Integritas: Jurnal Antikorupsi
Vol 10, No. 1, 2024, pp. 149-160

https://jurnal.kpk.go.id/index.php/integritas

Reconstruction of special sentencing guidelines on state loss crime in the Indonesian Criminal Code

Andi Muhammad Alief
Universitas Ahmad Dahlan. Umbulharjo, Yogyakarta, 55111, Indonesia
andi1800024191@webmail.uad.ac.id
* Corresponding Author

Abstract: State loss crimes are regulated by two laws: Act 31/1999 and Act 1/2023 (KUHP). The regulation of state loss crimes in the KUHP replaces the regulation of state loss crimes in Act 31/1999. Three years after January 2, 2023, Perma 1/2020 will not apply, so there are no special sentencing guidelines to apply the state loss crime article of KUHP. Such sentencing guidelines are required to minimize unwarranted disparities. This study aims to prevent a legal vacuum and unwarranted disparity from occurring when the KUHP comes into effect. The methods of this research include the normative legal type, statutory approaches, conceptual approaches, primary and secondary data sources and qualitative analysis. Sentencing guidelines for state-loss crimes present several problems. *First,* Perma 1/2020 does not follow the regulations for the formation of legislation, the material on the criminal sanctions range is contrary to the principle of legality and is weak from a juridical aspect. *Second,* the sentencing guidelines in the KUHP do not provide comprehensive parameters. Therefore, the KUHP must adopt several materials from Perma 1/2020, with several modifications.
Keywords: Reconstruction, Special Guidelines, Sentencing, State Loss, KUHP

How to Cite: Alief, A. M. (2024). Reconstruction of special sentencing guidelines on state loss crime in the Indonesian Criminal Code. *Integritas : Jurnal Antikorupsi*, *10*(1), 149-160. https://doi.org/10.32697/integritas.v10i1.1069

Introduction

According to C.J. Friedrich, there is a view that corruption is like a plague that affects various countries (Nye, 1967). This includes Indonesia, as reflected in the declining rankings of the Corruption Perceptions Index (CPI) for Indonesia over the past three years: in 2021, it ranked 96th; in 2022, it dropped to 110th; and in 2023, it further declined to 115th (Transparency International, 2023). The Secretary General of Transparency International Indonesia, Wawan Heru Suyatmiko, explained that one of the reasons for this situation is the ineffectiveness of corruption eradication efforts (DA, 2023). Therefore, this research will examine fundamental aspects of law enforcement regarding one type of corruption offense in Indonesia: regulations governing the guidelines for special sentencing for corruption offenses causing state losses. These regulations are intended to encourage judges to impose proportional sentences based on the principles of justice, legal certainty, and the effectiveness of corruption eradication.

Indonesian positive law classifies corruption into certain types of acts that are punishable (*strafbaar feit*). One of them is the state loss crime, which often occurs in Indonesia: recording 1,188 cases of state loss crimes in 2021 (Indonesia Corruption Watch, 2021). State loss crimes were regulated in Act 31/1999, specifically in Article 2, paragraph (1), and Article 3. It was then rearranged in the KUHP, specifically in Articles 603 and 604.

The elements (*bestanddeel*) of Article 603 of the KUHP and Article 2 paragraph (1) of the Act 31/1999 are similar, as are Article 604 of the KUHP and Article 3 of the Act 31/1999. (Interview, Supandriyo, online, 19 July 2023). Doctrinally, the four articles were distinguished only by the subject of their application (*addressaat norm*). Nur Basuki Minarno explained that "The subject of Article 2 (1) of the Act 31/1999 is not a state organizer." (Ali & Yuherawan, 2021). Article 3 of Act 31/1999 applies to perpetrators with the qualifications of officials or state organizers (Ali & Yuherawan, 2021). As to the teks article 2 paragraph (1) of Act 31/1999, similar to the teks Article 603 of the KUHP, and the teks of Article 3 of Act 31/1999, similar to the teks Article 604

of the KUHP, then Article 603 of the KUHP is addressed to not the organizer of the state, while Article 604 of the KUHP is addressed to officials or state organizers.

Three years from January 2, 2023 (January 2, 2026), KUHP will be in force (Vide Article 624 KUHP). On January 2, 2026, Articles 2 and 3 of Act 31/1999 will no longer apply (Vide Pasal 622 paragraph 1 letter i KUHP). Consequently, as of January 2, 2026, Perma 1/2020 is no longer in force. This is because Perma 1/2020 only binds to articles 2 and 3 of Act 31/1999 and does not bind to other articles (Hastuti, 2021). Perma 1/2020 is useful for determining a proportionate and rational penalty weight within the overly broad range of sentencing, as regulated in the crime articles.

Articles 603 and 604 of the KUHP regulate the range of criminal sentencing between special minimum sentencing and overly broad special maximum sentencing. For the criminal type of imprisonment, this denotes 2 years to 20 years. The criminal type of penalty is a category II fine (Rp. 10.000.000,00) to a category VI fine (2.000.000.000,00) (Vide Pasal 79 KUHP). Suppose that the range of criminal sentencing is too wide without comprehensive parameters. In this case, the judge can drop the disproportionate weight of a crime without logical rationalization as much as he wishes when determining the weight of the crime, with the pretext of having the freedom of a judge (Interview, Gaza Carumna Iskadrenda, online, 30 June 2023).

Disproportionate, unreasonable, and disproportional weight of sentencing (or other judgments) on a comparably dangerous criminal act is called unwarranted disparity. Such problems can be minimized using the sentencing guidelines (*straftoemeting leidraad*) (Interview, Gaza Carumna Iskadrenda, online, 30 June 2023). Sentencing guidelines for generally applicable or all criminal acts have already been laid out in Articles 53–56 of the KUHP. Still, these articles have not yet established comprehensive parameters and have not established gradations of the range of criminal sentencing (criminal sanctions range).

