

# The Concretization of Criminal Sanctions by Judges to Support Corruption Eradication

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## Abstract

The criminal act of corruption is a crime that has long been known to mankind. Various efforts in Indonesia have been carried out to increase the effectiveness of corruption eradication. Such support is demonstrated by the Supreme Court through the issuance of Supreme Court Regulation Number 1 of 2020 concerning Sentencing Guidelines for Article 2 and Article 3 of the Eradication of Corruption Crimes Law (Perma No. 1 of 2020). However, this regulation lacks concrete formulation of criminal sanctions and insight of corruption impacts on society. The aim of this research is to analyze approaches for judges in concretizing their considerations when imposing criminal sanctions to support the eradication of corruption. This research was prepared using normative legal research methods and supported by descriptive economic analysis. The result of this study shows the need for improvements to Perma No. 1 of 2020 by focusing the impacts of corruption on legal developments in society. These efforts, moreover, need to be supported by reviewing the range of criminal sanctions contained in the provisions of Article 2 and Article 3 of the Law concerning the Eradication of Corruption Crimes, as well as Article 603 and Article 604 of Law Number 1 of 2023 concerning the Criminal Code.

**Keywords:** *Judge's Consideration, Criminal Sanctions, Criminal Acts of Corruption*

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## A. INTRODUCTION

The criminal act of corruption (tipikor) is a crime that has long been known to mankind. According to Transparency International, corruption is related to the behavior of public officials who enrich themselves or related parties illegally and unreasonably through abuse of power given to them (Shoim, 2009). This is in line with Black's Law Dictionary which defines corruption as several actions, namely (BPKP, 1999):

- 1) Benefiting a party that is not in accordance with its proper obligations and rights; and
- 2) Abuse of an official's authority to benefit himself or others.

National law is currently still struggling with eradicating corruption (KPK, 2023) even though it has not yet achieved the expected results as reflected in Indonesia's position on the Corruption Perception Index (IPK) as follows:



Source: Transparency International 2022, processed

**Figure 1. Development of the Indonesian Corruption Perception Index**

Based on the picture above, it appears that the eradication of corruption after the issuance of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended several times, most recently with Law Number 30 of 2002 concerning the Commission for the Eradication of Corruption Crimes (UU Tipikor), has been effective. However, the eradication of corruption has not been carried out optimally, due to the following reasons:

1. Since 2019, Indonesia's Corruption Perception Index has continued to decline, reaching number 34 in 2022 (ICW, 2022);
2. Indonesia's Corruption Perception Index is still below the average compared to other countries.

The decline in Indonesia's Corruption Perception Index is in sharp contrast when looking at the various efforts made by the State to implement the Corruption Law through law enforcement, including through Supreme Court Regulation Number 1 of 2020 concerning Sentencing Guidelines of Article 2 and Article 3 of the Corruption Eradication Law (Perma No. 1 of 2020).

Perma No. 1 of 2020 is a regulation that not only aims to ease judges in corruption trials, but also to prevent disparities in the imposition of criminal sanctions. Through Perma No. 1 of 2020, judges are obliged to give grounds for determining the severity of criminal sanctions. All of this is to embody legal certainty, justice, and proportional benefit in imposing criminal sanctions based on Article 2 and Article 3 of the Corruption Law, before the two provisions were revoked and replaced by Law Number 1 of 2023 concerning the Code of Criminal Law.

The mentioned objectives of Perma No. 1 of 2020 show that the regulation is intended to support, not only the Corruption Law, but also Law Number 48 of 2009 concerning Judicial Power and Law Number 8 of 1981 concerning Criminal Procedure Law (KUHP). Law No. 48 of 2009 and the Criminal Procedure Code implicitly impose judges to base their decisions on the following (Soetopo, 2019):

1. Juridical considerations including two legal evidence; And

2. Non-juridical considerations consisting the judge's beliefs based on several factors; such as jurisprudence, doctrine, background of the action, consequences of the action, condition of the defendant, and community norms.

