of the opinion that the defendant violated Article 378 of the Criminal Code regarding fraud, in the case of adultery of the in-laws of Raja Sidabutar, a contractor with Katarina br. Siahaan That the High Court, especially in this case, will also expand that understanding where the definition of "goods" in Article 378 of the Criminal Code includes "services"; Where as it is also about something that sticks together within a person, in this case what the witness Katarina br. Siahaan, is also included in the meaning of "goods", because hasn't he given up his honor, specifically and especially in this case regarding the term goods, in the regional language of the defendant and witness (Tapanuli), the term "bonda" is known which is nothing but goods, which is defined as genitals, so that when the witness Katarina br. Siahaan handing over his honor to the defendant is the same as handing over his bonda (goods).[33]

Currently, the panel of judges in trying the defendants who commit criminal acts of corruption Articles 2 and 3 of the Law of the Republic of Indonesia. No. 31 of 1999 concerning the

[32] Sudikno Mertokusumo dan A. Pitlo, *Op. Cit*. 26.
[33]Antonius Sudirman, The Judge's Conscience and His Decision. An Approach from the Perspective of Behavioral Jurisprudence Case of Judge Bismar Siregar,(Bandung: PT. Citra Aditya Bakti, 2007), 236

Eradication of Criminal Acts of Corruption as amended by the Law of the Republic of Indonesia. No. 20 of 2001 concerning amendments to the Law of the Republic of Indonesia. No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption can be guided by PERMA No. 1 of 2020 concerning Guidelines for the Criminalization of Articles 2 and 3 of the Law on the Eradication of Criminal Acts of Corruption, where in the guidelines there is the creation of a matrix with a range of imprisonment and fines which are then qualified based on state losses. With the categorization of the heaviest, heavy, medium, lightest, lightest while the errors, impacts and benefits by making the categorization of high, medium, and low.

The aim of PERMA Number 1 of 2020 concerning Sentencing Guidelines Article 2 and Article 3 of the PTPK Law is to prevent differences in the range of criminal sentences for corruption cases that have similar characteristics without sufficient consideration. The PERMA requires judges to consider the reasons in determining the severity of the crime in cases of criminal acts under Article 2 and Article 3 of the PTPK Law and to realize legal certainty, justice and proportional benefit in imposing sentences in cases of criminal acts of corruption Article 2 and Article 3.[34]

If it is related to this case, the defendant Sahyan in the author's opinion is included in the category of medium error, namely the defendant has a significant role in the occurrence of criminal acts of corruption, namely as a village head who participates in abusing power to the detriment of state finances. The aspect of the impact is low because the defendant's actions resulted in an impact or loss on a village scale, and was included in the category of lowest state losses because the value of the loss was Rp. 5,000,000 (five million rupiah).

The space for legal discovery by judges is regulated in Article 5 paragraph (1) of Law No. 48 of 2009 which states that judges and constitutional judges are obliged to explore, follow, and understand the legal values that live in society. The space for movement given to judges is intended so that judges can deviate from the provisions contained in laws and regulations that are clearly contrary to the sense of justice in society. This deviation in the law is known as the contra legem principle.[35]

According to Sudikno Mertokusumo, the three principles must be implemented in a compromise manner, namely by

[34] Helmi Muammar, Wawan Kurniawan. Fuad Nur Fauzi, Y Farid Bambang T, Aryo Caesar Tanihatu, "Analysis of Supreme Court Regulation Number 1 of 2020 concerning Sentencing Guidelines in relation to the Principle of Legal Freedom in Corruption Crimes" Widya Pranata Hukum Journal, Vol 3 No.2 (September 2021): 86.
[35] Dahlan Sinaga, *Op.Cit*, Page, 176.

applying all three in a balanced or proportional manner, so that there is no need to follow the priority principle as stated by Gustav Radbruch. However, it should follow the principle of casuistic priority and in accordance with the case at hand.[36] According to the author's view, the judge in the case of defendant Sahyan has applied the principle of legal certainty, the principle of justice and the principle of balanced benefit.