If the guidelines contained in the KUHP were to be used in the implementation of Articles 603 and 604 of the KUHP, then the judge would still be able to determine the weight of the crime according to the (currently too-wide) range of criminal sanctions. However, it would be different if the judge also used special sentencing guidelines, which gave the option of 15 gradations of the criminal sanctions range. This is according to the characteristics of the criminal act, which can be made known by assessing any parameters met as set out in Perma 1/2020. The subject matter of this special sentencing guideline will reduce the contestable subjectivity of a judge. Still, it does not eliminate the subjectivity of the judge in determining the weight of specific crimes. In other words, the existence of special sentencing guidelines is necessary in the application of Articles 603 and 604 of the KUHP: for justice, certainty, and the benefits of judgment.

At the moment, there are no special sentencing guidelines for articles 603 and 604 of the KUHP, even the discourse on its formation has yet to be heard. This special sentencing guideline has many benefits; not only for judges, but also for the entire component of the criminal justice system, the perpetrators, and the community. The benefits of such special sentencing guidelines could potentially turn to harm, if none were formed for Articles 603 and 604 of the KUHP.

The study isintended to examine the sentencing guidelines in Indonesia; in particular, the sentencing guidelines for state loss crimes. The study covers two aspects: *First*, the deconstruction of the sentencing guidelines set out in Perma 1/2020 and KUHP. *Second*, reconstruction as a recommendation for the legal issues found during deconstructions. The study aims to present objective, comprehensive, and rational recommendations to address legal issues in Indonesian sentencing guidelines. This is to improve the quality of the law enforcement of state loss crimes in Indonesia; in particular, the application of Articles 603 and 604 of the KUHP in the future.

Methods

This study uses normative types of law, statutes approaches, and conceptual approaches to study synchronization or compatibility between positive legal norms (*ius constitutum*) and legal concepts. These are additionally used to assess better positive law norms in the future (*ius constituendum*). Data collection consists of primary and secondary data, using field and library

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

methods. Primary data is obtained from the results of interviews. Secondary data include primary and secondary legal materials. The data analysis uses qualitative methods to discuss the objects being studied. The object of this study is the sentencing guidelines related to the enforcement of the state loss crime laws, including four articles. These are articles 2 and 3 of Act 31/1999, and articles 603 and 604 of the KUHP.

Conceptual Framework

Justice and legal certainty

Justice and legal certainty (the principle of legality) become important variables to measure the success of a law (Putri & Arifin, 2019). Aristotle explained that justice treats the same cases the same way, and different cases are treated differently as well (Ginsberg, 1963). Equal or different treatments are performed proportionately (Gusman, 2023). There are values of equality and comparable justice. Thus, injustice refers to treating identical cases differently, or treating different cases the same way.

The feature of legal certainty in the material of criminal law regulation is reflected in the basis of legality (principle of legality). In the form of legality equalization, the formulation of the law article must accommodate three principles: the written principle (*lex scripta*), the principle of clarity (*lex stricta*) and the principle of accuracy (*lex certa*) (Abdullah, 2013). In other words: written with formal legal certainty, unambiguously clear, with accurately narrow interpretation (Abdullah, 2013). The principle of legality is important, because in criminal law, the legality principle serves to regulate the fair distribution of sentences (Westen, 2006). The scope of legal certainty and justice covers legislative regulation and implementation. The regulatory material of the special sentencing guidelines of state loss crimes should reflect the principle of legality and justice, thus enabling the realization of certainness, justice, and utility in the law enforcement of criminal cases of state loss.

Sentencing Decision and Disparity of Sentencing

There is an latin adage that says, *"In criminalibus, probationes bedent esse luce clariores."* This translates to: "In criminal cases, the evidence must be brighter than the light" (Mochtar & Hiariej, 2023). To make clear what is wrong, who has done wrong, and who will be held accountable, evidence and the proof are essential. Evidence is a sign or a set of signs that reveal the truth of an event. Proof is the way to explain the truth of a crime based on evidence (Satria, 2018).

Referring to Indonesian law, to prove the occurrence of a criminal act, five types of evidence will be used, as provided for in Article 184 of the KUHAP. Indicative evidence will then be extended through Article 26A of Act 20/2001 (Satria, 2018). Indonesia uses the negative legal proof method (*negatief wettelijk bewijs theorie*) (Triantono & Marizal, 2021). The negative legal proof method regulates that in taking a verdict (veroordeling), at least two means of proof that are mutually relevant to each other and the presence of the convictions of the judge accompanying them are satisfied (Vide Pasal 183 KUHAP). If there is sufficient evidence but the judge is not convinced, he shall release the accused (Novita et al., 2023). Such a consequence is relevant to the principle of *in dubio pro reo*, which explains that if there are doubts about the defendant's guilt, it is better to release the accused from charges (Sidauruk & Hutabarat, 2023). On the contrary, if the judge conceives that the accused is guilty of the matter, then the court shall pronounce the sentencing decision (Unas, 2019).

One problem in a criminal verdict is unwarranted disparity. Unwarranted disparity refers to cases that are considered the same, but are treated differently (Brantingham, 1985). Additionally, it involves the imposition of markedly different criminal weights for crimes of comparable seriousness, without a clear justification (Gulö & Muharram, 2018). Importantly, no two cases are identical (Brantingham, 1985). It could be that the crime is the same, but different in terms of the method of operation and personality of the perpetrator. Thus, the severity of the punishment imposed can vary, according to the seriousness of the crime and the personality of the perpetrator. This difference in punishment is called a reasonable disparity in punishment.

