

THE DILEMMA OF DISPARITY IN JUDGES' DECISIONS IN DISTRICT COURT PRACTICE

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Abstract

This study examines the factors affecting different sentences or criminal disparities and the reasons underlying the judge's decision to adjudicate criminal cases during trial. This study employs a legal scholarship technique utilizing procedural and philosophical methods. The study findings indicate that criminal disparity has a fundamental cause, which can be examined from theoretical, legal, and empirical viewpoints. Legal theory argues that the autonomy and freedom granted to judges is based on the Constitution of the Republic of Indonesia of 1945 and Law No. 48 of 2009, which regulates the current judicial power. Then, the *decided ratio* theory, disagreement, equilibrium theory, intuition art theory, experience theory, and science theory explain the criminal disparity. Indonesian courts now use a punishment system exclusively based on trial exams. This leads to discrepancies in judicial decisions by judges, known as criminal disparita. At the very least, consider criteria related to exterior activities and subjective elements such as motives and objectives. Next, evaluate the impact of the action, the gravity of the violation, the approach used, the internal disposition (wrong), and relevance to the core of consideration. Judges cannot rely solely on procedural factors.

Keywords: *Criminal Disparity; Judge's Decision; Court Practice*

INTRODUCTION

The Law on crime is one of a nation's most significant legal components. The connection between the State, an institution established by society, and citizens or society in general is substantively addressed by criminal Law, a public law branch.¹ Consequently, criminal enforcement is executed by the penal court system. The expression "criminal justice system" denotes a system that is employed to prevent

¹Henny Saida Flora, Mac Thi Hoai Thuong, and Ratna Deliana Erawati, "The Orientation and Implications of New Criminal Code: An Analysis of Lawrence Friedman's Legal System," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 1 (April 4, 2023): 113–25, <https://doi.org/10.29303/ius.v11i1.1169>.

crime through the application of a systemic approach.² In terms of functionality, the criminal justice system will consist of at least three interrelated components: legal substance, legal structure, and legal culture.³ Substances of Law encompass formal criminal Law and material criminal Law. Concurrently, the legal framework comprises the following: the National Police of the Republic of Indonesia or civil servant researchers, the prosecution's office, the Court, the execution of the decision (prison), and adjudication or releasing a verdict (Court). The legal culture encompasses the ideas, beliefs, opinions, principles, views, and additional variables present in the community and affect the Law.⁴

The autonomy in courts is ensured by the law No. 48 of 2009, which relates to judicial authority. During the examination and determination of the criminal case, the judge is permitted to make an assessment. The defendant's guilt or innocence is assessed solely by his beliefs or perspectives. Fundamentally, the obligation of judges to render judgments encompasses two objectives: the preservation of fairness and the enforcement of the rule of Law.⁵ According to section 5, line (1) of Law No. 48 in 2009 concerning judicial authority, courts must examine, uphold, and understand the principles of Law and the cultural belief in fairness. The prosecutor might additionally be required to examine the defendant's virtuous and wicked characteristics during the proceeding, as stated in Article 8 paragraph (2).⁶ Judges are not guided by rigid requirements for sentencing in the criminal laws and regulations that have been established thus far, which is the reason for the imposition of legal penalties on offenders. The existing Law is solely employed as a reference for the utmost and minimum potential penalties.⁷ In order to prevent judges from inflicting their judgments arbitrarily, the guidelines for sentencing should be explicitly incorporated into the Law. The reason for the frequent disparities in criminal sentences administered by judges is this.

The application of disparate criminal offenses to the same crime or unlawful conduct of a commensurate severe nature without a clear justification is known as sentencing disparity. Additionally, criminal disparities may arise in penalizing individuals who perpetrate multiple crimes without regard to the "legal category." Criminal disparity has a profound impact because it is a constitutional balance between the State's authority to criminalize and individual freedom. Various factors may precipitate a criminal disparity; however, the judge ultimately determines its existence. There will be an ongoing issue of criminal disparity due to the disparity between the minimum and maximum criminal sanctions. The criminal disparity is

² Ook Mufrohim and Ratna Herawati, "The independence of the prosecutor's office as a legal structure in the criminal justice system in Indonesia," *Jurnal Pembangunan Hukum Indonesia* 2, no. 3 (2020): 373–86, <https://doi.org/10.14710/jphi.v2i3.373-386>.

³ Nur Atnan, "Fenomena Korupsi Pejabat Publik Di Jawa Barat Dan Cara Mengatasinya," *Veritas et Justitia* 1, no. 1 (2015): 159–82, <https://doi.org/10.25123/vej.1421>.