2. Sentencing Below the Special Minimum in Cases of Criminal Acts of Corruption Judging from the Principle of Judge Independence

a. The Independence of Judges in Sentencing Criminals Against Specific Minimum Criminal Threats

Judges are state judicial officials who are authorized by law to adjudicate. The definition of adjudicating here is defined as a series of judges' actions to accept, examine, and decide cases based on the principles of being free, honest, and impartial in court in the case according to the procedures regulated in the Act.[37]

Judicial power is an independent power, as stated in the explanation of Article 24 and Article 25 of the 1945 Constitution of the Republic of Indonesia, namely that: "*Judicial power is an independent power to administer justice in order to uphold law and justice. The conditions to become and to be dismissed as judges are stipulated by law"*.

This means that the position of judges must be guaranteed by law. One of the characteristics of the rule of law is that there is an independent, impartial and independent judge who is not influenced by the Legislative and Executive Powers. The judge's freedom does not mean that the judge can take arbitrary action on a case that is being handled, but the judge is still bound by the existing legal regulations.

The judge's freedom in finding the law does not mean he creates the law. But to find the law, judges can reflect on the jurisprudence and opinions of well-known legal experts which are commonly called doctrines. According to Muchsin that: "Regarding the freedom of judges, it is also necessary to explain the position of impartial judges. The term impartiality here is not interpreted literally, because in making a decision the judge must side with the right one".[38]

In addition, judges in adjudicating must consider and explore the values of justice that exist in society. In Article 10 of Law no. 48 of 2009 concerning Judicial Power states: "The court

[36] Sudikno Mertokusumo dan A. Pitlo, Chapters Concerning Legal Discovery, (Bandung: Citra Aditya Bakti, 1993), 2.
[37]Article 1 number 9 of the Criminal Procedure Code Pasal 1 Angka 9 Kitab Undang-Undang Hukum Acara Pidana
[38]Muchsin, Independent Judicial Power and Human Policy, (Jakarta: STIH IBLAM, 2004), 20.

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is prohibited from refusing to examine, hear, and decide on a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it".[39] This is explicitly stated in Article 5 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power, which reads: "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society".[40]

The independence of judicial power or the freedom of judges is a universal principle, which exists anywhere and anytime, this principle means that in carrying out the judiciary, judges are basically free, namely free in examining and adjudicating cases and free from interference or interference from power. extra judicial.[41] Although judges are basically independent, judges' freedom is not absolute because in carrying out their duties judges are micro-limited by Pancasila, the 1945 Constitution, laws and regulations, the will of the parties, public order and morality. Even if the judge's freedom is universal, its implementation in each country is not the same.

In the development of legal cases, there is a phenomenon of judges who impose criminal penalties below the specific minimum in cases of corruption, some argue that judges may deviate from the provisions of the law because judges are not mouthpieces of the law, if there is a conflict between legal certainty and justice then justice must be done put forward.

Sudikno Mertokusumo and A. Pitlo also stated, as a teaching about the freedom of judges, the teaching that judges are not only mouthpieces for forming laws, but autonomously, creates, and explores social processes.[42] The phenomenon of judges who impose criminal penalties below the specific minimum in corruption cases means that the judge deviates from the provisions contained in the Corruption Crime Act (Contra Legim). According to Judge I Gede Komang Ady Natha, S.H., M.Hum. that deviations from the provisions of the law on criminal acts of corruption cannot be carried out because there are special minimum and maximum criminal provisions that actually make it easier for judges to hear a case.[43]

[39] Article 10 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power Pasal 10 ayat (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman
[40] Article 5 Paragraph (1) Of Law Number 48 of 2009 concerning Judicial Power Pasal 5 ayat (1) Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman
[41]Bambang Sutiyoso dan Sri Hastuti Puspitasari, Aspects of the Development of Judicial Power, (Yogyakarta:UII Press, 2005), 51.
[42] Sudikno Mertokusumo dan A. Pitlo, Chapters Concerning Legal Discovery, (Bandung: Citra Aditya Bakti, 1993), 7.
[43]Interview with resource person Judge I Gede Komang Ady Natha, S.H., M.Hum. On Monday 17 January 2022 at the Mataram High Court.