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

Meanwhile, unreasonable disparities should not occur, because they are considered unfair (Hofer et al., 1999).

To find out whether disparity punishment is reasonable or unreasonable, it must be seen from the similarities and danger levels of the crime, which can be compared in each case. Then, the differences in handling and sentencing crimes should be assessed alongside adequate statutory reasons (ratio legis). Unwarranted disparity must be minimized because parties who are victims of unwarranted disparity have the potential to become people who do not respect the law. This can, in turn, weaken public confidence in the criminal justice system (Supandriyo, 2019). Steps to minimize unwarranted disparities can start with implementing a sentencing guideline instrument that reflects certainty and fairness. This should be adequate in its statutory regulations and content material, making it easier for the public to carry out objective supervision of examining decisions.

Sentencing Guidelines

Sentencing guidelines are already known in several countries, such as England, Wales, and the United States (Roberts, 2013). Recently, Indonesia also created sentencing guidelines. Such guidelines are the basic provisions, directions, and guidelines for judges to impose sentences (Mulyadi, 2020). To define meaning, the sentencing guidelines referred to in this article are limited to those that are explicitly named as such.

The existing sentencing guidelines in Indonesia can be seen in Part One, Chapter III, of the KUHP and Perma 1/2020. In the KUHP, criminal guidelines are regulated into four articles: Article 53 concerning the level of priority between certainty and justice; Article 54 regarding parameters for criminal acts committed by human subjects (*naturlijk person*); Article 55 concerning responsibility and elimination of crime; and Article 56 parameters for crimes committed by corporations. These articles can be said to be general sentencing guidelines, as they apply to all articles that regulate criminal acts, whether the perpetrators are individuals or legal entities.

The guidelines in Perma 1/2020 are special sentencing guidelines on the grounds that Perma 1/2020 is intended for specific crimes of corruption (extraordinary crimes), more specifically for state loss crimes, as stated in Article 1 point 2 of Perma 1/2020. The next reason is that Perma 1/2020 regulates 15 criminal sanction range gradation options. Perma 1/2020 is the only sentencing guideline in Indonesia that does so for sentences imposed. This is regulated in Article 12, in conjunction with Attachment Phase III to Perma 1/2020.

Several academics and practitioners explained the benefits of specific sentencing guidelines, referring to Perma 1/2020 to support their claims. Binding sentencing guidelines is said to reduce further disparity in sentencing (Frase, 2019). Molly Cheang explained, Sentencing guidelines provide the basics of rationality, a description of the *ratio decidendi*, a philosophical framework, and clarity of the judge's decision (Mulyadi, 2020, p. 65). G. Larry Mays and L. Thomas Winfree Jr. expanded on the urgency of sentencing guidelines as follows: (1) It limits judge's use of authority in imposing sentences; (2) It ensures that the judge considers several important factors related to the criminal offense he is adjudicating; (3) It prevents judges from imposing sentences on a minimal scale, solely because of the judge's subjectivity; (4) It realizes consistency in criminal verdicts, based on type and weight based on the factors that are the determining variables; and (5) It encourages judges to prioritize transparency and consistency in imposing sentences, in accordance with the principles of presumptive sentencing (Mulyadi, 2020).

Considering the above benefits, Perma 1/2020 functions to improve the quality of punishment from the aspects of certainty and justice (Interview, Agus Setiawan, offline, 25 July 2023). Perma 1/2020 requires judges to consider the reasons in determining a crime's severity or lightness, realizing legal certainty, justice, and proportional benefits, making it easier for judges to judge criminal cases (Andini & Nilasari, 2021). Moreover, Perma 1/2020 is considered a supporting instrument for the independence of judges (Hambali et al., 2021). For the public, Perma 1/2020 functions to make it easier to assess the proportionality of punishment imposed by a panel of judges (Interview, Supandriyo, online, 19 July 2023).

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

Regarding material aspects, the objective factors (the case or chronology of the crimes) and subjective factors (the person) of the sentencing guidelines should be formulated in detail. This formulation would align with the neo-classical lens and the perspective of criminal proportionality. The neo-classical theory views that sentencing guidelines should maintain a balance between objective factors (acts) and subjective factors (person), with an emphasis on the act and the perpetrator (*daad-dader strafrecht*) (Mulyadi, 2020). Proportionality refers to the balance between the seriousness of the crime and the severity of the sentence imposed, or making the sentence imposed appropriate to the crime that has been committed (Frase, 2019).

Apart from being aligned with these perspectives, the formulation of detailed sentencing guidelines also conforms to the views of the majority of the people interviewed for this research. Interviewees consisted of 160 judges in the courts of first and second instance. 74% were of the opinion that sentencing guidelines should ideally be made in detail; on the subjects of the qualifications of the criminal act, and the length of the sentence (Mulyadi et al., 2019). By taking refuge in the clearly formulated content of the sentencing guidelines, judges would undoubtedly be provided with a juridical basis for, or shield from negative perceptions of, the sentences imposed (Mulyadi et al., 2019).

Sentencing guidelines formulated in detail should be prepared as an Act, just like the existing sentencing guidelines in the United States. After the Sentencing Reform Act of 1984, unwarranted disparities in the United States decreased (Anderson et al., 1999). With the material content of the sentencing guidelines, which are regulated in detail and prepared as an Act, unwarranted disparities can be minimized (Hofer et al., 1999). In Indonesia, it would be better to include Perma 1/2020 material in the KUHP to increase its hierarchical status and strengthen its binding powers (Interview, Agus Setiawan, offline, 25 July 2023). Special sentencing guidelines formulated comprehensively in the Act can prevent disparities in sentencing regarding applying Article 603 and Article 604 of the KUHP in the future.