⁴ Ahmad Rofiq, Hari Sutra Disemadi, and Nyoman Serikat Putra Jaya, "Criminal Objectives Integrality in the Indonesian Criminal Justice System," *Al-Risalah* 19, no. 2 (December 16, 2019): 179, <https://doi.org/10.30631/al-risalah.v19i2.458>.

⁵ Ismail Rumadan, "Penafsiran Hakim Terhadap Ketentuan Pidana Minimum Khusus Dalam Undang-Undang Tindak Pidana Korupsi," *Jurnal Hukum Dan Peradilan* 2, no. 3 (2018): 379, <https://doi.org/10.25216/jhp.2.3.2013.379-404>.

⁶ Widowati Widowati and Y. A. Triana Ohoiwutun, "Kepastian Hukum Putusan Yang Melanggar Special Straf Maxima," *Jurnal Yudisial* 14, no. 1 (2021): 1, <https://doi.org/10.29123/jy.v14i1.413>.

⁷ Wahyu Nugroho, "Disparitasi Hukuman Dalam Perkara Pidana Pencurian Dengan Pemberatan," *Jurnal Yudisial* 5, no. 3 (2012): 265, <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/124>.

significantly impacted by the legislature's formulation process of criminal sanctions, as the legislator. This is a result of the absence of standards for their formulation.

According to Section 1 (11) of the penal procedure code, a court decision is characterized as a ruling issued by a judge at a public session. The ruling may manifest as a criminal judgment and a resolution free of any litigation, contingent upon the circumstances or the execution mechanism delineated in this Legislation. Nevertheless, there continue to be numerous decisions made by courts regarding convicts who have not attained justice in the community, as there are numerous discrepancies within the imposition of criminal sanctions. Criminal disparity can manifest in various forms, including a) Disparity among identical criminal acts, b) Disparity in criminal acts of equal severity, c) Criminal disparity imposed by a panel of judges, and d) Disparity between crimes imposed by distinct panels of judges for the same crime.

It is evident from the aforementioned description that one of the justifications for criminal disparity has resulted in a state of our Law that is no longer consistent with the mission of law enforcement. The Law, which originally aimed to protect justice, social benefits, and legal stability, can no longer be fully realized, as the justice component still needs to be completed or provided by judges in the administration of the Law. Law enforcement is fundamentally concerned with disseminating legal principles to society to achieve the objectives of justice, proportionality, order, preservation of liberties, community well-being, and certainty of Law.⁸

The Ternate District Court's verdict on the offense of persecution, for instance, accounted for the disparity:

Table: 1
Disparity of Court Decisions

| No | Court Decision Number | Types of Articles Dropped | Duration of Sentence |
|----|---------------------------------------|---------------------------|----------------------|
| 1 | Decision Number 137/Pid.B/2024/PN Tte | 351 Paragraph 1 | 5 Months |
| 2 | Decision Number 144/Pid.B/2023/PN Tte | 351 Paragraph 1 | 8 Months |
| 3 | Decision Number 122/Pid.B/2023/PN Tte | 351 Paragraph 1 | 7 Months |
| 4 | Decision Number 57/Pid.B/2023/PN Tte | 351 Paragraph 1 | 6 Months |
| 5 | Decision Number 68/Pid.B/2023/PN Tte | 351 Paragraph 1 | 4 Months |
| 6 | Decision Number 42/Pid.B/2023/PN Tte | 351 Paragraph 1 | 2 Months |

⁸ M N Amin, "Disparitas Pemidanaan Tindak Pidana Korupsi Dalam Praktik Pengadilan," *Lex Librum: Jurnal Ilmu Hukum* 9 (2022): 1-14, <https://doi.org/doi:10.46839/lljih.v9i1.635>.

| | | | |
|----|--|-----------------|---------------------|
| 7 | Decision Number 31/Pid.B/2022/PN Tte | 351 Paragraph 1 | 1 Month 15 Days |
| 8 | Decision Number 136/Pid.B/2022/PN Tte | 351 Paragraph 1 | 2 Months 15 Days |
| 9 | Decision Number 68/Pid.B/2019/PN Tte | 351 Paragraph 1 | 1 year 6 months |
| 10 | Decision Number 157/Pid.B/2019/PN Tte | 351 Paragraph 1 | 1 Year 10 Months |

