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A Process to Determine Aggravating and Mitigating Circumstances in an Attempt to Assess the Extent of Criminal Charges in Cases Involving Corruption in Indonesia

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Abstract

This study examines the legal philosophical basis for determining aggravating and mitigating factors in sentencing, identifies the causes of policy disparities in their application, and formulates an ideal policy for public prosecutors in determining criminal charges. This study employs a normative juridical method with several approaches, including: (1) the legislative approach, (2) the conceptual juridical approach, (3) the historical approach, and (4) the comparative approach, to analyze and examine the issue comprehensively. The research findings indicate several key considerations: (1) the need to enhance public prosecutors' understanding of the philosophical basis for determining aggravating and mitigating factors in criminal prosecutions, (2) the necessity of technical guidelines or regulations to establish ideal policies for determining these factors, and (3) in corruption cases, public prosecutors must explicitly explain (a) the defendant's actions, (b) the consequences of those actions, and (c) external factors related to the corruption offense. These findings emphasize the importance of enhancing public prosecutors' understanding of the philosophical basis for determining aggravating and mitigating factors in criminal prosecutions. They also highlight the need for technical guidelines or regulations to establish ideal policies. In corruption cases, public prosecutors must explicitly explain the defendant's actions, the consequences of those actions, and external factors related to the corruption offense.

Keywords

Aggravating circumstances and mitigation, Corruption, Justice, Legal certainty, Prosecution

INTRODUCTION

Corruption is an extraordinary crime faced by almost all countries in the world today (Van Dijk et al., 2021; Nur-tegin & Jakee, 2020). Therefore, Anne Peters states that corruption is a violation of international Human Rights, thus requiring law as the basis of norms that regulate human behavior itself because law is connected to the existence of humans; without humans, there is no law (Peters, 2018).

A figure in Sociological Jurisprudence, Roscoe Pound, stated that criminal law policy (criminal law policy) is one of the efforts in combating crime in the rational enforcement of criminal law, therefore the implementation of law enforcement is a systematic authority and an integrated value from the stages of investigation, prosecution, adjudication by the court, and correctional institutions (Spyropoulos et al., 2023).

One of the crucial issues at the moment is the disparity in the enforcement of anti-corruption laws (Brody et al., 2020). Disparities in law enforcement are usually viewed narrowly, referring only to the disparities that occur in court

rulings, particularly regarding the differences in the application of the law to two or more similar corruption cases, but prosecuted under different legal provisions or offenses (Olujobi & Yebisi, 2023; Dandurand, 2019). However, if disparities in law enforcement are viewed broadly, the disparities that occur are not only related to the rules in the rulings, but disparities in law enforcement also begin to occur at the investigation and prosecution stages (Davis, 2021).

Such conditions cannot be denied that it can occur at the prosecution level, that is, disparities in the determination of aggravating and mitigating circumstances to determine the severity of charges in corruption cases (Lokanan & Masannagari, 2021). The application of aggravating and mitigating circumstances is a substantial and very important matter that must be properly observed and considered by the Public Prosecutor, because it is a consideration for the Public Prosecutor in determining the severity of the criminal charges to be prosecuted against the defendant (Januari & Waluyo, 2024; Ouziel, 2021).

Other than the huge literature on corruption law enforcement, not much research has comprehensively studied the inconsistencies that arise in the application of aggravating and mitigating circumstances in the course of prosecution. Earlier studies have concentrated more on the inconsistencies concerning different sentencing outcomes than upon the prosecutorial decision-making process. This loophole in the literature calls for a systematic analysis of how aggravating and mitigating factors are treated during corruption cases. The purpose of this research is to find out the legal provisions regulating aggravating and mitigating circumstances in corruption cases and to analyze the degree of their influence upon prosecutorial decision-making. Finding inconsistencies in their application will go a long way in creating a more just and standardized prosecutorial practice in corruption cases.