However, there are judges who have a different opinion, according to Hakim Mahsan, SH that deviations from the provisions of the law on corruption can be deviated because judges are not mouthpieces of the law.[44] Deviations by imposing a penalty below the specific minimum in practice are very limited and casuistic, full of caution, namely by considering the principle of legal certainty, the principle of justice and the principle of expediency.[45]

The phenomenon of judges who impose criminal penalties below the special minimum for corruption cases according to the Lecturer of the Faculty of Law, University of 17 August 1945, Banyuwangi, Dr. Aditya Sanjaya, SH, MH, MHLi this should not have happened and was not done because the purpose of the law was made so that judges would have guidelines in imposing a sentence. it has been formed by the legislators so that there is a specific and definite range, if it is ignored, the special minimum and maximum special punishments are useless.[46]

In general, the freedom of judges is limited to the law, for example in trials based on criminal procedural law, in the case of special crimes they do not use procedural law as in general criminal acts.[47] Judges are free from intervention by the executive, legislature and chairman of the court, judges are not free in deciding to be bound by the provisions of the law with a minimum of 2 (two) pieces of evidence, judges are bound to carry out their duties as judges are bound by the judge's code of ethics.[48]

A judge's decision that violates the provisions of a normative law or in this case under the demands of the Public Prosecutor may or may not be null and void as long as it is based on an objective sense of justice. In general, decisions below the special minimum are based on the "sense of justice" criteria.[49]

E. Conclusion

[44]Interview with resource person Judge Mahsan, S.H. On Monday 17 January 2022 at the Mataram High Court

[45]Interview with resource person Judge B.U Resa Syukur,S.H.,M.H. On Monday 03 January 2022 at the Mataram Judge I Gede Komang Ady Natha, S.H., M.Hum. On Monday 17 January 2022 at the Mataram District Court.

[46]Interview with resource person University Law Faculty Lecturer 17 August 1945 Dr. Aditya Sanjaya, S.H., M.H., M.H. Li, on Monday 18 January 2022.

[47]Interview with resource person Judge B.U Resa Syukur,S.H.,M.H. On Monday 03 January 2022 at the Mataram Judge I Gede Komang Ady Natha, S.H., M.Hum. On Monday 17 January 2022 at the Mataram District Court.

[48] Interview with resource person Judge I Gede Komang Ady Natha, S.H., M.Hum. On Monday 17 January 2022 at the Mataram High Court.

[49]Amirul Faqih Hamza,Genta Judge's Freedom in Special Minimum Criminal Sanctions (Yogyakarta: Publishing, 2021), 153.

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Ratio decidendi the judge's decision that imposes a crime below the special minimum in the case of a criminal act of corruption.

Judges who impose criminal penalties under the specific minimum penalty for decisions on cases of criminal acts of corruption which the authors analyze assume that the degree of guilt of the accused is not directly proportional to the dangerous nature of the act and will be very disproportionate between the act and the punishment that will be given to the perpetrator of a criminal act of corruption. so that in the name of "Justice" the judge performs contra legem or legal breaches of the provisions of the special minimum criminal threat in the Law on the Eradication of Criminal Acts of Corruption.

The imposition of a criminal offense under a special minimum in cases of criminal acts of corruption in terms of the principle of independence of judges.

The independence of judges and the conviction of judges in imposing criminal penalties under a special minimum penalty in cases of criminal acts of corruption are reflected in legal reasoning in the judge's decision, so that the judge's decision becomes rational even if the sentence is below the special minimum. This is also intended as a form of judge's responsibility in carrying out their duties as law enforcers and justice enforcers, namely as stated in the judge's decision letter "For Justice Based on God Almighty" (Vide Article 197 paragraph (1) letter a KUHAP).

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