Source: Ternate District Court Decision

According to the summary above, the ten cases exhibit variations in the imposition of criminal sentences by judges, with the same case violating Article 351 paragraph (1) concerning misdemeanors. This circumstance is exceedingly concerning and necessitates that all individuals, particularly law enforcement personnel, expand their knowledge of their profession and acquire the requisite competencies to execute their obligations impartially and to the best of their ability. To implement them, the Court must comply with the standards recognized by the legal community. The basic concept of legitimacy. The notion of legitimacy guarantees that the public, especially the defendant or convict, restricts the Court from exercising arbitrary discretion in determining whether actions may be categorized as offenses.⁹

It is imperative to conduct additional legal research to delve deeper into the factors contributing to criminal disparities in applying criminal penalties. The existence of criminal disparities in the criminal justice system will undermine public confidence in the courts and detract from the consistency of Indonesian Law. The problem is formulated as follows, taking into account the background information that has been explained earlier: "What are the factors that cause a criminal disparity in the imposition of criminal punishment committed by the judge, and what is the basis for the judge's consideration in deciding the criminal case in the trial?"

RESEARCH METHOD

This research is a doctrinal study aimed at assessing and recommending the advancement of certain notions through examining authoritative texts, which are effectively utilized to elucidate legal theories and conceptions. Doctrinal law research seeks to identify legal principles inside a legal event, offer justification, clarify, and uphold the coherence of the normative system about fundamental norms or doctrines. This study analyzes the differences in decisions made by the judges of the Ternate District Court. This research employs an approach to Legislation, concepts, cases, and interpretations. The information is secondary, comprising fundamental legal information such as court rulings and secondary legal sources, including legal concepts and pertinent citations. Material is obtained by collecting or taping from the web page for the Supreme Court Decision Directory. This research data is presented as a document, and the analytical technique employed is content analysis, which encompasses three components of

⁹ Mahrus Ali, *Asas, Teori Dan Praktek Hukum Pidana Korupsi* (Yogyakarta: UII Press, 2013). hlm.102

systematic content analysis: case selection, case coding, and analysis, to derive a thorough conclusion.

DISCUSSION

Criminal disparity factors in the imposition of criminal penalties committed by judges

One of the principles of law enforcement states that one acts against the Law and performs what the Law prohibits; in deception, however, one circumvents its judgment while preserving the language of the Legislation. Someone is deemed illegal if the action undertaken contravenes legal prohibitions.¹⁰ Criminalization is defined as determining and granting sanctions in criminal Law. "criminal" is generally interpreted as Punishment, while "criminal" is interpreted as Punishment.¹¹ Within the framework of the penal system, criminal acts are perceived as assaults on the rule of Law, stemming from the principle that the State, via its institutions of power, possesses the authority to delineate banned or mandated actions (criminal Law in the objective sense, *ius poenale*) and to impose penalties as prescribed by Law on individuals who engage in prohibited conduct or fail to perform the necessary steps (criminal Law in the personal sense, *ius puniendi*).¹² Alternatively, crime is perceived as a conflict between the State and the perpetrator.

Imposing a criminal sanction on an individual who commits a criminal act is critical to a successful criminal justice system. In this case, the magistrate should be able to determine the right criminal Punishment for the offender.¹³ As a result, the judge's role significantly influences the efficacy of a perpetrator's sanction. JM. Van Bemmelen, as referenced by Lamintang, clarified that the philosophy of penal Law is categorized as official crime law and material penal Law, which are further explicated as follows: Material criminal Law encompasses consecutively defined illegal activity, applicable basic norms and violations that threaten the act. Formal criminal justice prescribes how to commit a criminal offense and the discipline to be upheld during that event.¹⁴ Eddy O.S. Hiariej, quoted from van Hamel, Vos, and Lafave, explained the material legal theory and the formal penal Law as follows:

- a. Material criminal Law encompasses every aspect of the Law, including principles, prohibited acts, mandated acts, and penal repercussions for individuals who contravene or fail to adhere.
- b. Formal criminal Law is a legal framework designed to enforce material penal Law in the penal system, from the initial inquiry to the execution of court

¹⁰ Zainal and Hiariej Eddy O. S Arifin, *Fundamentals of Legal Science: Understanding the Rules of Legal Theory, Principles and Philosophy*, pert edition (Yogyakarta: Red & White Publishing, 2021). hlm. 123

¹¹ Topo Santoso, *Criminal Law An Introduction* (Jakarta: Rajawali Pers, 2020). hlm. 10

¹² Nefa Claudia Meliala, "Efforts to Involve the Participation of Victims and Offenders," *Veritas et Justitia* 1, no. 1 (2015): 111–35.