Perma No. 1 of 2020 is expected to increase the transparency and accountability of judges in making court decisions (Sanjaya, 2022) and uphold that decisions are in accordance with the values of justice and benefit (Muslih, 2013). Perma No. 1 of 2020, on the one hand, makes it easier for judges to make decisions in accordance with the defendant's actions. However, the classification of crimes, depicted as most severe, severe, moderate, light, and lightest based on the value of State losses, does not optimally demonstrate the impact of corruption on society and the national economy. Such broad classifications cause imposed sanctions to be ineffective; thus recovery of the State's losses and deterrent effects have been suboptimal. These problems have an impact on achieving national development targets, especially in relation to Chapter 8 of Appendix 1 of Presidential Regulation Number 18 of 2020 concerning the 2020-2024 National Medium-Term Development Plan (RPJMN 2020-2024) titled "Strengthening the Stability of Political, Legal and Security Affairs and Transformation of Public Services". The development agenda includes several indicator indices with targets for eradicating corruption, as follows:

| No.                        | Indicator                      | Baseline (2019) | Target (2024) |
|----------------------------|--------------------------------|-----------------|---------------|
| <b>Live Indicator</b>      |                                |                 |               |
|                            | Anti-Corruption Behavior Index | 3.7             | 4.14          |
| <b>Indirect Indicators</b> |                                |                 |               |
| 1                          | Legal Development Index        | 0.61            | 0.73          |
| 2                          | Access to Justice Index        | 69.6            | 71-80         |

Source: RPJMN 2020-2024; Processed

**Table 1. Impacted 2020-2024 RPJMN Indicators**

The various targets for the 2020-2024 RPJMN above show the need to carry out evaluations and studies of Perma No. 1 of 2020. Through this legal research, this article bases most of its arguments on the theory of justice efficiency, as stipulated in the 1945 Constitution of the Republic of Indonesia (UUD 1945), and Gary Becker's theory as regards to punishment. Justice efficiency is a theory that views justice as to be applied rationally by inserting efficiency as an element. In other words, it is in line with Richard Posner's view that "the most common meaning of justice is efficiency" (Posner, 1983). Meanwhile, Gary Becker's theory of punishment postulates that a person will commit a crime if the benefits attained are greater than the costs of the crime (Atmasasmita & Wibowo, 2017). In this framework, the research questions of this article are as follows:

1. What are the current regulations regarding considerations of judges in imposing sanctions of corruption?
2. How should the considerations of judges be concretized in imposing sanctions to support corruption eradication?

## B. METHOD

This research was prepared using normative legal research methods (Benuf & Azhar, 2020) supported by descriptive economic analysis. The legal materials utilized consist of primary, secondary, and tertiary legal materials, as well as non-legal materials (Salim & Nurbani). The type of approach used is a statutory regulatory approach and a conceptual approach (Marzuki, 2010). The legislative approach is carried out using several regulations, such as Perma No. 1 of 2020, Presidential Decree No. 18 of 2020, Law No. 48 of 2009, Law No. 8 of 1981 concerning the Criminal Procedure Code, and the Corruption Law. Meanwhile, a conceptual approach is applied through the use of justice efficiency theory and Gary Becker's theory of punishment (Marune, 2023).

## C. RESULT AND DISCUSSION

### 1. Relevance of Perma No. 1 of 2020 in regards to Law no. 1 of 2023

The problems contained in Perma No. 1 of 2020 cannot be separated from the threat of punishment in the provisions of Article 2 and Article 3 of the Corruption Law, which have not been amended. In this regard, it must be acknowledged that the Constitutional Court (MK) through Decision Number 003/PUU-IV/2006 and Decision Number 25/PUU-XV/2016 has changed several articles and explanations of the two provisions of the law. However, the changes were not followed by adjustments of the punishments.

