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The Nature of Justice in Criminal Peneemby under the Minimal Limitation in Decision Judge of Corruption

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Abstract *: The purpose of this study is to understand, analyze and find: the justice nature of criminal sentencing the special minimun treshold under in the* judge decision of criminal corruption*; The freedom of* criminal corruption *judges in criminal proceedings under minimum limits; Factors affecting the judge of corruption in the imposition of a criminal under the minimum limit.*

The type of research that will be conducted is descriptive research with the type of normative legal research on the nature of justice in the imposition of criminal under minimum limit in the judge decision of corruption

The results showed that the imposition of criminal under the minimum limit in the judgment of corruption criminal justice did not realize procedural justice values but what was realized was substantive justice. The meaning of substantive justice is justice related to the content of the judge's decision in examining, hearing, and deciding a case to be made based on the consideration of rationality, honesty, objectivity, impartiality, without discrimination and based on conscience. The judge has the freedom to impose a penalty on a person including the imposition of a criminal under a special minimum. The judge's freedom to see and examine the facts of the trial. The judge's judgment must contain three juridical, philosophical and sociological aspects so that justice in the judge's decision is not only oriented toward legal justice, moral justice, and social justice. The judge of corruption in the imposition of a criminal under the minimum limit is based on the overlap of maximal and minimum penalty in the Corruption Eradication Act, the difference of philosophy embraced by each different judge can lead to criminal disparity, the presence of judge's freedom to drop Criminal under minimum special.

Introduction

The State of Indonesia is a state based on law, not based on mere power, it implies that the state, including the government and other state institutions in carrying out any action must be based on law or must be legally accountable. Therefore it is necessary for the development of law which in essence the development of law is as an effort to uphold justice, truth and order in the state of Indonesia based on Pancasila and the Constitution of the Republic of Indonesia Year 1945.

So far, the state of law is understood to be limited only to how a country acknowledges even claims to have various normative conditions, then automatically the country is considered a state of law. The size of the legal state exists or not only measured by the fulfillment of various categorical elements, such as supremacy of law, equality before the law, due process of law, independence and impartiality of judicature and so on. Issues were considered completed and final. Like a "nameplate" the existence of these conditions the state of the law immediately becomes available.

The Indonesian state proclaimed on August 17, 1945 has defined itself as a state based on the law. In Article 1 Paragraph (3) of the 1945 Constitution stipulates that Indonesia is a law-based state (rechstsstaat) and not based on mere power (machtsstaat). Mere power only creates dictatorism and arbitrariness. The judge actually makes that power lawful by showing the mechanism of organization and the limits of an action. The judiciary must be independent from influence, the government. The protection of human rights must be exercised in practice, since the main principles of the rule of law are the principles of legality, free trial and protection of human rights. That is, the actions of the state organizers must be based on the law.

The consequence of this recognition implies the existence of an institution of judicial power because this institution must exist and is a requirement for a country that calls itself a state based on the law, as our country is Indonesia. This, if we associate with the outcome of a decision at a meeting of jurists in Bangkok 1965 organized by the International Commission of Jurists, has broadened the meaning or condition of the Rule of Law namely: the existence of constitutional protection, the existence of free and impartial judiciary, free elections freedom of expression, freedom of

association or organization and operation, civil education.

Article 24 paragraph (1) of the 1945 Constitution states that the judicial power is an independent power to organize the judiciary to enforce the law and justice. As an independent institution mandated to uphold law and justice, the judiciary must be independent and should not be interfered with by other powers such as executive and legislative power. So that talk about the implementation of the independence of judicial power, there should be a clear parameter that becomes the benchmark of self-reliance or not the judicial institution. The independence of the judicial authority can be divided into three types, namely the independence of the institution, the independence of the judicial process and the independence of its own judges.

In the judicial institution a very important element in the judge is, because in the judge's judgment the fate of a person will be determined whether he will be found guilty, free from any (onslagh) or free (vrijsvraak) demands. One of the most fundamental obstacles and disturbing the freedom of judges especially the judges of the Corruption Crime Court is the existence of minimum and maximal criminal provisions, whereas on the one hand the judges are given an extraordinarily heavy duty of enforcing the law and justice it is implied in the provisions of Article 5 paragraph 1) of Law Number 48 Year 2009 on Judicial Power "that judges are law enforcement and justice. Constitutional judges and judges are obliged to explore, follow and understand the values of law and sense of justice that live in society. As the most important element of the judiciary, the judge is given the authority to receive, examine and decide upon any case against him even if the case examined is not regulated in the norm.