Result and Discussion

Deconstruction of Sentencing Guidelines in the KUHP and Perma 1/2020

According to Barbara Johnson, deconstruction is a strategy for parsing texts (Al-Fayyadl, 2005). More specifically, Barker explained that deconstruction is an action that separates, dismantles, and lays bare various assumptions of the text (Siregar, 2019). The deconstruction in this article aims to look for legal issues regarding sentencing guidelines in the KUHP and Perma 1/2020. There are several results of deconstruction, as follows:

Perma 1/2020 Deviates from Act 31/1999 and the Rules for Forming Statutory Regulation

Wayne R. Lafave explained that material criminal law focuses on actions and various types of crimes along with criminal consequences (Hiariej, 2015). Articles 6, 7, 8, 9, 10, and 12 Perma 1/2020 describe criminal acts (*actus reus*) and criminal consequences (or the criminal sanctions range), as seen in Article 2 paragraph (1) and Article 3 of Law 31/1999. The materials in Articles 6, 7, 8, 9, 10, and 12 Perma 1/2020 thus fall into the material criminal classification (Interview, Gaza Carumna Iskadrenda, online, 30 June 2023).

The material in Article 6 of Perma 1/2020 further explains *bestanddeel* ("state loss") as stated in Article 2 paragraph (1) and Article 3 of Act 31/1999. The material in Articles 7, 8, 9, and 10 of Perma 1/2020 further explains *bestanddeel* ("against the law"), *bestanddeel* ("acts of enriching oneself or another person or a corporation"), and *bestanddeel* ("benefiting oneself or another person or a corporation"); also regulated in Article 2 paragraph (1), and Article 3 Act 31/1999. Based on the above description, it can be asserted that Perma 1/2020 further regulates Article 2 paragraph (1) and Article 3 Act 31/1999.

Examining these further regulations, the author first outlines the levels of Perma in the hierarchy of statutory regulations. Referring to the formulation of Article 8 paragraph (1) of Act 12/2011, the regulations set by the Supreme Court (such as Perma) are statutory under the act (Safudin, 2021). In the context of Perma 1/2020, the part 'considerations' numbers 1–5 of Perma 1/2020 includes several acts, one of which is Act 31/1999. Typically, higher (superior) norms

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

are often included in the 'considerations' section of the norms to be formed and lower (inferior) ones (Anggraeni, 2019). Based on this, it is clear that Perma 1/2020 is lower than Act 31/1999. Further regulation by Perma 1/2020 of Act 31/1999 cannot be justified for two reasons.

First, Perma 1/2020 limits judges freedom in determining the crime's severity. These limitations are more rigid than those provided by Act 31/1999 – this is called a conflict of norms. The content that can provide more rigid limitations than Act 31/1999 is the Act's only material content, and cannot exist under it. If there is a conflict of norms, the principle of *lex superior derogat legi* inferiori applies, which means that lower legal regulations are overruled by higher legal regulations (Sahlan, 2016).

If the material for sentencing guidelines on state loss crime is regulated in the Act, then its validity will not be ruled out – even if there is a conflict of norms between the sentencing guideline material, and the material for articles on state loss crime. This is because of the principle of lex *systematische specialiteit*, meaning that the rules used have even more exceptional characteristics than special ones. The sentencing guidelines are more special than the state loss crime article itself, as long as the formulation of both is regulated in the Act.

Second, it does not comply with the rules for forming statutory regulations. Further regulating the material of the Act means that the Act has previously and explicitly stated that it gives authority to lower regulations to further regulate it (Asshiddiqie, 2017). This is referred to as delegation (Vide poin 198, Sub Chapter A, Chapter II, UU 12/2011). Not a single article could be found in Act 31/1999 that delegates the legislation below it to regulate its content. Based on the reasons for the conflict of norms and the absence of delegation, Perma 1/2020 deviates from Act 31/1999, and is therefore not in accordance with the rules for forming statutory regulations.

The Criminal Sanctions Range Material for Perma 1/2020 Deviates from the Principle of Legality

In latin, the principle of legality contains three meanings: *nulla poena sine lege*, *nulla poena sine crimine* and *nullum crimen poena sine legali*. These must exist under the legal system, including legal substances such as Perma 1/2020. Article 12 of Perma 1/2020 and Attachment Phase III of Perma 1/2020 regulate the criminal sanctions range (previously regulated in Article 2 and 3 of Act 31/1999). The meaning of *nulla poena sine lege* ("no criminal without Act") is that the judge can only decide the severity of the crime according to the measure determined by the Act (Achjani, 2011).

Perma is not an Act, so the content of Perma 1/2020 should not regulate the criminal sanctions range. This is because as opposed to Perma, judges determine the severity of the sanctions according to the standards determined by the Act. Therefore, the material contained in the regulatory sentencing guidelines will only be binding on judges if it is regulated in the Act – not statutory regulations, which are lower than the Act. This means that the material on the criminal sanctions range placed in Perma 1/2020 does not align with the principle of legality, specifically in *nulla poena sine lege.*

Perma 1/2020 is Weak From a Juridicial Aspect

There is an latin adage that says, "*Apices juris non sunt jura*," meaning that a weak law is not a law (Mochtar & Hiariej, 2023). This adage suggests that the laws formed must be strong enough to bind and effectively regulate society. Strong law can here also be understood as legislation whose formation is not problematic, or is based on the principles of forming statutory regulations (Febriansyah, 2016). The principles in question are twofold. *First,* the principle of conformity between type, hierarchy, and content material (principle of conformity). *Second,* the principle can be implemented.