¹³ Gatot Sugiharto, "The Relevance of the Policy of Determining Social Work Crimes in the Penal System in Indonesia," *Jurnal Hukum Novelty* 7, no. 3 (2016): 83–96, <https://doi.org/10.26555/novelty.v7i3.a3936>.

¹⁴ Basto Daeng Robo Fakultas Dyah Rosiana Puspitasari, "Relevansi Filsafat Ilmu Hukum Dalam Pembentukan Metode Penelitian Hukum (Suatu Tinjauan Terhadap Pengaruh Konsep Filosofis Dalam Pengembangan Penelitian Hukum Kontemporer)," *Khairun Law Journal* 8, no. 1 (2024): 17–29.

decisions. It is characterized by its strict adherence to procedural processes and principles.¹⁵

It is evident from the aforementioned perspective that formal criminal regulation is a collection of regulations that regulate the application and enforcement of material criminal Law, whereas material criminal Law is composed of commands or prohibitions that have repercussions if they are not adhered to. One of the principal concepts of penalties is that Punishment on offenders can be ethically justifiable, not only because it positively impacts the Victim, the perpetrator, and other members of society. As an outcome, this philosophy is also known as the theory of racialism. Penalties are implemented to prevent future criminal activities and to reduce the likelihood of the perpetrator committing the same offense rather than as a result of an error.¹⁶

This criminal activity is intended to resolve disputes. Bringing a sense of harmony and balance to society will be achieved by resolving disputes caused by criminal activity. In his statement, L.H.C. Hulsman defined the penal system as the statutory regulations relating to criminal penalties and Punishment.¹⁷ Mr. Barda Nawawi Arief clarified that the principal aim of Punishment is to protect from any criminal activity. I will begin by safeguarding the community from illicit activities. The principle is to safeguard the public interest by preventing crime, preserving safety and security for everyone, and reestablishing equilibrium to settle conflicts and establish a sense of tranquility. The second aspect is the safeguarding and development of personalities. The primary goal is to re-socialize criminal offenders and prevent them from being arbitrarily imposed with illicit behaviors.¹⁸

Consequently, the examination and comprehension of the purpose and function of penalization are inextricably linked to the State of penal theories.

- a. In the Absolute Theory (*Vergeldingstheorie*), Punishment is perceived as a mechanism of vengeance against people who cause harm to those in the community. A state is empowered to impose criminal penalties on those who infringe upon protected legal rights and interests through the act of rape. The absolute idea posits that the penalty is administered only as retribution. This hypothesis is supported by Emmanuel Kant and Hegel, Nigel Walker, Pompe, Polak, et Herbart. This philosophy asserts that the offense necessitates retribution and that the offender must endure equivalent suffering as the Victim. The severity of the penalty depends on the nature of the offense.
- b. The Theory of Relative or the theory of purpose (*doel theory*) is predicated on the notion that crime is a means to maintain order (Law) in society. The purpose of crime is to prevent the occurrence of a crime in order to preserve public order. Based on the perspective of community defense, crime is an obligation that must be enforced (*noodzakelijk*). Crime exhibits three distinct characteristics to maintain public order: As per Frank von Liszt, criminalization is intended to either intimidate, enhance, or eradicate if it is no longer possible to enhance.

¹⁵ Eddy O.S. Hiariej, *Prinsip Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2018).hlm.15

¹⁶ Putra Perdana Ahmad Saifulloh, "Politik Hukum Pengaturan Organisasi Sayap Partai Politik Dalam Hukum Positif Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, no. 2 (2020): 17-32, <https://doi.org/10.24090/volksgeist.v3i2.3974>.

¹⁷ Rio Christiawan, "Evaluasi Kebijakan Moratorium Pada Perkebunan Kelapa Sawit," *Veritas et Justitia* 6, no. 1 (2020): 1-22, <https://doi.org/10.25123/vej.3364>.

¹⁸ Barda Nawawi Arief, *Objectives and Guidelines of Penal Punishment* (Semarang: Pustaka Magister, 2011).hlm.43

- c. Theories of Combination. The theory of the combined approach is predicated on the notion that crime should be motivated by the desire for retribution and that public order should be maintained simultaneously. This theory is implemented by accentuating one without erasing the other. According to Hugo de Groot, the perpetrator is responsible for the suffering they inflict; however, the severity of the suffering will be determined by the social benefits the perpetrator can tolerate within that limit.
- d. Modern Philosophy The three theories mentioned above are the source of these contemporary theories, as per Eddy O.S. Hiariej. As Wayne R. Lafave has stated, the purpose of crime is to serve as a deterrent, preventing criminals from committing similar offenses. Similarly, illicit activity informs the public about the distinctions between morally sound and immoral actions. In addition, rehabilitation is another objective of the *piscina*, as per Lavave. This implies that the perpetrators of crimes must be rehabilitated in a manner that is more conducive to their reintegration into society, thereby preventing them from committing the same offense.

