International Journal of Law, Policy and Social Review
www.lawjournals.net
Online ISSN: 2664-6838, Print ISSN: 2664-682X
Received: 29-09-2023, Accepted: 15-10-2023, Published: 30-10-2023
Volume 5, Issue 4, 2023, Page No. 31-34

Policy Formulation of the principle of material illegality in the criminal code and the law on the eradication of criminal acts of corruption

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Abstract
One of the central problems in criminal policy using penal means (criminal law) is the problem of determining what actions should be considered criminal offenses. Analyzing this issue cannot be separated from the integral conception of criminal policy and national development policy. The above conception must be carried out by analyzing a policy-oriented approach that is not only a criminal law approach but an approach related to legal development in general related to the eradication of corruption crimes, as seen from the nature of the material law applied in the regulation of corruption crimes.
The normative law research method was applied, with a conceptual and statutory approach. The research method is descriptive-qualitative; the sources of primary and secondary legal material include legislation and secondary legal material, scientific publications connected to this writing corruption, legal material collection techniques through literature studies, and online media.
The results and debate in this article are the establishment of the principle of material lawlessness in laws, which cannot be separated from one of the goals of suppressing and reducing crime in order to achieve public welfare. It must be acknowledged that, until far, the legislation that serves as the source of written law (the principle of legality) in determining a criminal act lags far behind. This necessitates a reorientation in determining a criminal offense, not just from the standpoint of written legislation. Rather, it must be decided by the principles that have grown and developed in Indonesian society (material legality), such as customary law, morality, and fairness.

Keywords: Policy formulation, against the law, corruption

Introduction

Since the enactment of the 1945 Constitution, based on the affirmation of the 1945 Constitution's Transitional Rules, Article II, among other things, requires the Indonesian nation to reform the regulations of the former colonial government (Dutch East Indies, Japanese Army), which were forced to remain in effect during this legal transition period.[1]

Legal reform, especially colonial criminal law, is a mandate for an independent and sovereign nation. The principle of independence must be realized in all aspects of national life, especially in the field of law. Legal products and instruments must be subjectively characterized and reflect the identity of the Indonesian nation as a civilized nation and respect and appreciate human rights. From this description, the law must have its own characteristics that arise due to its attachment to the social base.[2] This social base includes physical [3] and non-physical elements contained in the preamble of the 1945 Constitution as the highest values and goals of the Indonesian nation.

In line with the above, Sudarto argues that in facing the problem of determining what actions should be considered criminal offenses, the objectives of criminal law, the determination of undesirable actions, the comparison between means and results, and the ability of law enforcement[4] agencies should be considered. Determining an act as a criminal offense with a social policy-oriented approach was also seen at the National Criminal Law Reform Symposium in August 1980 in Semarang. One of the reports stated, among others, as follows:

"The issue of criminalization and decriminalization of an act must be in accordance with the criminal politics adopted by the Indonesian nation, namely the extent to which the act is contrary to the fundamental values that prevail in society and by the community and is considered appropriate or not worthy of punishment in the context of organizing public welfare".[5]

According to the symposium's presentation and outcomes, establishing the despicability of an act must take into account the attitudes and perspectives of the community. Even this needs to be investigated, particularly in regard to technology breakthroughs that contribute to social transformation. Furthermore, Komariah Emong noted, "An act can be punished if it is determined by law to be an act against the law (formal lawlessness)".[6] However, in Indonesia, the law is viewed not only as a statute but also as customary law and other unwritten rules (material lawlessness)." According to Roeslan Saleh, "the law and the law are not the same thing in the Indonesian mind." Even the majority of Indonesian legislation remains unwritten.[7]

Reorientation and reevaluation of the application of the principle of nature vs material law in the design of criminal law policy in Indonesia are required in relation to the growth of society and the types of crime. The establishment of the idea of material illegality in legislation cannot be isolated from one of the goals of suppressing and reducing crime in order to achieve public welfare. It must be acknowledged that, thus far, the legislation that has been the source of written law (the principle of legality) in determining a criminal act has lagged far behind. This necessitates a shift in how criminal offenses are defined, not just from the standpoint of written laws. This requires a

reorientation in determining a criminal offense, not only from the perspective of the written law. Rather, it must also be determined by the values that live in Indonesian society (material legality), such as customary law, values of decency, and justice, that have grown and developed in society. Thus, customary criminal law can be a positive source of law and a negative source of law in the sense that the provisions of customary criminal law can be an excuse, a reason to mitigate the punishment, or a reason to aggravate the punishment.[8]