The judge is one of the basic elements in the judicial system other than the prosecutor and the investigator (the Prosecutor and the Police), as the subject of a decision on a case in a court. The judge who is the personification of the law should ensure a sense of justice for everyone seeking justice through legal legal process, and to ensure a sense of justice that a judge is limited by such signs as accountability, integrity, morals and ethics, transparency and oversight. In relation to duties as a judge, the independence of judges should still be complemented by an attitude of impartiality and professionalism in the field of law.

The duties of a judge are tough, because judges judge justice seekers expect justice, even if justice is something abstract. The judge's verdict also brought him to hell or to heaven as the message of Prophet Muhammad SAW in his hadith that "every judge who wants to decide a case to really think (ijtihad) if ijtihad is wrong then he can be a reward and if ijtihad is true then he can be two rewards. Remember that the judge's verdict will bring him closer to hell or heaven.

On the one hand, justice seekers do not know directly that most judges feel intimidated directly by the provisions of the law with the limitation of the minimum provisions that are widely spread in various kinds of legislation, whereas the minimum criminal provision limits the judges in creating the fairness and when the minimum provision applied in the judgment of the verdict then yelled yustisiaben (seeker of justice), NGOs, print media and electronic media who consider that the judge's decision is unfair. Such as minimum criminal provisions in Law Number 31 Year 1999 concerning the Eradication of Corruption as has been amended by Law Number 20 Year 2001 regarding the Amendment of Law Number 31 Year 1999 on the Eradication of Corruption, where many of the judges to impose a criminal punishment of at least 4 (four) years when the value of state losses is only under ten million rupiah, of course the criminal 4 (four) years is related to the amount of the value of the state losses are considered unfair.

In exercising an independent judiciary power must be supported by the independence of judges in carrying out their functions as law enforcement and justice. If we look more deeply that the independence of a judge can be seen in the judge's verdict which always begins its verdict with the revelation of "THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD" (even if a judge does not mention the phrase "By Justice by the One God" when reading the decision then the decision is null and void).

The judge's freedom in handling the verdict, especially in cases of corruption, is certainly not an unlimited freedom. Because of frequent mistakes to understand the meaning of judicial independence (judicial independency), so that the judiciary through the judge conduct violations of authority or abuse of authority (abuse of authority). It is as if freedom is interpreted indefinitely, resulting in judges being identical with judiciary and law. But the freedom of the judges here is the relative freedom to apply the law. To understand this issue, referring to the elucidation of Article 4 of Law Number 4 Year 2004, (before revoking Law Number 48 Year 2009 regarding Judicial Power).

Discussion

Criminal Determination under Minimum Limit in Decision of Corruption Judge in accordance with the Values of Justice

When further examined the criminal philosophy lies the basic idea of punishment which clarifies the understanding of the nature of punishment as the responsibility of the legal subject to criminal acts and public authority to the State

based on the law for committing a crime. While the theory of punishment is in the process of scientific organizing, explaining and predicting the purpose of punishment for the State, society and the subject of the criminal law.

According to M. Sholehuddin, the philosophy of punishment has two functions, namely: [i]

First, the fundamental function is as a basis and normative principles or rules that provide guidance, criteria or paradigms against criminal and criminal matters. This function is formally and intrinsically primary and is contained in every teaching system of philosophy. That is, every principle is defined as a principle or rule that is recognized as a truth or norm that must be enforced, developed and applied.

Second, the function of theory, in this case as meta theory. The entry, punishment philosophy serves as the underlying theory and the background of any theory of punishment.

Based on the above two functions in the process of implementation, the determination of criminal sanctions and actions is the activity of the legislation and / or judicial program to normalize the types and forms of sanction (punishment) as the basis of law enforcement validity through the application of sanctions.