First, Perma which is hierarchically under the Act. The content of Perma 1/2020 should be accommodated in the Act, not in the Perma, because the formulation of sentencing guidelines is the jurisdiction of Act makers as a legislative policy (Mulyadi, 2020). Therefore, Perma 1/2020 does not align with the principle of conformity. *Second,* legally, Perma 1/2020 is problematic because it does not align with Act 31/1999, the rules for forming statutory regulations, and the principle of legality. Thus, Perma 1/2020 is difficult to implement, as judges could ignore Perma 1/2020 on the pretext that Perma 1/2020 is problematic.

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

Based on the description two explanations, Perma 1/2020 is weak from a juridical aspect, difficult to implement, and can even be ignored. It is proven that there are several criminal decisions regarding the application of Article 2 paragraph (1) and Article 3 of Act 31/1999 that ignore Perma 1/2020. These include Decision Number 37/Pid.Sus-TPK/2021/PN Srg; Decision Number 92/Pid.Sus-TPK/2021/PN Mdn; Decision Number 42/Pid.Sus-TPK/2022/PN Mdn. Moreover, the panel of judges should in these cases use Perma 1/2020 as a reference for determining the proportional weight of sanctions against the defendant.

The Sentencing Guidelines Material in the KUHP is too General

Concerning the application of Articles 603 and 604 of the KUHP, this section will examine Article 54 paragraph (1) of the KUHP. There are eleven parameters in the Article 54 paragraph (1) of the KUHP. The eleven parameters in Article 54 paragraph (1) of the KUHP are still general, and have multiple interpretations (Assegaf, 2018). They are hence insufficient to describe the characteristics of the crime or criminal acts. These eleven parameters do not provide clear, rigid, and comprehensive parameters regarding objective and any elements related to criminal acts. Article 54 paragraph (1) of the KUHP reads:

> "In sentencing, consideration must be given to: (a) the form of guilt of the perpetrator of the criminal act; (b) motive and purpose of committing a criminal act; (c) the inner attitude of the perpetrator; (d) Criminal acts are planned or unplanned; (e) how to commit a criminal act; (f) the attitude and actions of the perpetrator after committing the criminal act; (g) life history, social situation, and economic situation of the perpetrator of the criminal act; (h) the influence of the crime on the future of the perpetrator of the criminal act; (i) the influence of the crime on the Victim or the Victim's family; (j) forgiveness from the Victim and/or the Victim's family; and/or (k) the value of law and justice that lives in society."

This is different from the content of Perma 1/2020, which provides comprehensive parameters. If, in the future, the judge only considers the eleven parameters in Article 54 paragraph (1) of the KUHP (general and multiple interpretations) without considering the parameters in the material of Perma 1/2020, then in applying Article 603-604 of the KUHP, it will be difficult to realize the proportionality of criminal sentences or sanctions. This is because the sentencing guidelines in the KUHP do not regulate parameters relating to comprehensive objective elements and the criminal sanctions range as regulated in Perma 1/2020.

Perma 1/2020 regulates 34 parameters for state loss crimes and 15 options for the criminal sanctions range, due to the parameters of the realised criminal guidelines. Such arrangements (Perma 1/2020) are considered more careful. They also provide proportional discretion limits for judges to realise the proportionality of criminal sentences, regarding the application of Article 603 and Article 604 of the KUHP. Therefore, in the future application of Articles 603-604 of the KUHP, general sentencing guidelines (Article 54 of the KUHP) must be used. Additionally, special sentencing guidelines should be used which are adequate in content and type.

Reconstruction of Special Sentencing Guidelines for State Loss Crime

Special sentencing guidance material is packaged in the form of Perma 1/2020, and only applies to Article 2 and Article 3 of Act 31/1999 (does not apply to Article 603 and Article 604 of the KUHP). Meanwhile, the material of Perma 1/2020 is needed as a special sentencing guideline in applying Article 603 and Article 604 to the KUHP in the future. Therefore, it is necessary to carry out reconstruction or rearrangement first, as follows:

Special Sentencing Guidelines is Entered in the KUHP

Incorporating special sentencing guidelines material into the act, namely the KUHP. It is thus necessary to revise the KUHP by adding Paragraph 2A: the Special Sentencing Guidelines for State Loss Crime, or *Pedoman Pemidanaan Khusus Delik Kerugian Negara (PPK-DK)*. All special sentencing guidelines material for Article 603 and Article 604 of the KUHP will later be included in this PPK-DK. The rationalization of special sentencing guidelines must be regulated in the KUHP with the following understanding: (1) Sentencing guidelines are a legislative product (Act); (2) The KUHP already recognizes the concept of sentencing guidelines; (3) It should not

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

conflict with the KUHP; (4) It should align with the principle of legality, especially the principle of "no criminal without Act"; (5) It should comply with the principle of being clear or unambiguous (*lex stricta*); (6) It must be under the principle of conformity between type, hierarchy, and content material; (7) It must be under the principle, it can be implemented (applicable); (8) It intends that judges cannot ignore these special sentencing guidelines under the pretext of the judge's freedom; (9) It improves the quality of sentencing from the aspects of certainty and justice.

Adopting Perma 1/2020 Material

The articles of Perma 1/2020 that need to be adopted into the PPK-DK include Article 6 paragraph (1), Article 6 paragraph (2), Articles 7, 8, 9, 10, 11, and 12 Perma 1/2020.