THEORETICAL FOUNDATION

The criminal act of corruption does not exist without a cause, but everything returns to the behaviour and mental attitude and integrity of the human being itself, hence there are several theories that can be put forward as follows:

The Working Theory of Law

The work of law in people's lives is very important to be observed because if the law can work well in society, it can be ensured that the law will be a means of realizing a prosperous society. This is inseparable from the nature of the law itself, which is to serve the needs of the community, including protecting the interests of the community. Therefore, the law that has been made, must be seen how it works in society (Durkheim, 2023).

Criminal Policy Theory

Criminal policy is an effort to determine various policy measures to overcome crime. Therefore, according to Carloni & Cantone (2022) that criminal policy discusses repressive measures while not ignoring preventive measures to prevent widespread crime. Thus, it shows that criminal policy is an integral step because in order for the policy to be effective, it must be implemented in a manner that is consistent with the law.

Theory of Criminal Liability

According to Sjawie (2015), criminal Liability means that a person who has committed a criminal act is not yet subject to punishment, but he must be held accountable for his actions that have been committed, if an element of guilt is found on him because a criminal act consists of two elements of A Criminal Act (Actus Reus) and A Criminal Intent (Mens Rea). According to the experts' opinions, it can be concluded that criminal responsibility occurs when a person is deemed proven to have committed a criminal offense so that they must be responsible for the criminal offense that has been committed, namely they will be sentenced to criminal punishment. Thus, criminal responsibility becomes a form of settlement of a criminal offense. This means that by being held criminally responsible, the criminal offense that occurred will be considered resolved because the perpetrator of the criminal offense has been held responsible for his criminal act and on the other hand the victim has received legal certainty and justice (Kholiq & Gunarto, 2021).

Theory of Punishment

According to Brooks (2021), in daily language, the term giving or imposing punishment is called punishment, which is the provision of sanctions in the form of a special suffering to someone who has actually committed an act that is expressly formulated and threatened with punishment by law. According to this understanding, it shows that there is a correlation between punishment and the role of the public prosecutor in conducting prosecution, which is more clear that punishment or sanctioning is a stage after the public prosecutor conducts criminal prosecution and after the judge gives a decision on punishment with reference to the demands of the public prosecutor, so that it is expected to provide legal certainty, expediency and a sense of justice.

MATERIALS AND METHODS

The normative legal method is used in this research because it involves the study of law, norms, principles, and doctrines in studying the legal framework of aggravating and mitigating circumstances in corruption cases in Indonesia. The investigation is a systematic survey of the legal sources and mandates encoded in normative provisions, legal theories, historical development, and case law. The research was conducted through four main approaches:

Statutory Approach

This study approach includes the relevant law and regulations applicable to corruption offenses and penalties that take place in Indonesia. It includes the analysis of statutory provisions such as the Indonesian Criminal Code (KUHP), Anti-Corruption Law, and other related legal instruments.

Conceptual Approach

This understanding comprises those of the legal concepts, principles, and doctrines with which aggravating and mitigating circumstances in sentencing are informed. This gives a theoretical foundation to the policies in sentencing and how they shape the final judicial verdict.

Historical Approach

This approach grounds pertinent findings for the reform of municipal law from various argumentative perspectives in a historical framework. Then, the study will involve an overview of the legal theories and phenomena in the past concerning violence against women within the context of sexual corruption.

Case Approach

This approach looks at the analysis of judgments (jurisprudence) to know how they have used and interpreted aggravating or mitigating factors in corruption cases in Indonesia. By reviewing those landmark cases, we know the trends in the reasoning of the courts against the background of sentencing.

Commes unto these approaches to give a study which will holistically accommodate analysis of the law in relation to aggravating and mitigating factors while determining indictment for crimes which have to do with corruption in Indonesia.