The Criminal Code (KUHP) itself is not known for any special minimal criminal threat that exists only minimal public threats so that general rules are oriented to the maximum system. This is in contrast to the specific rules / laws made for a particular offense whose arrangements are outside the Criminal Code as Law no. 31 Year 1999 concerning the Eradication of Corruption Act jo Law no. 20 of 2001 on Amendment to Law No.31 of 1999. Against the special law is known the existence of a special minimum criminal threat to criminal sanctions whether in the form of imprisonment or fine. However, the standardization of special minimum threats varies and is not patterned depending on the nature of the crime so that the rules and guidelines for implementation / implementation do not exist by default that will be used as a reference to implement them. [ii]

The definition of "universal minimum" is the minimum (minimum) penalty that is universal (universal) which applies to each case with each type of punishment. The definition of "maximum special" is the maximum (maximum) penalty that is special (special) for each, the provisions of different laws or have been determined maximally. On the basis of this principle, it is guaranteed that the legal certainty in the application of criminal law in the criminal law means that the principle is of course "binding the judges to the minimum and maximum limit of punishment" which will be imposed on the perpetrators of corruption. On the basis of the principle of punishment means that the judge shall not impose a lower sentence than the minimum and also the judge shall not impose a higher penalty than the maximum limit of punishment that has been determined by law. [iii]

The existence of a special minimal criminal threat on the perpetrators of corruption acts not only provides a deterrent effect to the perpetrators of corruption as the purpose of absolute punishment but in the Purpose of absolute punishment also has implications for the protection of society (the theory of social defense), it can be seen that the purpose of punishment in Corruption Act is to prevent the occurrence of Corruption Criminal Act which states that the purpose of punishment to provide a deterrent effect for the Corruptor.

Whereas in order to achieve more effective objectives to prevent and combat corruption, this Law makes criminal provisions different from the previous Law, namely determining special minimum criminal threats, higher fines and death sentences which constitute a criminal offender. In addition, this Law contains also imprisonment for perpetrators of corruption offenses who can not afford additional crime in the form of state compensation money.

The laws and regulations prevailing in Indonesia are somewhat influenced by the international trend. According to Muladi, the development of specific minimum sanctions for certain crimes is one of 7 (seven) international trends[iv]:

a. The tendency to seek alternative sanctions from the criminal sanction (alternative sanction);
b. b.The development of specific minimum sanctions for certain offenses;
c. The regulation of a cumulative criminal system for certain offenses;
d. Polarization of capital punishment;
e. Criminalization of corporations;
f. The use of a two-track system (double track-system);
g. The special arrangement of the child criminal system.

Muladi further explained that the development of specific minimum sanctions for certain crimes is aimed at reducing the disparity of sentencing and indicating the severity of the crime concerned. Muladi's opinion is similar to that conveyed by Barda Nawawi Arief, who said that the need for this special minimum can be felt from public unrest or the lack of public satisfaction of prison sentences that have been imposed in practice, especially criminal that is not much different between perpetrators of criminal acts big class with perpetrators of petty criminal acts"[v].

When using the definition, the development of specific minimum sanctions for certain crimes is intended in order to indicate the severity of the crime concerned, as the opinion of Muladi above, it can be said that the criminal act of

corruption is one of the serious crimes, because it also has minimum sanctions special. According to Barda Nawawi Arief, the special minimum criminal system is an exception, namely for certain offenses considered to be very harmful, endangering or disturbing the society and the delays that are qualified by the consequences (erfolsqualifizierte delikte) as a quantitative measure that can be used as a benchmark that the offense -lots that are threatened with imprisonment over 7 (seven) years that can be given a special minimum threat, because the delays are classified as very heavy. This benchmark can in certain cases be reduced to "heavy" delays (prisons 4 to 7 years). Meanwhile, regarding the minimum length specially adapted to the nature of the nature and quality or weight of the offense concerned. [vi]

In subsequent developments, there is a special minimum pattern change that ranges from 1 (one) - 7 (seven) years. Minor threatened bills are "heavy" and "very heavy" delays with a maximum of 4 (four) years imprisonment. This special minimum pattern changes in the latest development, which is in the range of 1 (one) - 5 (five) years. Thus, there is a change from the highest minimum threat, which previously was 7 years to 5 years. In addition, the minimum criminal threat pattern is not divided into prison criminal ranges, but is made in an absolute penalty of 1, 2, 3, or 5 years.