Sanctions of Article 2 and Article 3 of the Corruption Law did not take into account the severity and range of criminal sanctions that can potentially be imposed. The sanctions are only revised after the enactment of Law No. 1 of 2023 and is found in the provisions of Article 603 and Article 604. The comparison of the range of sanctions between the two laws is as follows:

| Corruption Law          |                                                                                                             | UU no. 1 of 2023 |                                                                                                       |
|-------------------------|-------------------------------------------------------------------------------------------------------------|------------------|-------------------------------------------------------------------------------------------------------|
| Chapter                 | Penalty                                                                                                     | Chapter          | Penalty                                                                                               |
| Article 2 Paragraph (1) | Prison:<br>Minimum 4 years<br>Maximum 20 years<br>Fine:<br>Minimum IDR 200 million<br>Maximum IDR 1 billion | Article 603      | Prison:<br>Minimum 2 years<br>Maximum 20 years<br>Fine:<br>Minimum category II<br>Maximum category VI |
| Article 2 Paragraph (2) | Death penalty                                                                                               |                  |                                                                                                       |
| Article 3               | Prison:<br>Minimum 1 year<br>Maximum 20 years<br>Fine:                                                      | Article 604      | Prison:<br>Minimum 2 years<br>Maximum 20 years<br>Fine:<br>Minimum category II                        |

|                        |                       |                     |
|------------------------|-----------------------|---------------------|
| Minimum IDR 50 million | Maximum IDR 1 billion | Maximum category VI |
|------------------------|-----------------------|---------------------|

Source: Corruption Law, Law no. 1 of 2023; Processed.

**Table 2. Comparison of criminal sanctions between Article 2 and Article 3 of the Corruption Law and Article 603 and Article 604 of Law no. 1 of 2023**

From the table above, it appears that Article 603 and Article 604 of Law No. 1 of 2023 base the categories of sanctions to be stipulated in the provisions of Article 79 of the Law as follows:

| Sanction Category | Maximum Sanction (Rp) |
|-------------------|-----------------------|
| Category I        | IDR 1,000. 000,-      |
| Category II       | IDR 10,000. 000,-     |
| Category III      | IDR 50,000. 000,-     |
| Category IV       | IDR 200,000. 000,-    |
| Category V        | IDR 500,000. 000,-    |
| Category VI       | IDR 2,000,000. 000,-  |
| Category VII      | IDR 5,000,000. 000,-  |
| Category VIII     | IDR 50,000. 000,-     |

Source: Law no. 1 of 2023.

**Table 3. Sanction Categories Based on the Provisions of Article 79 of Law no. 1 of 2023**

The enactment of Law No. 1 of 2023 revokes the application of Article 2 Paragraph (1) and Article 3 of the Corruption Law within a period of three years from the promulgation of the law on 2 January 2023. However, in regards to the severity of the criminal fine, it appears that Law No. 1 of 2023 imposes light sanctions. Apart from that, changes to the sanctions are not in accordance with Law No. 1 of 2023, where the substance of the regulation is still based on the Corruption Law: a minimum fine of IDR 200,000. 000,- for the provisions of Article 2 Paragraph (1) and IDR 50,000,000,- based on Article 3. Discrepancies found between Perma No. 1 of 2020 and Law No. 1 of 2023 precipitate the Supreme Court regulations to lose its relevance. In accordance to the hierarchy of statutory regulations contained in Article 7 and Article 8 of Law Number 12 of 2011 concerning the Establishment of Legislations, as amended several times, most recently with Law Number 13 of 2022 concerning the Second Amendment to the Law Number 12 of 2011 concerning the Establishment of Legislations (UU PPP), Perma No. 1 of 2020 is categorized as a Ministerial and Institution regulation. This means, as *verordnung* and *autonome satzung*, Perma No. 1 of 2020 should not conflict with Law no. 1 of 2023, which hierarchically is at the *formell gesetz* level (Sihombing, 2016). Case in point, it is in line with the principle of *lex superior derogat legi inferiori*, which prohibits regulatory norms at the lower levels from conflicting with regulations at the upper levels (Harahap, 2018).