Article 51 of Penal Code No. 1 of 2023 delineates the objectives of criminalization as follows: a) To deter criminal behavior through the enforcement of legal standards aimed at societal protection; b) To rehabilitate offenders by promoting guidance that fosters their development into constructive members of society; c) To address conflicts arising from criminal activities, thereby restoring equilibrium and instilling a sense of tranquility within the community; and d) To alleviate the shame experienced by offenders.

Article 54, paragraph (1) encompasses the subsequent penal recommendations: a) The mental State of the convicted offender; b) the purpose for the criminal act; c) details psychological disposition of the offender; d) Whether the offense was premeditated; e) The method employed in executing the wrongdoing; f) the outlook as well as actions of the perpetrator post-offense; g) the professional record and socio-economic circumstances for the offender; h) This criminal's subsequent behavioral implications; i) the impact of what was done on the Victim when their relatives; j) Forgiveness of the prey or their relatives; k) The importance of the judiciary within society.

In its basic form, the Code of Criminal Procedure defines a judge as a State judicial official legally permitted to render judgments. Concurrently, the judgment refers to a sequence of actions judges take to accept, examine, and determine criminal matters in line with the principles of freedom, honesty, and impartiality during court proceedings, as outlined in the Criminal Code (Article 1 paragraph (9)).

The defendant will be issued three categories of rulings by the Court or justices after the trial. These types of decisions are as follows: a) This occurs if the Court determines that the defendant's negligence for the acts charged against him is not legally and convincingly proven through the trial investigation (Article 191 paragraph (1)); b) If the Court determines that the act imposed against the accused is proven, yet it does not constitute a criminal act (Article 191 paragraph (2)); c) A criminal verdict The Court applies a penalty of Imprisonment to the defendant if it determines that the defendant is culpable of the criminal conduct accused against them (Article 193 paragraph (1)). The judge's decision is significantly influenced by

"juridical considerations for the perpetrators of the charged crime." In reality, juridical considerations serve as evidence of the elements (*bestendallen*) of a criminal act, deciding if the defendant's behavior is consistent with the criminal act billed by the prosecutor/public prosecutor. It is possible to implement this further, as the Amar/doctrine of the judge's decision will be directly influenced by the addition of these juridical considerations.¹⁹ In most cases, a judge will derive inferences from the facts at the trial, the defendant's statement and the evidence submitted and examined at the trial, in the choice made before "juridical considerations" in the justice process.

The following will explain the Court's deliberations that are juridical and non-legal:

- 1) Judicial considerations Judicial considerations, defined as aspects to be included in a decision, are grounded in the factors shown during the trial and by Law. The criteria encompass people prosecutor's charges, witness testimonies, the offender's declaration, and relevant legal statutes.
- 2) Non-jurisdictional factors The judge bases his decision on non-jurisdictional considerations and juridical perspectives: a. The consequences of the defendant's conduct. b. The defendant's condition (personal).

Additionally to the aforementioned juridical and non-jurisdictional factors, the legal Punishment imposed by the magistrate on the accused is influenced by aggravating and mitigating factors. These factors are as follows:

- 1) The following are criminal aggravating factors: a. Acts that disturb the community; b. The nature of the defendant's actions; c. Effects of actions that result from the offender's actions; and d. The defendant was ultimately convicted.
- 2) Matters that mitigate the crime include: a. Never getting convicted; b. Regretting what they did; c. Admitting their actions; and d. Behaving civilly in Court.