Because the characteristics of customary criminal offenses and material law violations show the same characteristics, there is a concern that the nature of the violation of the law will change from its negative function to its positive function. In this situation, there will be a clash with legal certainty, which is contained in the principle of legality.[9] This has also been proven in several jurisprudences, and the most recent development is the adoption of the material tort in its positive function, namely in the Explanation of Article 2 paragraph 1 of Law No. 31 of 1999 on the Eradication of the Crime of Corruption[10] as amended by Law No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of the Crime of Corruption. Then the explanation of this article was canceled by the Constitutional Court with Decision Number 003/PUU-IV/2006.[11]

The panel of judges reasoned that the explanation of Article 2 paragraph 1 of the UUPTPK is in conflict with Article 28 D paragraph 1 of the 1945 Constitution, which establishes and protects citizens' fundamental rights to receive guarantees and specific legal protection. In criminal law, this is known as the principle of legality, which is found in Article 1 paragraph 1 of the Criminal Code. That principle is a demand for legal certainty, where people can only be prosecuted and tried on the basis of existing written law (lex scripta).[12]

The decision has far-reaching implications for the eradication of corruption and other crimes.[13] In addition, this decision must also be interpreted as a challenge to efforts to form national law based on the social basis of Indonesian society. By accommodating the aspirations of customary law (unwritten law) in accordance with the values of justice and legal awareness of the community. This can be seen in the concept of the Criminal Code, which clearly includes the nature of material law violations in its positive function.

Starting from the aforementioned points of view, this research seeks to reorient and assess the natural law concept in relation to material law. The problem of defining and formulating the principle of material tort in legislation as material for improving or rearranging legislative policy as the most strategic stage for the future is the focus of the subject matter. The evaluation of the material tort concept is critical in the context of legal reform. Because legal reform is an attempt to identify what should or should not apply rather than what already applies.[14]

Based on the foregoing, the following are the primary issues in this study, how is the notion of material illegality formulated in the Criminal Code and Law No. 31/1999 on the Eradication of Corruption?

Research Methods

The type of legal research used in this research is normative law, with a problem approach using legislative approaches and conceptual approaches. The type of research used is a type of qualitative descriptive research that describes and declassifies overall data obtained from the results of library studies and field research related to the title of this writing. Related sources of legal material used are:

a. The material of primary law consists of laws.
b. Secondary legal material, i.e. data obtained through the study of the library is through literature or books and regulations that have relevance to the material discussed as well as papers, and websites that relate to this writing.

The legal material collection and analysis technique used is the library study by inventory, collection and organization of legal materials into an information system, thus facilitating the retrieval of such legal materials. Whereas the analysis of legal material is qualitatively analyzed, then will be presented descriptively, so that it can make conclusions specifically aimed at obtaining and understanding the formula of the problem arising.

Result and Discussion

Criminal Sanction Formulation System, Types of Criminal Sanctions, and Duration of Punishment in the Law on Corruption Crime

The system of criminal sanction formulation in Law No. 31 of 1999, namely the cumulative system and the combined system (cumulative-alternative), The cumulative system and combined system (cumulative-alternative) can be seen from the formulation of criminal sanctions, namely "punishable by imprisonment, confinement, or fine...". The existence of the threat of imprisonment only indicates the use of a single main criminal formulation system. The types of criminal sanctions (strafsoort) for corruption offenses in Law No. 31/1999 consist of imprisonment, confinement, and fines. All three types of sanctions are threatened for corruption crimes.

However, the formulation policy of the criminal sanction model in Law No. 31/1999 is unclear in terms of concept, criteria, or reasons for determining the policy of why an offense is threatened with a cumulative system (e.g., "self-enrichment" in Article 2), while others are threatened with a combined system (e.g., "abuse of authority" in Article 3). In addition, the cumulative system is a very rigid system. Moreover, there are threats of life imprisonment that are accumulated with fines (e.g., Article 2).

Meanwhile, the length of the punishment (strafmaat) varies. Corruption offenses are punishable by imprisonment for 1 (one) year to 20 (twenty) years, with a fine of at least IDR 50,000,000.00 (fifty million rupiah) and a maximum of IDR.1,000,000,000.00 (one billion rupiah). However, the aggravation provision in Article 2 paragraph (2) is directly related to the provisions of paragraph (1), which means that the provisions of paragraph (2) apply specifically to the provisions of paragraph (1) for the aggravation of criminal sanctions for corruption crimes committed in certain circumstances, as stipulated in Article 2, paragraph (2), which states that the death penalty can be imposed.

The issue of criminal sanctions against corporations is one of the main criminal provisions stipulated in Article 7 of Law No. 31 of 1999, which reads as follows: "The main punishment that can be imposed on corporations is only a fine, provided that the maximum penalty is increased by 1/3 (one-third)."

