

Policy Update Of The Criminal Sanction Formulation For Corporations In Corruption Case

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Abstract : *The regulation of corporations as subjects of criminal acts in the Indonesian legal system has basically been formulated explicitly in laws that are specific to those outside the Criminal Code (WvS), one of which is the Corruption Eradication Act. This research is a doctrinal research with a statute approach and supported by a comparative approach. The conclusion of this study shows that the policy of formulating criminal sanctions for corporations in corruption cases at this time is in the form of a fine as a principal crime, while additional crimes are in the form of: (1) Confiscation of goods resulting from corruption (2) Payment of replacement money (3) Closing of all or part of the company (4) Revocation of all / part of certain rights or certain advantages. As for reforming the formulation of criminal sanctions policy for the future, it can be carried out by making additional penalties for corporations in corruption cases a principal crime, so that the main criminal sanctions for corporations are more varied.*

Keywords: *Renewal, Formulation, Criminal, Corporations, Corruption.*

1. INTRODUCTION

The increasing role of corporations in various fields of economic, social and political life in the global era, marked by the emergence of multi-national corporations (MNCs), is inevitable. On the one hand, this role has a positive impact because it facilitates the fulfillment of the needs of human life, but on the other hand, it is necessary to be aware of the negative impacts that arise, namely the occurrence of globalization of crimes that are very dangerous to humanity. In general, Steven Box states that the existence of corporations in modern society raises negative things which motivate the emergence of corporate crimes. (Box, 1983)

Basically, these corporate crimes are categorized as transnational organized crimes. It is said so, because the crime involves people who form a network or system that are interrelated and cannot be separated from one another. (Kristian, 2014) Even so, what is actually dangerous is that such crimes can harm the country's finances or economy, among others by the emergence of a form of corruption in which corporate actors can commit crimes. It is worth knowing together, initially in Indonesia, corporations were not known as the subject of criminal acts. Natural man was the only one known at that time. This can be seen in the Criminal Code (WvS) which views that a criminal act can only be committed by humans, which is seen in the formulation of Article 59 which reads as follows:

commissioners, management, members of the governing body, or commissioners who apparently did not interfere in committing an offense shall not be penalized".

More explicitly, it appears in *Memorie van Toelichting Article 51 Ned.WvS* (the same as Article 59 of the Criminal Code / WvS) states: "a strafbaarfeit can only be realized by humans and fiction about legal entities (read: corporations, pen.) Does not apply in the field. criminal law". (A.Z. Abidin, 1962) In other words, that in the view of the Criminal Code, a person who can be a subject of a criminal act is a human being. (Muhamad Mahrus S.W., 2017) This thought is essentially motivated because in the Netherlands when the Criminal Code (WvS) was formulated by its compilers in 1886, it was accepted the principle of "societas / university delinquere non potes" that legal entities or associations cannot commit criminal acts. (Muladi, 2002) Even so, it cannot be denied that the rapid development of the times which gives a strategic role for corporations in daily activities in the society has encouraged new breakthroughs to be made. (Muhamad Mahrus Setia Wijaksana, 2020) The shift of humans as the sole subject of criminal law is beginning to be seen for the first time in special laws outside the Criminal Code. (Harahap, 2017) This means that various special laws have stipulated that apart from people (humans), corporations are also included as perpetrators of criminal acts that violate the criminal provisions in the law. (Sjahdeini, 2006) As for one of them, is evident in the provisions of Law Number 31 of 1999 concerning Eradication of Corruption as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. Based on the background description above, the formulation of the problems raised in this study are: (1) What is the current policy for the formulation of criminal sanctions for corporations in corruption cases? and; (2) How is the reform of the ideal criminal sanctions formulation policy for corporations in future corruption cases?