To ensure justice is achieved and paid, a jury must assess all pertinent legal and extralegal factors influencing their verdict. The basis of the judge's consideration in a case is a critical factor in the decision-making process, as the panel of courts' reasoning serves as the basis or material for the legal analysis needed to determine the defendant's ruling. The judge's decision-making process will be more reflective of the level of justice due to the more specific considerations employed. The Concept of the Judge's Consideration in the Decision of Criminal Evidence in Trial

The Concept of Judges' Considerations in Making Decisions on Criminal Cases

A judge is a critical component of law enforcement and justice. Therefore, the judge cannot decline to review, rule, and decide on a legal matter outside the Law. The Law is incapable of being adaptable; it is merely one stage in establishing a law, necessitating that one seek its origins in the justice system from justices. Judges must be acquainted with readings and adapt to the laws' norms, principles, and beliefs

¹⁹ Henry Lbn Toruan Donald et al., "Analisis Juridis Terhadap Disparitas Putusan Hakim Dalam Tindak Pidana Transaksi Elektronik Dan Pencucian Uang (Studi Putusan Nomor :1240/Pid.Sus/2022/PN. Tng Dan Putusan Nomor: 576/ Pid,Sus/2022/PN. Blb.)," *Jurnal Penelitian Hukum De Jure* 23, no. 4 (2023): 507, <https://doi.org/10.30641/dejure.2023.v23.507-522>.

by responding to the development of the Law that evolves in civilization.²⁰ The current criminal statutes in Indonesia, both general and unique, do not rigorously regulate the minimum limit of the possibility of jail time for perpetrators of crimes, which is why the variables that impact judges in criminalizing defendants are relevant.²¹ This minimum limit is not present, allowing the judge to impose a criminal sentence more flexibly. As a result, this frequently results in disparities in Punishment, which are frequently referred to as criminal disparity.

Muladi and Barda Nawawi Arief, as cited by Yusti Probowati Rahayu, establish a boundary for the permissible disparity of the crime. This boundary is determined by the reasonable justification that can be accepted or the balance of Punishment for the permissible disparity. Harmonious principles must balance Punishment. Compatible with the justice of the convict, compatible with the justice of the community, compatible with the decisions of other judges in analogous cases, and in line with current judgments.²² Furthermore, the adagium in society, which is also a principle in penal Law, asserts that "There is no offense without culpability," implying that the crime must be in line with the faults of others.²³ This can result in vigilante actions when perceived as contradictory because of the absence of a rational basis to explain the disparity.

According to Barda Nawawi Arief, the implications of this disparity on the ruling of the Court are numerous. Certainly, the community may develop a sense of mistrust toward the community due to the crime inequality, which lacks a foundation. Secondly, there is a feeling of unhappiness about how they are dealt with compared to other perpetrators. Third, it subsequently invokes a sense of injustice. Lastly, it incites animosity toward the system, particularly within the courthouse. At last, it may lead to feelings of distrust toward law enforcement authorities within the framework of the criminal justice system.²⁴ As a result, a significant issue will serve as an expression and indicator of the system's inability to attain equality of justice in the State of Law while eroding public confidence in handling the criminal justice system.²⁵

The criminal disparity in Harkristuti Harkrisnowo can manifest in various ways, including a. Disparity between identical criminal acts; b. Disparity between criminal acts of equal severity; c. Criminal disparity determined by a panel of judges; and d. Disparity among crimes is enforced by different panels of justices for an identical

²⁰ Krishna Gumelar, "Soul Shaking as Reason for Criminal Abolition: The Dilemma Between Legal Certainty and Justice," *De Jure: Jurnal Hukum Dan Syar'iah* 13, no. 1 (2021): 113–25, <https://doi.org/10.18860/j-fsh.v13i1.12056>.

²¹ Satria Manda Adi Marwan, "The existence of life imprisonment in Indonesia is reviewed from the perspective of the objectives of modern criminal law," *De Jure: Jurnal Hukum Dan Syar'iah* 13, no. 1 (July 28, 2021): 140–55, <https://doi.org/10.18860/j-fsh.v13i1.12025>.

²² Yusti Probowati Rahayu, *Behind the Judge's Decision on Legal Psychology Studies in Criminal Cases* (Surabaya: Penerbit Srikandi, 2005). hlm.44

²³ Mahrus Ali and Ari Wibowo, "Victim-Oriented Compensation and Restitution," *Juridika* 33, no. 2 (2018): 260, <https://doi.org/10.20473/ydk.v33i2.7414>.

²⁴ Donald et al., "Analisis Juridis Terhadap Disparitas Putusan Hakim Dalam Tindak Pidana Transaksi Elektronik Dan Pencucian Uang (Studi Putusan Nomor :1240/Pid.Sus/2022/PN. Tng Dan Putusan Nomor: 576/ Pid,Sus/2022/PN. Blb)."