First, Article 6 paragraph (1) Perma 1/2020 explains that state loss or state economy (due to criminal act Article 2 of Act 31/1999) are divided into four parameters, including: (a) the heaviest category; (b) the heavy category; (c) the medium category; (d) the light category. Here, the four parameters are intended for Article 603 of the KUHP. *Second,* Article 6 paragraph (2) Perma 1/2020 explains state loss or state economy (due to criminal act Article 3 of Act 31/1999) is divided into five parameters, including: (a) the heaviest category; (b) the heavy category; (c) the medium category; (d) the light category; (e) the lightest category. Here, the five parameters are intended for Article 604 of the KUHP. *Third,* Article 7 of Perma 1/2020 explains that the aspects of mistakes, impacts, and benefits are divided into three categories or levels: low, medium, and high. *Fourth,* Article 8 of Perma 1/2020 states several parameters regarding the high category mistake aspect, the high category impact, and the benefits of the high category. *Fifth*, Article 9 of Perma 1/2020 states several parameters regarding the medium category mistake aspect, the medium category impact, and the medium category benefits. *Sixth,* Article 10 Perma 1/2020 states several parameters regarding the aspects of low-category mistakes, low-category impact, and low-category benefit. *Seventh,* Article 11 of Perma 1/2020 regulates how to determine the level of mistake, impact, and benefit aspects*. Eighth,* article 12 of Perma 1/2020 legitimizes the application of the criminal sanctions range table as contained in Appendix III of Perma 1/2020. In the future, the table of criminal sanctions range would be included in the attachment to the KUHP. Still, before that, the Phase III Attachment Perma 1/2020 must sequentially formulate Roman numerals in each column of the table. This phase should start from number XV to number I for the level of 'state loss' and 'mistakes, impacts, and benefits' from the heaviest category to the lightest categories. This is to avoid ambiguity, such as if there are the same Roman numerals in different columns. It can be formulated as in Table 1.

Based on this ideas, the 34 parameters and the 15 gradations of criminal sanctions from Perma 1/2020 need to be adopted into the KUHP. The idea of adopting these special sentencing guidelines in the KUHP is relevant to the aspirations of judges, the doctrine of sentencing guidelines, the principle of legal certainty, the principle of justice, the rules for the formation of statutory regulations, and the principles of formation statutory regulations as previously described. Suppose these special sentencing guidelines are combined with general sentencing guidelines (Article 54 paragraph (1) of the KUHP). In this case, it will become easier for judges to determine the level of proportionality between the seriousness of the state loss crime (objective factors and subjective factors). They would additionally be able to better determine alternative gradations of the range of criminal sentences that can be imposed.

With special sentencing guidelines and general sentencing guidelines in the KUHP, judges handling cases under Article 603 and Article 604 of the KUHP generally consist of three stages. *First,* the *konstatir* stage. The panel of judges would here reveal the facts in detail – both objective factors relating to the criminal act, and subjective factors relating to the perpetrator's personality. *Second*, the *kualifisir* stage. The panel of judges would explain the elements of the article charged, then determine whether the defendant's actions fulfil these. The panel of judges then determines the 'category of state loss' and the categories of 'mistake, impacts, and benefits'. After that, the panel of judges would find a 'criminal sanctions range' narrower than the range determined by the criminal act article. Furthermore, to determine the weight of the criminal sanctions, the judge would be obliged to consider the eleven parameters of Article 54, paragraph

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

(1) of the KUHP. This is to determine the weight of the criminal sanctions to be imposed. *Third,* the *konstituir* stage. The panel of judges would determine the sentence against the defendant in line with the two previous stages (which are supported by special- and adequate general sentencing guidelines). Thus, every criminal decision regarding Article 603 and Article 604 of the KUHP in the future would be accompanied by an adequate legal ratio.

Tabel 1. Criminal Sanctions Range

(State losses)	Mistakes, Impact, and Benefits		
	a. High	b. Medium	c. Low
The heaviest category, more than one hundred billion rupiahs	(XV) Imprisonment of 16-20 years/life imprisonment & a fine of eight hundred million rupiahs up to one billion rupiahs	(XIV) Imprisonment of 13-16 years & a fine of six hundred fifty million rupiahs up to eight hundred million rupiahs	(XIII) Imprisonment of 10-13 years & a fine of five hundred million rupiahs up to six hundred and fifty million rupiahs
Most severe category, more than twenty-five billion to one hundred billion rupiahs	(XII) Imprisonment of 13-16 years & a fine of six hundred fifty million rupiahs up to eight hundred million rupiahs	(XI) Imprisonment of 10-13 years & a fine of five hundred million rupiahs up to six hundred and fifty million rupiahs	(X) Imprisonment of 8-10 years & a fine of four hundred million rupiahs up to five hundred million rupiahs
Medium category, more than one billion rupiah to twenty billion rupiah	(IX) Imprisonment of 10-13 years & a fine of six hundred fifty million rupiahs up to eight hundred million rupiahs	(VIII) Imprisonment of 8-10 years & a fine of four hundred million rupiahs up to five hundred million rupiahs	(VII) Imprisonment of 6-8 years & a fine of three hundred million rupiahs up to four hundred million rupiahs
Light category, more than two hundred million rupiah up to one billion rupiah	(VI) Imprisonment of 8-10 years & a fine of four hundred million rupiahs to five hundred million rupiahs	(V) Imprisonment of 6-8 years & a fine of three hundred million rupiahs up to four hundred million rupiahs	(IV) Imprisonment of 4-6 years & a fine of two hundred million rupiahs up to three hundred million rupiahs
Lightest category, up to two hundred million rupiahs	(III) Imprisonment of 3-4 years & a fine of one hundred fifty million rupiahs up to two hundred million rupiahs	(II) Imprisonment of 2-3 years & a fine of one hundred million rupiahs up to one hundred and fifty million rupiahs	(I) Imprisonment of 2-3 years & a fine of fifty million rupiahs up to one hundred million rupiahs