From the provisions of the article above, it is clear that the main criminal sanctions that can be imposed on corporations, as formulated in Article 20 paragraph (7), have the same consequences as the sanctions formulated in single, because there are no other alternatives that can be chosen. This can cause problems in its implementation, namely, what if the fine is not paid by the corporation and what actions can be taken? Whereas in Book I of the Criminal Code, it is regulated that if the fine is not paid, it will be imposed by imposing confinement in lieu of a fine (Article 30, paragraph 2).

In terms of the main punishment for corporations, Barda Nawawi Arief stated that "in addition to fines, several types of additional punishment, such as closure of the company or corporation for a certain period of time or revocation of business rights or licenses" should be used as the main punishment for corporations, or at least as an additional punishment that can be imposed independently, because this type of sanction is equivalent to deprivation of liberty, which is punishable by imprisonment.

Criminal sanctions against corporations should be tailored to the corporation's nature and the motivations for corporate crime. There are two variables that create corporate crime reasons, namely:

1. The first variable is related to the organization's goal, which is in the form of a preference for profit (growth, market control), which is reflected in individual characteristics known as anomie of success;
2. The second variable is the conflict between corporate goals and the needs of competitors, the state, employees or workers, consumers, and society.[15]

Sentencing Guidelines in Law No. 31/1999 on the Eradication of the Crime of Corruption

Indonesian legislation until now has not had a "national punishment system" which includes "punishment patterns" and "punishment guidelines". "Pattern of punishment" is a reference or guideline for lawmakers in making or compiling laws and regulations containing criminal sanctions. The term pattern of punishment is often also called "legislative guidelines" or "formulative guidelines". Meanwhile, "punishment guideline" is a guideline for the imposition or application of punishment for judges ("judicial guideline or applicative guideline"). Judging from the function of its existence, the pattern of punishment should exist before criminal legislation is made, even before the national Criminal Code is made.[16]

In addition to death penalty, life imprisonment or certain period of imprisonment and additional punishment as stipulated in the Criminal Code, perpetrators of corruption offenses according to Article 18 of the 1999 Anti-Corruption Law may be sentenced to additional punishment in the form of:

a. forfeiture of tangible or intangible movable property or immovable property used for or obtained from the crime of corruption, including companies owned by the convicted person where the crime of corruption was committed, as well as the price of goods that replace these goods;
b. payment of restitution in the maximum amount equal to the property obtained from the corruption offenses;
c. closure of all or part of the company for a maximum period of 1 (one) year;
d. revocation of all or part of certain rights or removal of all or part of certain benefits, which have been or may be granted by the Government to the convicted person.

According to Law No. 1 of 1999, the main punishment that can be imposed on the corporation is only a fine, the maximum of which is aggravated by 1/3 (one-third) (Article 20 paragraph 7) In addition to fines, several types of additional punishment in Article 18, paragraph (1), can also be used as the main punishment for corporations, or at least as additional punishment that can be imposed independently. If imprisonment (deprivation of liberty) is the main punishment for "persons", then the main punishment for corporations that can be identified with deprivation of liberty is a sanction in the form of "closure of the corporation or company for a certain time" or "revocation of business rights or licenses."

In Law No. 31 Year 1999 there are no special provisions regarding the implementation of fines that are not paid by corporations. This can cause problems, because the provisions for the implementation of fines in Article 30 of the Criminal Code (i.e., if the fine is not paid, it is replaced by substitute imprisonment for 6 (six) months) cannot be applied to corporations.)[17]

Specifically for additional punishment in the form of payment of restitution, if, at the latest within 1 (one) month after the court decision has permanent legal force, the convict does not pay the restitution, then the prosecutor can confiscate the property of the convict and then auction it to cover the restitution. If the convicted person does not have sufficient assets to pay the restitution, then the convicted person shall be sentenced to imprisonment, which shall not exceed the maximum term of the basic punishment for the crime committed, and the length of this imprisonment shall be determined by a court decision. The elucidation of Article 18 letter C explains that what is meant by "closure of all or part of the company" is the revocation of a business license or temporary suspension of activities in accordance with a court decision".

Conclusion

The establishment of the principle of material tort in legislation cannot be separated from one of the objectives to suppress and reduce the problem of crime in an effort to realize public welfare. It must be recognized that so far, legislation as a source of written law (the principle of legality) to determine a criminal act is quite far behind. This requires a reorientation in determining a criminal offense, not only from the perspective of written laws. Instead, it must also be determined by the values that live in Indonesian society (material legality), such as customary law and the values of decency and justice that have grown and developed in society. Thus, customary criminal law can be a positive source of law and a negative source of law in the sense that the provisions of customary criminal law can be an excuse, a reason to mitigate the punishment, or a reason to aggravate the punishment. The suggestions proposed by the author are the reorientation and reevaluation of the implementation of the principle of material tort in the formulation policy of criminal law in Indonesia, which needs to be done in connection with the development of society and the development of types of crimes.

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