## **2. The Impact of the irrelevance of Perma No. 1 of 2020 in regards to Law no. 1 of 2023**

Regulatory inconsistencies encountered between Perma No. 1 of 2020 and Law no. 1 of 2023 cause the Supreme Court Regulation to be irrelevant. The principle of *lex superior derogat legi inferiori* contributes to the invalidity of Perma No. 1 of 2020 in the year 2026, after Law No. 1 of 2023 is declared valid based on the provisions of Article 624. The absence of such guidelines potentially induces the process of imposing criminal sanctions to return to the original approaches prior to Law No. 1 of 2020, which did not embody justice efficiency, due to the following:

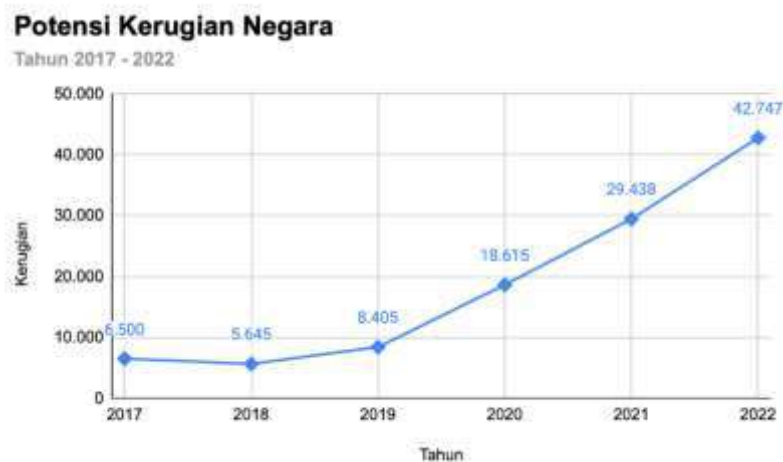
1. High disparity in sanctions of corruption cases with similar characteristics;
2. Reduced legal certainty due to disparities in criminal sanctions in cases related to Article 603 and Article 604 of Law no. 1 of 2023; and
3. Ineffectiveness of the law due to criminal sanctions with suboptimal deterrent effects.

Effectiveness of Perma No. 1 of 2020 relies heavily on the Corruption Law and Law no. 1 of 2023. However, the Supreme Court Regulation does not provide a clear scheme for aspects; such as fault, impact, and benefit. Although the regulation aims to provide legal certainty and eases judges to make decisions, the implementation of Perma No. 1 of 2020 has not been able to fully realize justice efficiency.

## **3. Formulation of the Ideal Criminal Act Sanctions Sentencing**

Based on data from the Indonesian Corruption Watch (ICW) In 2022, State losses due to corruption will actually be much greater than the amount of funds corrupted. These factors show that the aspect of corruption impact should be the dominant factor in decision making. From 2017 to 2022, it appears that anti-corruption efforts did not correlate with a reduction in potential State losses, as follows:

## Potential State Losses



Source: Indonesian Corruption Watch 2022, processed

**Figure 2. Potential State Losses Due to Corruption 2017 – 2022**

The figure above shows that the potential for State losses due to corruption continues to increase from IDR 6.5 trillion in 2017 to IDR 42.74 trillion in 2022. This increase is in contrast to the number of corruption prosecutions, based on cases and the number of suspects, regardless of a decrease in the year 2017-2019, as follows:



Source: Indonesian Corruption Watch 2022, processed

**Figure 3. Corruption Crime in Indonesia in 2017 – 2022**

The various figures above reflect the inconsistency between eradicating corruption and reducing the number of State losses. The corruption category is based on the provisions of Article 6 of Perma No. 1 of 2020, which are as follows:

| Loss Range |                   | Category    |
|------------|-------------------|-------------|
| a          | > IDR 100 billion | Most Severe |

|                         |   |                                    |             |
|-------------------------|---|------------------------------------|-------------|
| Article 6 Paragraph (1) | b | > IDR 25 billion – IDR 100 billion | Severe      |
|                         | c | > IDR 1 billion – IDR 25 billion   | Moderate    |
|                         | d | > IDR 200 million – IDR 1 billion  | Light       |
| Article 6 Paragraph (2) | a | > IDR 100 billion                  | Most Severe |
|                         | b | > IDR 25 billion – IDR 100 billion | Severe      |
|                         | c | > IDR 1 billion – IDR 25 billion   | Moderate    |
|                         | d | > IDR 200 million – IDR 1 billion  | Light       |
|                         | e | < IDR 200 million                  | Lightest    |