RESULTS AND DISCUSSION

The Philosophical Basis of Legal Policy for determining aggravating and mitigating circumstances in an attempt to assess the extent of criminal charges in cases involving corruption in Indonesia

The policy of determining aggravating and mitigating circumstances in determining the severity of criminal charges for defendants in corruption cases in Indonesia is a juridical aspect that must be considered and understood properly by the Public Prosecutor. This is because the criminal charges in corruption cases filed by the Public Prosecutor are expected to not only provide legal certainty but also be able to provide a sense of justice and legal benefits to all parties in protecting the interests of the state or government, society and the interests of the perpetrators of corruption themselves (Syaraf & Syahbandir, 2024).

Understanding the philosophical foundation of law related to “The policy of determining aggravating and mitigating circumstances to determine the severity of charges for defendants in corruption cases” will assist the Public Prosecutor in applying the law appropriately and proportionally, because in essence the philosophical foundation of law is a view of the values that underlie the existence of laws that have relevance to corruption and the perpetrators of corruption so that they can be analyzed by the Public Prosecutor to determine aggravating and mitigating circumstances in determining the severity of criminal charges for perpetrators of corruption.

In formal juridical terms, the philosophy of corruption law is based on the philosophical basis in Law Number: 31 of 1999 as amended by Law Number: 20 of 2001 concerning the Eradication of Corruption, which shows that there are two aspects that encourage the issuance of the law, which is:

- a. The crime of corruption is seriously detrimental to the state's finances or the state's economy
- b. The crime of corruption hinders national development and must be eradicated in order to realize a just and prosperous society based on Pancasila and the 1945 Constitution.

Therefore, the “policy of determining aggravating and mitigating circumstances” which serves as a filter to decide the severity of the criminal charges imposed on the defendant must be appropriate, proportional and fair to the state, government, society and the defendant himself so that it is in line with the philosophical basis of the crime of corruption.

The Factors That Cause the Disparity in Determining Aggravating and Mitigating Matters to Determine the Severity of Criminal Charges for Defendants in Corruption Cases

Disparity is one of the things that usually happens and is still questioned in criminal law enforcement, including in the handling of corruption cases (Nandang & Fakrulloh, 2024). In General, the issue of disparity in the handling of corruption crimes only refers to the disparity in criminal charges filed by the Public Prosecutor and the disparity in sentencing decisions by judges, but if we take a good look at it, the disparity that occurs in the criminal charges made and arranged by the Public Prosecutor is a unity that cannot be separated from “Determination of aggravating and mitigating circumstances in criminal charges made by the Public Prosecutor in corruption cases.”

The results of the research found that in the jurisdiction of the East Nusa Tenggara High Prosecutor's Office there are still disparities and inconsistencies in the determination of “aggravating and mitigating circumstances” to determine the severity of criminal charges for defendants in corruption cases.

Based on a review of several corruption cases that were handled by the Public Prosecutor, both corruption cases that were prosecuted separately (displitsing) and corruption cases that were not splitsing cases, it shows that the Public

Prosecutor in determining “aggravating circumstances” and mitigating circumstances in the criminal charges against the defendant still shows the disparity contained in the criminal charges made by the Public Prosecutor including:

- The Public Prosecutor did not fully elaborate on all issues relating to the application of the articles proven during the trial, thus showing disparity.
- The Public Prosecutor did not have the same context in describing the aggravating and mitigating circumstances of the same case but the prosecution was separate (displitsing).
- The Public Prosecutor did not have the same context on matters of substance in describing aggravating and mitigating circumstances in cases where the prosecution was not separate (Splittings).