The minimum special minimum criminal pattern for imprisonment is 1 (one) year based on the following points:

1. A prison sentence is one type of criminal that is considered quite heavy and risky. Therefore, there is an international tendency to pursue a selective policy that is limited in the use of imprisonment. The imprisonment is only for certain acts which are considered severe enough for certain persons who are deemed necessary to obtain coaching by imprisonment with a penal system.
2. Starting from the above thinking, then to give the impression or image of prison penalty which is the type of pidan ayang quite heavy and requires considerable time in fostering / correctional, then used the size of one year. By the kraena, the delik whose weight is considered less than 1 (one) year is considered a "very mild" offense and is considered unnecessary to be threatened with imprisonment.
3. If the offense is considered very light, it is also threatened with a mild criminal (within a few months or weeks only), then this will give an opportunity for the imposition of a short prison sentence. The international trend (as evident from the recommendations of the UN Congresses on The Prevention of the Treatment of Offenders) calls for the limitation of the imposition of a short jail sentence, because in addition to bringing negative effects it is also seen as underpinning the correctional system of penalization and interferes with the Standard Minimum Rules (SMR) system. With the imposition of a minimum 1 (one) year limit does not mean a complete abolition of a short prison sentence, but at least it is expected to reduce the imposition of a short prison sentence, but at least it is expected to reduce the imposition of an excessive penalty if the maximum threat is too light. Still given the possibility to impose a short penalty, because in certain cases short criminal it is still needed.

Furthermore, according to Barda Nawawi Arief, a special minimum criminal system, is a formulation deviating from the punishment pattern of Wetboek van Strafrecht which embraces the general maximum and minimum general patterns. The special minimum penalty applies only to some crimes that are considered to be disturbing to the public, while the application of minimum criminal threats aims to avoid the disparity (discrimination) of punishment. [vii]

The criminalizing system of corruption specifies specific special and maximum specific threats, both on imprisonment and imprisonment and does not use the system by stipulating the general maximum penalty and general minimum penalty as in the Criminal Code. This particular minimum system, first of all, it should be emphasized that according to the concept of Book 1 only formulated or permitted a special minimum for imprisonment, it is not possible for a criminal fine. [viii]

Regarding some time of the minimum minimum requirement (for imprisonment) The Concept Book 1 only gives clues that it can be more than one day. So it does not give a limit, how long the minimum minimum of special special or the highest. Given the issue of special minimum limits is more "special", it is more casuistic and subjective, meaning that every person, nation or country will have different sizes and judgments based on their own interests, especially the interests of the state.

Criminal and special minimum threats are different from those of the current law:

a. The minimum special minimum criminal threat for imprisonment is 1 (one) year, this is based on the following thoughts:
   1) The imprisonment, is one type of criminal that is considered quite heavy and risky. Therefore, there is a tendency to adopt a policy of limitless selective use of imprisonment.
   2) Based on the above thought, to give the impression or description that the imprisonment is a criminal type that is quite heavy and requires a long time in the fostering / correctional, then used the size of the weight is considered less than 1

(one) year is considered not to be threatened with imprisonment.

b. The concept contains a specific minimum threat system that has been unrecognized in the Criminal Code, the adoption of this particular minimum threat based on the main idea:

1) In order to avoid the existence of a criminal disparity that is very striking for delays that are intrinsically of different quality.
2) To further streamline the effect of general prevention, especially for the offenses considered dangerous and disturbing to the public.
3) Analyzed with the idea that if in the case of being aggravated, the minimum punishment should be aggravated, then the minimum penalty should be aggravated, then the minimum penalty should be exacerbated in certain matters.

From the formulation of the penal system set out in the law, primarily concerning the specific minimum criminal formula, the following matters appear:

1. There is no uniformity of quantitative measure of when or at maximum criminal (prisons, confinement, and penalties) how many can be specified minimum specified. For imprisonment, some use the size of the year (from 3 years to 15 years) and some are using the moon. Likewise for criminal confinement, some use years and some are using the size of the moon. For criminal penalty there are using the size of millions of dollars, and some are using the size of billions of dollars.
2. There is no range-range uniformity for minimum jail, minimum special confinement, and minimum penalty. Furthermore, from the lowest range, either for imprisonment, criminal confinement or criminal penalty, using qualitative measures, it does not (all) indicate, that the offenses are a deliberately dangerous / disturbing society, and / or qualified offenses or exacerbated by the consequences (erfolgsqualijizierte delikte).