Source: Perma No. 1 of 2020; Processed

**Table 4. Categorization of Corruption in Article 6 of Perma No. 1 of 2020**

Therefore, if the corruption category in Article 6 Paragraph (1) and Paragraph (2) of Perma No. 1 of 2020 is to be adjusted, it requires projections of corruption impacts on society, namely:

|                         | Value of State Losses |                                    | Real Impact of Corruption          |
|-------------------------|-----------------------|------------------------------------|------------------------------------|
| Article 6 Paragraph (1) | a                     | > IDR 100 billion                  | > IDR 1 trillion                   |
|                         | b                     | > IDR 25 billion – IDR 100 billion | > IDR 250 billion – IDR 1 trillion |
|                         | c                     | > IDR 1 billion – IDR 25 billion   | > IDR 10 billion – IDR 250 billion |
|                         | d                     | > IDR 200 million – IDR 1 billion  | > IDR 2 billion – IDR 10 billion   |
| Article 6 Paragraph (2) | a                     | > IDR 100 billion                  | > IDR 1 trillion                   |
|                         | b                     | > IDR 25 billion – IDR 100 billion | > IDR 250 billion – IDR 1 trillion |
|                         | c                     | > IDR 1 billion – IDR 25 billion   | > IDR 10 billion – IDR 250 billion |
|                         | d                     | > IDR 200 million – IDR 1 billion  | > IDR 2 billion – IDR 10 billion   |
|                         | e                     | < IDR 200 million                  | < IDR 2 billion                    |

Source: Perma No. 1 of 2020; Processed.

**Table 5. Assumed Real Impact of Corruption Based on Categorization in Article 6 of Perma No. 1 of 2020**

From the impacts above, if adjustments are to be made to the provisions of Article 6 of Perma No. 1 of 2020, the adjustments are as follows:

| After Adjustment        |            |                                |
|-------------------------|------------|--------------------------------|
|                         | Loss Range |                                |
| Article 6 Paragraph (1) | a          | > IDR 250 billion              |
|                         | b          | > 25 billion – IDR 250 billion |
|                         | c          | > 200 million – IDR 25 billion |
| Article 6 Paragraph (2) | a          | > IDR 250 billion              |
|                         | b          | > 25 billion – IDR 250 billion |
|                         | c          | > 200 million – IDR 25 billion |

Source; Perma No. 1 of 2020; Processed

**Table 6 . Adjustments to the Corruption Categorization in Article 6 of Perma No. 1 of 2020 by focusing on the impact of corruption**

The results of the adjustments above show that the minimum impact of corruption is actually at a moderate level (> 1 billion – IDR 25 billion). This value does not include the state budget for law enforcement. Therefore, the criminal sentencing matrix in Attachment to Perma No. 1 of 2020 can be simplified by including limited categories of State losses in the most severe, severe and moderate categories. Adjustments to Article 2 and Article 3 of the Corruption Law can be made by increasing the range of sanctions that can be imposed.

According to the neo-classical view, the aim of punishment is ideally to internalize the social harm of criminal acts. A person will commit a criminal act if the benefits attained are greater than the negative impacts (Soetopo, 2021). Regarding the aspect of benefit, this can be divided into several types, namely (Soetopo, 2021):

1. Economic benefits from criminal acts; and
2. Personal satisfaction obtained from committing a criminal act.

Human beings are rational actors who have the tendency to maximize their needs. This means that decisions to act will be based on various choices originating from the information they obtain; such as the potential benefits of an act that violates the law/ does not violate the law.

The views mentioned essentially show the significance of criminal act sanctions. Such view includes factors of ensuring people's compliance with the law and achieving peace (Sulaiman, 2019). The awareness of these sanctions has made many parties provide explanations regarding the ideal criminal sanction (Kusumohamidjojo, 2022). One of the explanations focuses attention to the benefits of criminal acts for the perpetrator, the probability of the perpetrator being caught, and the severity of the sanctions imposed. A potential perpetrator of a criminal act will tend to commit a criminal act if faced with the following logic of thought (Sarel, 2021):

$$B > P \times S$$

B : Benefits of criminal act

P : Probability of being caught

S : The severity of the sanctions imposed

This formulation also reflects Gary Becker's theory of punishment in creating a deterrent effect on criminals and society. Criminal sanctions are ideal if the potential criminals react with the logic  $B < P \times S$ . However, its implementation must still focus on to the three principles of the objectives of punishment (Santoso, 2014). This means that, apart from deterrence, the imposition of criminal sanctions must still be carried out by focusing on the impact of crime on victims and society as well as improving the behavior of perpetrators of criminal acts. Therefore, the logic of imposing criminal sanctions in eradicating corruption needs to be complemented by including the impact of these criminal acts on people's lives and behavior (Binaji & Hartanti, 2019).