That this condition occurs because it is caused by several factors, including:

1. *There is no technical regulation as a guideline in determining aggravating and mitigating circumstances against the defendant in criminal charges in corruption cases*

According to the results of the research, it is known that one of the factors that can affect or cause disparity in the “Determination of aggravating and mitigating circumstances” against the defendant in the criminal indictment of the Public Prosecutor in corruption cases is the absence of technical regulations that can be used as binding guidelines for the Public Prosecutor in the “Determination of aggravating and mitigating circumstances” in the criminal indictment of the Public Prosecutor. This is based on the results of interviews with five prosecutors who also act as Public Prosecutors in corruption cases in Indonesia, especially in the East Nusa Tenggara High Prosecutor's Office, who basically stated that the main factor that can influence and cause disparities in the determination of “aggravating and mitigating circumstances” in criminal indictments made and prepared by Public Prosecutors in corruption cases is the absence of technical regulations that can be used as guidelines that must be obeyed and implemented by Public Prosecutors.

The five prosecutors who also act as Public Prosecutors who handle corruption cases in the East Nusa Tenggara High Prosecutor's Office from the investigation, investigation and prosecution stages and carry out executions against convicts where the case has received legal force (Inkrach), including:

- Ridwan Sujana Angsar S.H., M.H; Position of Assistant for Special Crimes at the East Nusa Tenggara High Prosecutor's Office.
- Salestinus Guntur, S.H; Position of Head of Investigation Section at the Special Crime Division of the East Nusa Tenggara High Prosecutor's Office.
- Morest A Kolobani, S.H; Position of Head of Execution and Examination Section at the Special Crime Division of the East Nusa Tenggara High Prosecutor's Office.
- Marthinus Tondur Suluh, S.H., M.Hum; Position of General Crime Examiner at the Supervision Division of the East Nusa Tenggara High Prosecutor's Office.
- Herry Franklin, S.H; Functional Prosecutor Position at the East Nusa Tenggara High Prosecutor's Office.

The five opinions of the Public Prosecutors essentially state that there is no technical regulation that specifically regulates the “Determination of aggravating and mitigating circumstances” which can be used as a guideline by the Public Prosecutor in determining aggravating and mitigating circumstances in the criminal indictment (Requisitoir).

2. *Human Resource Factors (HR) of Public Prosecutors who handle corruption cases*

The second factor that can affect and cause disparities is the Human Resources (HR) of Public Prosecutors in the Legal Area of the East Nusa Tenggara High Prosecutor's Office who handle corruption cases.

The Legal Area of the East Nusa Tenggara High Prosecutor's Office has a small number of prosecutors with various levels of education spread across the East Nusa Tenggara High Prosecutor's Office and 17 (Seventeen) District Attorney's Offices and 2 (Two) District Attorney Branch Offices as in the following table :

Table 1 Data on the Number of Prosecutors by Education Level in the Legal Area of the East Nusa Tenggara High Prosecutor's Office in 2024

No	Name of Prosecutor's Office	Number of prosecutors	Education		
			S1	S2	S3
1	High Prosecutor's Office NTT	46	15	32	-
2	Kejaksaan Negeri Kota Kupang	9	2	7	-
3	State Prosecutor's Office TTS	8	6	2	-
4	State Prosecutor's Office TTU	8	5	2	1
5	State Prosecutor's Office Belu	9	6	3	-
6	State Prosecutor's Office Ende	9	7	2	-
7	State Prosecutor's Office Sikka	9	5	4	-
8	State Prosecutor's Office East Flores	9	8	1	-
9	State Prosecutor's Office Kupang Regency	12	7	5	-
10	State Prosecutor's Office Manggarai	7	5	2	-
11	State Prosecutor's Office Sabu Raijua	7	5	2	-
12	State Prosecutor's Office Ngada	10	10	-	-
13	State Prosecutor's Office East Sumba	8	4	4	-
14	State Prosecutor's Office West Sumba	9	6	3	-

15	State Prosecutor's Office Alor	11	9	2	-
16	State Prosecutor's Office Rote Ndao	10	9	1	-
17	State Prosecutor's Office Lembata	8	4	4	-
18	State Prosecutor's Office West Manggarai	10	9	1	-
19	State Prosecutor's Branch Waiwerang	3	2	1	-
20	State Prosecutor's Branch Reo	3	3	-	-
Total		206	127	78	1