²⁵ Muchlas Rastra Samara Muksin and Nur Rochaeti, "Pertimbangan Hakim Dalam Menggunakan Keterangan Ahli Kedokteran Forensik Sebagai Alat Bukti Tindak Pidana Pembunuhan," *Jurnal Pembangunan Hukum Indonesia* 2, no. 3 (2020): 343–58, <https://doi.org/10.14710/jphi.v2i3.343-358>.

crime. The judge's decision is influenced by the following factors: a. personal variables; b. aspects of the Legislation itself; c. interpreting factors; d. political factors, and e. social factors. Criminal disparity refers to the inconsistent application of penalties for identical criminal crimes or criminal acts of similar severity without a clear rationale.²⁶ The lack of penal rules for judges to follow when imposing criminal penalties is one issue that might lead to criminal disparities. According to Sudarto, the guidelines for sentencing will facilitate the judge's assessment of the defendant's Punishment if it has been shown that the conduct occurred against him.

The sentencing guidelines include objective factors about the offender, ensuring that consideration of these elements leads to a more suitable and comprehensible rationale for the sentence imposed by the judge's judgment. Reviewing the factors that contribute to criminal disparity from a theoretical, juridical, and empirical standpoint is feasible. According to a legal theoretical point of see, criminal disparity is caused by the existence of

- 1) Judicial independence and freedom are guaranteed in the 1946 Constitution of the Republic of Indonesia. According to the highest Court for the Republic of Indonesia's book *Pedeoman Behavior of Judges (Code of Conduct)*, which defines the autonomy and freedom of judicial power, judges in Indonesia must uphold several fundamental moral principles inside and outside their workplaces.
- 2) The current judiciary power Law Article 1 of Law No. 48 of 2009 about the judiciary guarantees the basis of court discretionary authority.²⁷
- 3) Theory of Dissenting Opinion H.F. Abraham Amos defines dissenting opinion as a disagreement among a case's legal rulings. In an intercultural and diversified society, dissenting opinions upon a statute are increasingly widespread ("Definition and Concept of Dissenting Opinion,"

Mackenzie identifies many ideas or techniques that judges may use while deliberating the imposition of a decision in an instance, as follows:

- 1) Balance Theory represents an equilibrium within the stipulations established in line with the Law and the goals of the stakeholders engaged in the matter, including considerations about the local society, the opponent's passions, or a victim's rights.
- 2) The Art and Intuition Approach Theory posits that the pronouncement of a decision is a matter of discretion or power. The Court will use judgment in determining the right severity of the penal sentence for every offender, considering the circumstances of the accused and the public prosecutor. The courts' creative methodology in rendering a ruling is mostly influenced by instinct or intuition and the judge's expertise.
- 3) Theory of Approach Experience The judge's expertise helps manage everyday instances, enabling her to discern the effects of the verdict in a criminal case pertaining to the perpetrator, the innocent party, or society.
- 4) Theory of the Scientific Method This theory posits how the imposition of a criminal sentence must be executed methodically and with prudence, particularly about prior rulings, to guarantee the uniformity of the final conviction. This scientific method serves as an example of caution that a judge

²⁶ Nugroho, "Punishment Discrimination in Criminal Cases of Theft with Aggravation."

²⁷ Ayub Mursalin, "Legalitas Perkawinan Beda Agama: Mengungkap Disparitas Putusan Pengadilan Di Indonesia," *Undang Jurnal Hukum* 6, no. 1 (2023): 113-50, <https://doi.org/10.22437/ujh.6.1.113-150>.

should not base their decision on their gut feeling or instinct; rather, they ought to have legal expertise and scientific understanding when handling an issue that must be determined.

- 5) Theory of Ratio Decidendi Ratio Decidendi, or rationes decidendi, is a Latin phrase often interpreted as the rationale for the choice. This theory is founded on a basic philosophical framework that considers every pertinent consideration regarding the matter at hand and then looks for relevant regulations and laws to use as a legal foundation for rendering decisions. The judge's considerations are founded on a clear desire to uphold the rules and ensure that the parties to the case receive fairness.²⁸

From an empirical standpoint, the defendant's psychological, social, economic, and public opinions are considered, and the judge's assessment could be influenced by the evidence presented during the trial. A felony discrepancy cannot occur if the Court decides based on dubious proper principles and uncertainty. The criminal procedural Legislation acknowledges that justifications must support a judgment.²⁹ According to Article 50, paragraph (1) of the Judicial Power Law, in conjunction with Article 197, paragraph (1), letters d and f of the Criminal Procedure Code, the decision of the Court must not only articulate the rationale and foundation for the ruling but also reference specific articles of applicable laws and regulations or unwritten legal sources that underpin the adjudication.³⁰ Article 5, section (1) of the Law on judiciary stipulates that a court's responsibilities to examine, uphold, and understand societal norms or notions of justice necessitate the application of legal concerns or logic, both juridically and non-juridically, as a foundation for decision-making within criminal prosecutions.