The threat of criminal sanctions contained in the provisions of Article 2 and Article 3 of the Corruption Law and Article 603 and Article 604 of Law No. 1 of 2023 means that the imposition of criminal sanctions needs to be supported by additional penalties (Marune, 2021). Therefore, it is understandable that the provisions of Article 20 of Perma No. 1 of 2020 states that the existence of these regulations does not reduce the judge's authority to impose additional penalties. However, attention is essential to calculate the impact of corruption on society based on the perpetrator's profits being the same as the victim's losses. This logic can be formulated as follows:

$$\sum_{i=1}^n \text{Criminal Conviction } i \geq \sum_{j=1}^m \text{Victim Loss } j$$

The model above shows that criminal sanctions should ideally be greater than the victim's losses. The aim is not simply to restore losses that have already arisen from a criminal act, but rather to emphasize to the perpetrator that the crime committed will not commensurate with the profits. However, in eradicating corruption, this logic is far from perfect, as it does not include the impact of social harm that arises as a result of criminal acts. Therefore, to realize the ideal eradication of corruption, criminal sanctions can be carried out based on the following logic:

$$\sum_{i=1}^n \text{NE Criminal Conviction } i = \sum_{j=1}^n \text{Victim Loss } j + \sum_{i=1}^n \text{Victim's Social Losses } i$$

From the model above, ideal criminal sanctions need to include the victim's losses and social losses as variables to the constituent components. The greater the victim's losses and social losses arising from corruption committed by the perpetrator of a criminal act, the greater the criminal sanctions. The criminal punishment imposed should break the chain of losses on the part of the victim, the State and society as a

whole. In order to resolve these losses, concrete formulation of sanctions should be prioritized in eradicating corruption. Through proper sanctions, the Government can anticipate increased income to pursue the development targets as stipulated in the Presidential Regulation No. 18 of 2020 on National Medium-Term Development Plan 2020-2024.

#### **D. CONCLUSION**

The existence of Perma No. 1 of 2020 is currently a form of effort by the Supreme Court (MA) to concretize considerations by judges in imposing criminal sanctions as regulated in Article 2 and Article 3 of the Corruption Law. However, the regulation and substance of the guidelines still require improvement as they do not emphasize the impact of corruption on society. Imperfections of Perma No. 1 of 2020 is also caused by the existence of the Corruption Law which is the legal basis, especially in relation to the effectiveness of regulating the range of criminal sanctions in the provisions of Article 2 and Article 3 of the Anti-Corruption Law in supporting the recovery of State losses arising from corruption. Although the two provisions of the Corruption Law have been replaced by Article 603 and Article 604 of Law No. 1 of 2023, the regulations regarding the range of sanctions will not result to significant changes. Ideal criminal sanctions cannot only depend on the main criminal act, but also requires additional sanctions taking into account the impact of social harm. Suggestions to materialize ideal criminal corruption sanctions are as follows:

- 1) Evaluate and revise Perma No. 1 of 2020, as follows:
  - a. Adapt the regulations to Law no. 1 of 2023, especially Article 603 and Article 604 which replace Article 2 and Article 3 of the Corruption Law;
  - b. Prioritize the impact of corruption, not only on the State, but also on society by simplifying the categorization of losses into most severe, severe and moderate.
- 2) Review the effectiveness of the range of criminal sanctions contained in Article 603 and Article 604 of Law No. 1 of 2023, through the following:
  - a. Projecting how sanctions can restore State losses arising from corruption and provide a deterrent effect for perpetrators and society;
  - b. Changing the sanctions approach from long-term imprisonment to ideal sanctions.
- 3) Support the implementation of Perma No. 1 of 2020 to realize ideal criminal sanctions.

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