Criminal Disparity

Dispute punishment is a classic problem that continues to exist until now related to criminal prosecution. Criminal guidance can be a kind of guide in reducing disparities that can injure a sense of justice. It is not easy to find criminal guidance, in addition to each region of different sizes of 'sense of justice', it will also be considered 'reducing' the freedom of judges in exercising their authority of 'discretion' determining the numbers of justice in crime. Regardless, in spite of the fact that, in the absence of written guidance of criminal prosecution, on a certain scale, such as a particular jurisdiction, or perhaps a jurisdiction of a high court, will facilitate the judge in the 'inner struggle' in determining the justice figures in the criminalization , can also reduce the disparity of punishment that will harm the public sense of justice. When a sense of community justice is injured, it is as good and straight as any trial proceedings will be 'suspected' and become meaningless. When that happens it is not easy to 'explain' the judgment of the verdict that the punishment numbers have met the sense of justice.

According to Harkristuti Harkrisnowo criminal disparity is the difference in the imposition of a criminal to a similar or equivalent case of seriousness, for no apparent reason or justification. [ix] The disparity of sentencing in this case concerns the application of unlawful crimes to the same criminal offense or to criminal offenses whose comparable nature can be compared without clear justification grounds. Criminal disparity means the imposition of different criminal charges against perpetrators committing a crime jointly against a offense or by only one perpetrator.

In essence, the judge in deciding cases will find disparity. This is because the judge has the freedom to choose the desired type of crime (strafsoort), and also the judge can choose the weight of the criminal (strafmaat) to be imposed, because that is determined by the law is only maximum and minimum. Within the maximum and minimum limits the judge is free to move to get the right punishment.

The disparity of the verdict of corruption cases that are the themes of this chapter becomes an optical discovery to examine the quality of judges' rulings. There are at least two things to note, the first aspect of disparity that is often highlighted and the second is the complexity aspect of the case, especially the case of corruption. On the one hand, disparities will be seen as rational contracts, as Oemar Seno Adji says, that disparity is justifiable as long as it is done fairly. Disparity to this view is seen in line with the principle of judge's freedom in deciding the case against him. Disparities in this situation are also understood as attempts to maintain legal authority. [x]

By 2016, ICW has monitored 573 corruption cases by the distribution of decisions, the First Level Court (420 Decisions), the Court of Appeal (121 Decisions) and the Supreme Court (32 Decisions). The defendants who have been dismissed by the court, whether in the first level, appeal, cassation, or review are as follows:

Number of Defendants and Corruption Case of 2016

No.		Defendant	Decision

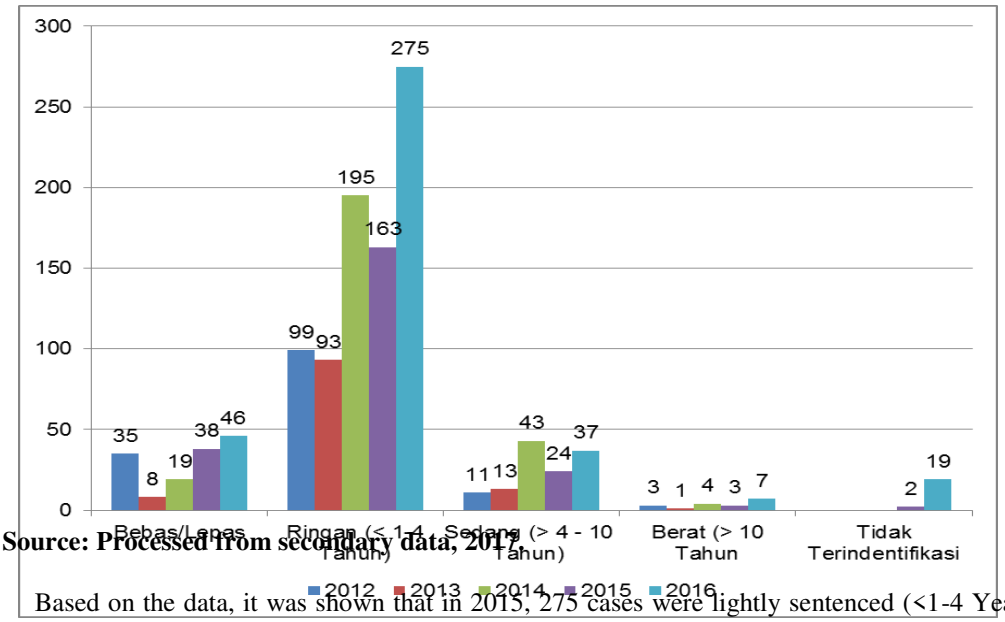
		Amount	Percentage	Amount	Percentage
1.	Court Level 1	467	73,89	420	73,20
2.	Corruption Court of Appeals	133	21,04	121	21,12
3.	Supreme Cour	32	5,06	32	5,58
	Amount	**632**	**100,00**	**573**	**100**

Source: Processed from secondary data, 2017.