2. RESEARCH METHODS

This research is of the type of doctrinal research, namely research in the form of an inventory of positive law and the discovery of the principles and basic philosophy (dogma or doctrine) of positive law. (Sunggono, 2005) The specification of this research is descriptive-analytical. (Muhamad Mahrus SW, 2016) The approach used is a statute approach and is supported by a comparative approach. (Ibrahim, 2005) The data used are secondary data, which is obtained through literature study of primary legal materials in the form of the Corruption Eradication Law, secondary legal materials including books, journals and research results, as well as tertiary legal materials sourced from the website. All the data is then analyzed qualitatively, by organizing the data and sorting it into manageable units, and deciding on something that can be shared with others or that describes it. (Moleong, 2008)

3. RESULTS AND DISCUSSION

3.1. Criminal Sanctions Formulation Policy for Corporations in Current Corruption Cases

Starting this discussion, it should be stated that the provisions of the positive criminal law (*ius constitutum*) (Septya Hanung Surya Dewi, 2020) which regulate criminal sanctions for corporations in corruption cases are contained in Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Law Number 20 2001. This becomes clearer by looking at the formulation of the provisions of Article 20 paragraph (7) which states that: "The main punishment that can be imposed against a corporation is only a fine, with the maximum penalty being added by 1/3 (one third)".

Observing the formulation of Article 20 paragraph (7) above, it appears that the main punishment imposed on corporations is only a fine. This is in line with the opinion of Barda

Nawawi Arief who stated that in the current legislation practice, the type of crime that is often threatened by corporations is generally in the form of fines (*financial sanctions*). (Arief B. N., 2011) Next, the authors observe that there are weaknesses that appear in the formulation of Article 20 paragraph (7), namely the absence of a formulation of rules for the implementation of criminal fines if the corporation is unable to pay the fine imposed. The weaknesses expressed by the author is increasingly complex, when it is related to the general rules of Book I of the Criminal Code (*WvS*) especially in the formulation of Article 30 paragraph (2) which states that: "if a fine is imposed and the fine is not paid, it is replaced by confinement". But unfortunately the imprisonment in lieu of fines in the KUHP (*WvS*) is not applicable to corporations, because the basic concept of the Criminal Code (*WvS*) does not recognize a legal subject in the form of a corporation (see Article 59 of the Criminal Code).

Moving on to the next analysis that in addition to basic crimes, corporations can also be subject to additional penalties as formulated in Article 18 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 which includes:

- a. confiscation of movable property that is tangible or intangible or immovable property which is used and obtained from the criminal act of corruption;
- b. payment of replacement money in the maximum amount as the assets obtained from the criminal act of corruption;
- c. closure of business or part of the company for a maximum period of 1 (one) year;
- d. Revocation of all or part of certain rights or part of certain benefits which the government has given or can give to the convicted person.

For the sake of completing this analysis, the author needs to say that discussing the issue of criminal sanctions must also pay attention to strafmaat (severity of punishment) and strafmodus (implementation / imposition of crimes). Meanwhile, from the strafmaat point of view, it can be seen that the maximum penalty provisions are added by 1/3 (one third) ". Meanwhile, regarding strafmodus, it appears that the main punishment is imperative in nature, while the additional punishment as formulated in Article 18 of the Corruption Eradication Law is of a facultative nature (seen from the word "... can...").

3.2. Updating the Formulation of Criminal Sanctions for Corporations in Ideal Corruption Cases in the Future

Judging by the types of criminal sanctions for corporations in corruption cases as stated in the positive law provisions of Indonesia, especially Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 which is only a single principal criminal in the form of a fine, and seeing the general rules of the Criminal Code (*WvS*) which already out of date and not even oriented to the legal subject recht person whose role is very urgent in the era of economic globalization, it is necessary to introduce the idea of reforming a more flexible criminal sanction formulation. Renewal in this context, is defined as an effort to modernize law. (Satjipto, 1979)

Starting from the weaknesses of the formulation in positive law, the writer proposes that in the future there will be improvements to Article 20 paragraph (7) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001, on the basis of considerations from comparative studies with the Law. Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering. This was done by examining Tahir's views Tungadi, that a comparative legal study is useful to objectively see the deficiencies of national law. (Arief T. T., 2011)

The rules for implementing fines when the corporation is unable to pay them are formulated in the provisions of Article 9 of Law Number 8 Year 2010 which reads:

- (1) In the event that the Corporation is unable to pay the fine as referred to in Article 7 paragraph, the penalty shall be replaced by confiscation of Assets belonging to the Corporation or Corporation Controlling Personnel whose value is the same as the penalty of the fine imposed.
- (2) In the event that the sale of the Assets confiscated by the Corporation as referred to in paragraph (1) is insufficient, imprisonment in lieu of fines shall be imposed on the Corporation Controlling Personnel by taking into account the fines that have been paid.