The social adage, also a tenet of Indonesian criminal Law, says, "There is no crime without guilt," or *geen straf zonder Schuld*, which means that the offense must be related to one another's shortcomings. Since there is no justification for this discrepancy, violent actions may result if seen as inconsistent. According to Roeslan Saleh, one can only be prosecuted for a crime once one first committed a crime. That is unjust if someone is suddenly held accountable for something they did not commit.³¹

Consequently, in the future, according to the provisions of Criminal Code Number 1 of 2023, Imprisonment shall be avoided wherever practicable, provided that the conditions outlined in Articles 51 to 54 are met. a. the accused is a child; b. the offender is over 75 (seventy-five) a while old; c. the defendant has dedicated a criminal act over the initial time; d. the Victim's losses and getting are not too wonderful; e. the defendant has paid harm to the Victim; f. the defendant is not aware which the Criminal Acts dedicated will cause excellent losses; g. The

²⁸ Bagir Manan, *Judges and Criminals, Varia Perjudian Law Magazine No. 249* Edition (Bandung: Ikahi, 2006).hlm.20

²⁹ Andi Sofyan and Abd. Asis, *Criminal Procedure Law: An Introduction* (Jakarta: Kencana Prenadamedia Group, 2014). hlm.16

³⁰ Aulia Milono, "Formulation of Guidelines for the Imposition of Criminal Sanctions Against State Administrators Who Commit Corruption Crimes in Indonesia," *Arena Hukum* 7, no. 1 (2014): 117-30, <https://doi.org/10.21776/ub.arenahukum.2014.00701.7>.

³¹ Silvia Dewi, "Perumusan Pertanggungjawaban Tindak Pidana Korporasi Dalam Berbagai Undang Undang," *Arena Hukum* 13, no. 01 (2020): 135-56, <https://doi.org/10.21776/ub.arenahukum.2020.01301.8>.

Criminal Act occurred due to a strong encouragement from another person; h. The Victim of the crime encourages or motivates the occurrence of the crime; i. The Criminal Act results from a circumstance that is unlikely to be repeated; j. the defendant's personality and behavior convince him that he will not commit another Criminal Offense; k. incarceration will cause wonderful suffering to the defendant or his family; l. coaching outside the penitentiary is expected to be effective for the accused; m. a lighter sentence will not reduce the extent of the crime committed by the defendant; n. The crime happened among the relatives and others. The crime occurred due to forgetfulness.

Creating the ideal of justice that permeates society is one of the responsibilities of justices, and in order to uphold the principles of substantive justice, the courts must consider variations in criminal Punishment. Judges must listen to the defense and consider the Victim's arguments when making decisions to behave fairly and stop using illegal coercion. This may be an attempt to reduce the difference in Punishment. This is reduced by using legal logic, which includes: a. articulating the content of the Law accurately; b. understanding legal errors; c. applying induction and deduction reasoning appropriately; and d. find and enforce the Law. However, criminal penalties cannot be completely abolished. For the Court to decide what type of criminal Punishment to apply to the offender, they need guidelines. Following these rules makes it possible to apply criminal penalties clearly and uniformly while adhering to punishment perception.

CONCLUSION

The disparity of judges in deciding the same case is not less important in Indonesian criminal Law because, in practice in several courts, especially in the first level of minor criminal cases, there are many disparities. The problem of disparity in criminal Law has always existed, but what needs attention is a disparity that is not reasonable. The reasons for these differences can be examined from a theoretical, legal, and empirical point of view. From the perspective of legal theory, it is believed that the independence and freedom given to judges in the 1945 Constitution of the Republic of Indonesia and Law number 48 of 2009, the current judicial authority, as well as the theory of ratio decidendi, dissent, balance, art and intuition, experience, and science, are the reasons behind disparities in criminal activities. Beyond legal difficulties, the components of the revised Criminal Code challenge theoretical Law, as the prior Legal Act lacked provisions for establishing a minimum criminal sentence for the offender. The judge's assessment of the plaintiff's circumstances, encompassing character, social and economic status, and public opinion, may also be swayed by the evidence provided during the trial. The process of proof, which mainly uses traditional or conventional methods, along with the fact that the judge still decides how lenient the defendant's sentence should be given due to the severity of the determination, is an additional obstacle and difficulty that judges face when making decisions.

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