Processed by the author from Attachment to Perma 1/2020

Conclusion

There are several conclusion points obtained from the discussion above. First, Perma 1/2020 deviates from Act 31/1999, which hierarchically says that Act 31/1999 is higher (superior) than Perma 1/2020 (inferior). Then, Perma 1/2020 deviates from the rules for forming statutory regulations. This is because Perma 1/2020 further regulates material criminal matters from Article 2 Paragraph 1 and Article 3 of Act 31/1999, even though the latter does not delegate further regulation. Perma 1/2020 deviates from the principle of legality, one of which means "no criminal without Act". This is because Perma 1/2020 regulates criminal sanctions, even though Perma 1/2020 is not an Act. Due to several of these problems, Perma 1/2020 is weak from a juridical aspect, so it tends to be ignored by the panel of judges in enforcing the article on state loss crime.

As a second conclusion, the sentencing guidelines in the KUHP (Article 54 of the KUHP) are too general because they only regulate parameters relating to the subjective elements of the perpetrator. Meanwhile, they do not regulate parameters surrounding the objective elements of the perpetrator's actions. Moreover, the sentencing guidelines in the KUHP do not regulate limitations on the criminal sanctions range based on objective and subjective element

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

parameters. Examples of such parameters include the limitations on the range of criminal sentences, regulated in Perma 1/2020.

Finally, based on the problems above, it is necessary to create Paragraph 2A of the KUHP, by adding the Special Sentencing Guidelines for State Loss Crime, or Pedoman Pemidanaan Khusus Delik Kerugian Negara (PPK-DK), to the KUHP. This is so that the criminal guidelines and regulations take the form of an act. It is concurrently necessary to modify and adopt the material of Articles 3, 6, 7, 8, 9, 10, 11, 12, and Attachment Phase III Perma 1/2020 into the PPK-DK and the KUHP Attachment. The material in Perma 1/2020 that needs to be adopted includes the article requiring judges to implement the sentencing guidelines. This article then requires the adoption of several attachments which regulate subjective and objective element parameters, and restrictions on the criminal sanctions range options. This idea is in line with the conceptual framework. It will strengthen the criminal justice system in enforcing the state's loss crime, because it makes it easier for panel judges to apply Articles 603 and 604 of the KUHP. Additionally, it makes it easy for the public to examine judgments using comprehensive parameters, so that judicial accountability is realised and unwarranted disparities can be minimised.

Reference

Abdullah, M. (2013). Mempertanyakan kembali kepastian hukum dalam perspektif hukum pidana dan sistem hukum nasional. *Legalitas: Jurnal Hukum*, *4*(1), 1–6. https://doi.org/10.33087/legalitas.v4i1.108

Achjani, E. (2011). Proporsionalitas penjatuhan pidana. *Jurnal Hukum Dan Pembangunan*, *41*(2). http://jhp.ui.ac.id/index.php/home/article/view/245/179

Al-Fayyadl, M. (2005). *Derrida*. LKIS Pelangi Aksara.

Ali, M., & Yuherawan, D. S. B. (2021). *Delik-delik korupsi*. Bumi Aksara.

Anderson, J. M., Kling, J. R., & Stith, K. (1999). Measuring interjudge sentencing disparity: Before and after the federal sentencing guidelines. *The Journal of Law and Economics*, *42*(S1), 271–308. https://doi.org/10.1086/467426

Andini, O. G., & Nilasari, N. (2021). Menakar relevansi pedoman pemidanaan koruptor terhadap upaya pemberantasan korupsi. *Tanjungpura Law Journal*, *5*(2), 133. https://doi.org/10.26418/tlj.v5i2.46109

Anggraeni, R. (2019). Memaknakan fungsi undang-undang dasar secara ideal dalam pembentukan undang-undang. *Masalah-Masalah Hukum*, *48*(3), 283. https://doi.org/10.14710/mmh.48.3.2019.283-293

Assegaf, R. S. (2018). Sentencing guidance in the Indonesia's criminal code reform bill: For whose benefit? *Australian Journal of Asian Law*, *19*(1), 87–104. https://doi.org/10.3316/informit.066607204684383

Asshiddiqie, J. (2017). *Perihal undang-undang di Indonesia*. Konstitusi Press.

Brantingham, P. L. (1985). Sentencing disparity: An analysis of judicial consistency. *Journal of Quantitative Criminology*, *1*(3), 281–305. https://doi.org/10.1007/BF01064637

DA, A. T. (2023). *3 sebab indeks persepsi korupsi Indonesia selalu rendah*. Hukum Online. https://www.hukumonline.com/berita/a/3-sebab-indeks-persepsi-korupsi-indonesia-selalu-rendah-lt643e4e2f1adfc/?page=2

Febriansyah, F. I. (2016). Konsep pembentukan peraturan perundang-undangan di Indonesia. *Perspektif*, *21*(3), 220. https://doi.org/10.30742/perspektif.v21i3.586

Frase, R. S. (2019). Sentencing guidelines in American Courts: A forty-year retrospective. *Federal Sentencing Reporter*, *32*(2), 109–123. https://doi.org/10.1525/fsr.2019.32.2.109

Ginsberg, M. (1963). The concept of justice. *Philosophy*, *38*(144), 99–116. https://doi.org/10.1017/S0031819100060101