As a comparison, interestingly, the 2019 (DPRRI, 2019) Criminal Code Bill has also formulated rules for implementing criminal fines that are not paid by corporations. This can be seen in the formulation of Article 122 paragraph (3) and (4) as follows:

- (3) "If the fine as referred to in paragraph (1) is not paid within a predetermined period of time, the assets or income of the corporation can be confiscated and auctioned off by the prosecutor to pay off the unpaid fine.
- (4) In the event that the assets or income of the corporation are insufficient to pay off the criminal fine as referred to in paragraph (3), the corporation shall be subject to a substitute penalty in the form of freezing part or all of the corporate business activities.

Regarding strafsoort, the 2019 Criminal Code Bill only recognizes the main criminal sanctions in the form of fines and that can be seen in the formulation of Article 119 of the 2019 Criminal Code Bill. As for strafmaat, it is explained in 121 Draft Criminal Code 2019 that:

- 1) Fines for corporations are at least category IV, unless otherwise stipulated by law.
- 2) In the event that the criminal act committed is threatened by:
 - a) Imprisonment for under 7 years, the most fine for many corporations is category VI
 - b) Maximum imprisonment of 7 to 15 years, the fine for corporation is category VII.
 - c) Death penalty, life imprisonment, or imprisonment for 20 years, the maximum fine for corporations is category VIII. (Adhari, 2020)

Towards the final part of this research, it is worth mentioning a comparative study of the formulation of criminal sanctions for corporations in France. This is done to examine the intellectual conception of a foreign criminal law system, which in the end can be used as a complement to updating a nation's intelligent design regarding the law to be enforced.

The French Criminal Code (France Penal Code) has classified criminal sanctions for people and for corporations separately, which is regulated in Book I Title III on "Penalties", Chapter I on (The Nature of Penalties) is divided into:

- 1) Section 1: Penalties applicable to Natural Person, starting from Article 131-1 to 131-36; and
- 2) Section 2: Penalties applicable to Legal Person, starting from Articles 131-37 to 131-49

Especially for the maximum amount of fines that can be applied becomes 5 (five) times the maximum amount that can be imposed on a legal subject. This provision is mentioned in Articles 131-38.

Next, criminal acts in the form of felonies & misdemeanors, the types of punishment can be imposed in the form of:

- 1) A fine (Articel 131-37);
- 2) In the cases set out by law, the penalties enumerated (Articles 131-39).

As mentioned above, the criminal sanctions that can be imposed on corporations are regulated in more detail in Articles 131-39. When a law stipulates a sanction against a legal subject in the form of a legal entity, a crime or violation can be punished by one or more of the following sanctions:

- a) Dissolution (dissolution), namely in the event that an artificial legal subject is made to commit a crime, or when the crime or violation carries a penalty of three years or more, where the artificial legal subject has been removed from its original target to commit the crime;
- b) Prohibition from carrying out, directly or indirectly, one or more professional or social activities, either permanently or for a maximum of 5 years;
- c) Placement under the supervision of a judge for a maximum of 5 years;
- d) Permanent closure or closure for a maximum of 5 years, one or more business entities, which were used to commit a crime, is being investigated;
- e) Disqualification from public tenders, either permanently or for a maximum period of 5 years;
- f) Prohibition either permanently or for a maximum period of 5 years, to collect funds from the public;
- g) Prohibition of withdrawing checks, except checks that are permitted to be withdrawn by the drawer, from certified or certified check makers and prohibition of using credit cards, for a maximum period of 5 years;
- h) Confiscation of objects that were used or intended to commit the crime or objects which were the result of the crime;
- i) Announcement to the public, criminal or disseminated either by print media or by television and radio media.