That according to these data, not all of them are involved in handling corruption cases because there are prosecutors who are assigned to handle general criminal cases as well as handling civil and state administrative cases and other duties in accordance with applicable laws and regulations. In addition, there are several prosecutors who for certain reasons such as health and age are no longer involved in handling cases, so it can be seen that there is still a shortage of prosecutors, even those prosecutors who are already there, when viewed from the level of education, those with a Bachelor's degree (S1) are more than those with a Master's degree (S2), even prosecutors with a Doctoral degree (S3) are only one person, this of course can have an impact on the performance of handling corruption cases.

3. *Factors caused by the defendant in corruption cases*

One of the factors that influence and cause disparity is the actions of the defendant in corruption cases.

According to the results of the study of eighteen corruption cases, it shows that there are several reasons that cause the consequences of the defendant's actions in corruption cases to be a factor in the occurrence of disparities in raising aggravating and mitigating circumstances for defendants in corruption cases, namely:

a. State financial losses incurred as a result of the defendant's acts of corruption

Theoretically and normatively, state financial losses / the state economy are an important element in the regulation of corruption crimes. This can be seen in the offense formulation of Article 2 and Article 3 of Law of the Republic of Indonesia Number: 31 of 1999 as amended by Law of the Republic of Indonesia Number 20 of 2001 concerning the Eradication of Corruption, which places state financial losses as part of the elements of Article 2 and Article 3 and emphasizes that Article 2 and Article 3 of Law of the Republic of Indonesia Number: 31 of 1999 as amended by Law of the Republic of Indonesia Number 20 of 2001 concerning the Eradication of Corruption are both formal and material offenses because to prove the acts of Article 2 and Article 3, it is necessary to prove the existence of state financial losses.

According to a review of eighteen corruption cases that were prosecuted by the Public Prosecutor and have been legally binding (Inkrach), not all of the Public Prosecutors who handled these cases placed the factor of state financial losses as one of the aggravating or mitigating factors, in which case the state financial loss factor is one of the very substantial benchmarks to be considered as a real and detailed aggravating or mitigating factor as stated in the Constitutional Court Decision Number: 25/PUU-XIV/2016 dated January 25, 2017.

b. The defendant's attitude during the trial process and the defendant's living conditions.

According to the results of a study of eighteen corruption cases handled by the Public Prosecutor, it shows that there are also disparities in the determination of aggravating and mitigating circumstances related to "the defendant's attitude during the trial process and the defendant's living conditions."

The convoluted attitude of the defendant during the trial was used by the Public Prosecutor as one of the aggravating circumstances, while "the defendant admitted and regretted his actions" and "the defendant was polite and cooperative during the trial" as well as "the defendant has never been convicted" were placed by the Public Prosecutor as mitigating circumstances for the defendant.

Ideal Policy for Determining Aggravating and Mitigating Factors to Determine the Severity of Criminal Charges for Defendants in Corruption Cases in Indonesia

That in order to anticipate or at least minimize the occurrence of disparities in the determination of aggravating and mitigating circumstances by the Public Prosecutor in the indictment, "Ideal determination of aggravating and mitigating circumstances as a parameter that must be implemented by the Public Prosecutor in preparing criminal indictments in corruption cases, must refer to several factors as in the following table:

Table 2 Aggravating and Mitigating Circumstances in Corruption Cases

No	Aggravating Circumstances	Relieving matters
1.	Factors of the defendant's actions in corruption cases:	
	<ul style="list-style-type: none"> The defendant's role as the main perpetrator and/or as an advocate. The defendant's actions are directly related to the position, position and authority that determine the occurrence of corruption crimes. Acts of corruption committed on a wide scale and / or national scale. The defendant's actions are related to natural disaster management. 	<ul style="list-style-type: none"> The defendant's role as a co-conspirator or as an accomplice. The acts of corruption committed were small-scale.