If the penalty for corruption is based on the category, it can be divided into 3 groups (mild (<1-4 years prison), moderate (> 4 - 10 years in prison), and severe (over 10 years in prison). The light category is based on the consideration that the prison minamal sentence in Article 3 of the Corruption Criminal Act is 4 years in prison. So the sentence of 4 years and under enter the light category. While the verdict into the category is a verdict over 4 years to 10 years. Enter the category of severe verdicts is a corruption case sentenced over 10 years in prison. In the analysis of researchers the average verdict in 2016 is different in each level. On the first level the average sentence is 1 year and 11 months. While at the appeal level is 2 years 6 months in prison and the appeal level is for 4 years 1 month. There is a tendency to flat - average verdict increases with appeal or cassation. But overall (3 levels of court) the average verdict for corruptors during 2016 is still relatively mild or 2 years 2 months in prison.

The following data shows the progress of corruption verdicts from 2012 to 2016 reported as follows:

Trend Corruption Verdict Year 2013 - 2016



Source: Processed from secondary data, 2017.

Based on the data, it was shown that in 2015, 275 cases were lightly sentenced (<1-4 Years). In 2014, 195 cases were lightly convicted (<1-4 Years). In 2015, 163 cases were lightly sentenced (<1- 4 Year), in 2012 99 cases were lightly sentenced (<1-4 Years), and Year 2013 were 93 cases that were lightly sentenced (<1-4 Years).

Further data show in the Year 2016, the average verdict of corruption cases at all levels as follows:

Average Correction of Corruption Accused in 2016

No.	Level	Average Punishment
1	First Level Corruption Court	1 Year 11 Months
2.	Court of Corruption Court of Appeal	2 Years 6 Months

3.	Supreme Cour	4 Years 1 Months

Source: Processed from secondary data, 2017.

Based on these data, the average of 2016 verdicts are different in each level. On the first level average - average sentence is 1 year 11 months. While at the appeal level is 2 years 6 months in prison and the appeal level is for 4 years 1 month. The average tendency of the sentence is increased if appeals or cassation are appealed. But overall (3 levels of court) the average verdict for corruptors during 2016 is still relatively mild or 2 years 2 months in prison.

Mild sentencing for the majority of corrupt perpetrators indicates a serious problem in the corruption court. The public deserves to be disappointed with the Corruption Court because its presence is expected to bring change in efforts to eradicate corruption. However, in practice, corruption courts do not contribute significantly to efforts to eradicate corruption. Corruption Court actually cinderung sent light punishment for perpetrators of corruption.

In the context of sentencing, there is virtually no significant difference between corruption as extraordinary crime and other common crimes such as theft or fraud. The birth of Corruption Court as a court that specifically handling corruption cases can not be separated from the spirit of massive corruption eradication. This is because corruption has been seen as a serious crime that has a very wide and destructive impact. Corruption has also been transformed into a crime against human rights.

Unfortunately, the Corruption Court has not been successful in carrying out its mandate. The phenomenon of mild punishment is clearly counter-productive with wider corruption eradication efforts. The phenomenon of mild verdicts for the perpetrators of corruption would be contrary to the sense of justice of the community as victims of corruption. The public would expect the corruption court to impose heavier penalties on the perpetrators of corruption, since corruption has widespread impact and is an expression of human rights. Providing more severe punishment to perpetrators of corruption is a form of court allegiance to the people who are victims of corruption. In addition to considering justice for the perpetrator, the Corruption Court is obliged to consider the sense of community justice. So it is not excessive if the public expect a punishment penalty for the perpetrators of corruption.

Conclusion

1. Criminal imposition below the minimum limit in the judgment of corruption judges does not realize procedural justice values but what is realized is substantive justice. The meaning of substantive justice is justice related to the content of the judge's decision to examine, hear, and decide a case to be made on the basis of consideration of rationality, honesty, objectivity, impartiality, without discrimination and conscience.
2. The judge has the freedom to impose a penalty on a person including the imposition of a criminal under a special minimum. Judge's kebabesan to see and examine the facts of the trial. The judge's decision must contain three juridical, philosophical and sociological aspects so that justice in the judge's decision is not only oriented towards legal justice, moral justice and social justice,

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[vii]*Ibid.,* hlm. 123-124.

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