Although the aforementioned sanctions are intended for artificial legal subjects (legal entities), there is a difference if the artificial legal subjects are public institutions, political parties or trade unions. (Awarta, 2018 Vol 6.)As mentioned in the following provisions, namely penalties based on paragraphs 1 and 3 above, does not apply to public institutions that can be subject to criminal responsibility. In addition, these matters also do not apply to political parties or associations or labor unions. (Handayani, 2018 Vol 21, Issue 2) Sanctions under paragraph 1 do not apply to institutions that represent workers.

As for petty offenses, the types of criminal sanctions that can be imposed on corporations are:

- 1) A fine (fine);
- 2) The penalties entailing forfeiture or restriction of rights set out under article 131-42 (sanctions containing deprivation or limitation of rights as regulated by Articles 131-42). These sanctions do not preclude the imposition of one or more of the additional sanctions provided for in Articles 131-42.

From all the analyzes mentioned above, it would not be an exaggeration if the author draws a conception that the criminal sanctions that can be imposed on corporations in France are more varied, and clearly distinguished regarding criminal sanctions for persons and criminal sanctions for corporations. (Najicha F. U., 2020) The existence of financial sanctions (fines), structural sanctions (closure / dissolution of corporations) and stigmatizing sanctions (public announcements) in the Criminal Code regulations in France allow law enforcement officials to impose more flexible criminal sanctions according to the level of corporate error and the impact caused by it.

Table 1. "Criminal Sanctions Comparison Matrix for Corporations"

| Law No.31 / 1999 juncto Law No.20 / 2001 | Criminal Code Bill 2019 | French Criminal Code |
|---|--|---|
| <ul style="list-style-type: none"> ➤ Principal Criminal: Fine ➤ Additional Criminal: Announcement of judges' decisions, suspension of part / all of corporate business activities, revocation of business licenses, dissolution and / or banning of corporations, confiscation of corporate assets for the state, takeover of corporations by the state | <ul style="list-style-type: none"> ➤ Principal Criminal: Fine ➤ Alternative main criminal: taking of assets or corporate income or; freezing of part or all of corporate activities. ➤ Additional Criminal: Payment of compensation, reparation due to criminal acts, implementation of neglected obligations, fulfillment of customary obligations, financing of job training, confiscation of goods / assets obtained from criminal acts, announcement of court decisions, revocation of certain permits, permanent prohibition of carrying out certain activities, partial / complete closure business activities, freezing of part / all activities, as well as dissolving corporations. | <ul style="list-style-type: none"> ➤ Main Criminal: Fines, dissolution, prohibition of carrying out activities, supervision of judges, closure of corporations, disqualification of auctions, prohibition of withdrawing checks for confiscation of assets, public announcements. |

Referring to the above matrix, the author can narrow a conception of thinking that the main criminal sanctions for corporations in France are not only fines, but are more varied in which additional crimes in Indonesia are the principal crimes in the French state. This should be used as a basis for the thinking of holders of legislative power, (Najicha F. U., 2020) that if the additional criminal sanctions in Indonesia are changed to become the main criminal sanctions, so that the basic criminal sanctions for corporations, especially in corruption cases, become more diverse.

4. CONCLUSION

Based on the results and discussion of this research, the following conclusions are obtained: (1) The policy for formulating criminal sanctions for corporations in corruption cases at this time is in the form of a fine as a principal crime, while additional crimes are in the form of (a) Confiscation of goods resulting from corruption; (b) Payment of replacement money; (c) The closure of all or part of the company; (d) Revocation of all / part of certain rights or certain benefits. (2) The reform of the ideal criminal sanctions formulation policy for the future can be seen from the provisions in other countries regulating criminal sanctions for corporations that are more diverse than fines, so that in the future it is better if additional criminal sanctions for corporations, especially in existing corruption cases, are used as principal punishment, so that the principal criminal sanctions for corporations become more varied.

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