2. Factors resulting from the defendant's actions in corruption cases: <ul style="list-style-type: none"> • The amount of state financial losses is relatively large. • The state financial losses incurred have a broad impact and / or national scale. • Disrupting state stability/security. • There is no return of state financial losses. 	<ul style="list-style-type: none"> • The amount of state financial loss is relatively small. • The state financial losses incurred do not have a wide impact. • There is a return of state financial losses.
3. Factors outside the crime of corruption but related to the corruption case: <ul style="list-style-type: none"> • The defendant is a recidivist. • The defendant was convoluted in providing testimony in court. • The defendant was not polite during the trial. • The defendant did not regret his actions. • The defendant has a good education or social status in the community. • The crime of corruption has become a public concern. 	<ul style="list-style-type: none"> • The defendant was a first time offender. • The defendant was honest in providing testimony. • The defendant was polite during the trial. • The defendant regretted his actions and promised not to reoffend. • The defendant has family responsibilities or the defendant is the backbone of the family. • The defendant is elderly.

CONCLUSION

According to the description above, it can be concluded as follows:

1. The philosophical basis for the policy of determining aggravating and mitigating circumstances for the defendant in the Public Prosecutor's Criminal Charge Letter is a filter in determining the severity of the criminal charges against the defendant in a corruption case is to create a just and prosperous society.
2. The occurrence of disparity carried out by the Public Prosecutor in determining aggravating and mitigating circumstances in the Criminal Charge Letter is caused by several factors, which is : First, there is no guideline / circular letter that regulates the determination of aggravating and mitigating circumstances in the indictment, Second, the Human Resources of the Public Prosecutor, Third, the consequences caused by the defendant's actions.
3. The policy of determining aggravating and mitigating circumstances in criminal indictments in corruption cases carried out by researchers as a novelty is: First, there needs to be a regulation related to the determination of aggravating and mitigating circumstances in Criminal Charges in corruption cases as a guideline that must be implemented by the Public Prosecutor. The regulation must outline several factors, namely: First, factors of the defendant's actions, Second, factors resulting from the defendant's actions, Third, factors outside the corruption crime but related to the corruption crime committed by the defendant.

IMPLICATIONS

That from some conclusions of the research results that have been described by researchers, several implications have been born as a logical consequence of the research carried out, such as:

1. Juridical Implications

The conclusions of the research results also have juridical implications, namely the need for renewal / improvement of statutory provisions related to the systematics and format of Criminal Charges in corruption cases.

2. Practical Implications

By looking at the description of the conclusions of the existing research results, it can implicatively provide practical benefits in general to law enforcers and especially for Public Prosecutors in understanding and applying their duties and authorities in the field of prosecuting corruption cases.

SUGGESTIONS

1. For the development of science related to the prosecution of corruption cases, it is suggested that academics and students can conduct more in-depth research as an effort to prevent disparities in the determination of aggravating circumstances and matters in Criminal Charges in corruption cases.
2. To provide legal certainty and legal justice, it is recommended that the Government and the House of Representatives of the Republic of Indonesia reform the Criminal Procedure Code so that it can accommodate the systematic regulation of the Criminal Charge Letter that must be made by the Public Prosecutor as the Criminal Procedure Code has also regulated the systematic Sentencing Decision that must be made by the Judge.
3. To anticipate or minimize the occurrence of prosecution disparities in corruption cases, the Public Prosecutor in the application of aggravating and mitigating circumstances in the Criminal Charge Letter must consistently describe and fully describe all matters relating to the defendant's actions, the consequences of the defendant's actions, and factors outside the crime of corruption but related to the corruption case committed by the defendant.

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The idea and design of the study were contributed to by all authors. NVB conducted the data analysis and literature search. NVB wrote the original draft of the manuscript, SS and HH provided feedback on earlier drafts. The final manuscript was read and approved by all writers.

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