Gulö, N., & Muharram, A. K. (2018). Disparitas dalam penjatuhan pidana. *Masalah-Masalah*

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

Hukum, *47*(3), 215. https://doi.org/10.14710/mmh.47.3.2018.215-227

Gusman, D. (2023). Keadilan dalam perspektif konstitusionalisme. *Unes Journal of Swara Justisia*, *7*(1), 284–293. https://doi.org/10.31933/ujsj.v7i1

Hambali, A. R., Ramadani, R., & Djanggih, H. (2021). Politik Hukum PERMA Nomor 1 Tahun 2020 dalam mewujudkan keadilan dan kepastian hukum terhadap pemidanaan pelaku korupsi. *Jurnal Wawasan Yuridika*, *5*(2), 200. https://doi.org/10.25072/jwy.v5i2.511

Hastuti, K. S. (2021). Pembaharuan hukum pedoman pemidanaan terhadap disparitas putusan pengembalian kerugian keuangan negara akibat tindak pidana korupsi. *Indonesian Journal of Criminal Law and Criminology (IJCLC)*, *2*(2), 92–102. https://doi.org/10.18196/ijclc.v2i2.12294

Hiariej, E. O. S. (2015). *Prinsip-prinsip hukum pidana: Edisi penyesuaian KUHP Nasional*. Raja Grafindo Persada.

Hofer, P. J., Blackwell, K. R., & Ruback, R. B. (1999). The effect of the federal sentencing guidelines on inter-judge sentencing disparity. *The Journal of Criminal Law and Criminology (1973-)*, *90*(1), 239. https://doi.org/10.2307/1144166

Indonesia Corruption Watch. (2021). *Laporan pemantauan tren vonis 2021: Rendahnya hukuman penjara dan anjloknya pemulihan kerugian negara*. Indonesia Corruption Watch. https://antikorupsi.org/sites/default/files/dokumen/Paparan Hasil Pemantauan Tren Vonis 2021.pdf

Peraturan Mahkamah Agung Nomor 1 Tahun 2020 tentang Pedoman Pemidanaan Pasal 2 dan Pasal 3 Undang-Undang Pemberantasan Tindak Pidana Korupsi, (2020).

Mochtar, Z. A., & Hiariej, E. O. S. (2023). *Dasar-dasar ilmu hukum: memahami kaidah, teori, asas, dan filsafat hukum*. Rajawali Pers.

Mulyadi, L. (2020). *Menggagas model ideal pedoman pemidanaan dalam sistem hukum pidana Indonesia*. Kencana.

Mulyadi, L., Yahya, B., & Suhariyanto, B. (2019). *Urgensi pedoman pemidanaan dalam rangka mewujudkan keadilan dan kepastian hukum*. Prenadamedia Group.

Novita, A. B., Riyanto, A. D., & Al Ghifari, A. F. A. H. (2023). Teori pembuktian dalam sistem hukum nasional. *Madani: Jurnal Ilmiah Multidisiplin*, *1*(5). https://jurnal.penerbitdaarulhuda.my.id/index.php/MAJIM/article/view/154

Nye, J. S. (1967). Corruption and political development: A cost-benefit analysis. *American Political Science Review*, *61*(2), 417–427. https://doi.org/10.2307/1953254

Undang-Undang Republik Indonesia Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi, (1999).

Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 tentang pembentukan peraturan perundang-undangan, (2011). https://bphn.go.id/data/documents/11uu012.pdf

Undang-Undang Republik Indonesia Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana, (2023).

Putri, K. D. A., & Arifin, R. (2019). Tinjauan teoritis keadilan dan kepastian dalam hukum di Indonesia (The theoretical review of justice and legal certainty in Indonesia). *MIMBAR YUSTITIA*, *2*(2), 142–158. https://doi.org/10.52166/mimbar.v2i2.1344

Roberts, J. V. (2013). Sentencing guidelines in England and wales: Recent developments and emerging issues. *Law and Contemporary Problems*, *76*(1), 1–25.

Safudin, E. (2021). Harmonisasi hukum dalam antinomi hukum (analisis terhadap penerapan Pasal 20 Ayat 2 Huruf B Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman). *Al-Syakhsiyyah: Journal of Law & Family Studies*, *2*(2), 201–229. https://doi.org/10.21154/syakhsiyyah.v2i2.2592

Sahlan, M. (2016). Unsur menyalahgunakan kewenangan dalam tindak pidana korupsi sebagai kompetensi absolut peradilan administrasi. *Jurnal Hukum IUS QUIA IUSTUM*, *23*(2), 271–

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)

293. https://doi.org/10.20885/iustum.vol23.iss2.art6

Satria, H. S. (2018). Pembuktian kesalahan korporasi dalam tindak pidana korupsi. *Integritas: Jurnal Anti Korupsi*, *4*(2), 29. https://doi.org/10.32697/integritas.v4i2.255

Sidauruk, C. F., & Hutabarat, R. R. (2023). Keterangan saksi yang mengakibatkan putusan bebas (vrijspraak) kepada terdakwa tindak pidana pembunuhan ditinjau dari Asas in Dubio Pro Reo (studi putusan nomor: 155/Pid/2020/PT TJK). *UNES Law Review*, *5*(4), 3398–3410. https://doi.org/10.31933/unesrev.v5i4.655

Siregar, M. (2019). Kritik terhadap teori dekonstruksi Derrida. *Journal of Urban Sociology*, *2*(1), 65. https://doi.org/10.30742/jus.v2i1.611

Supandriyo, S. (2019). *Asas kebebasan hakim dalam penjatuhan pidana: Kajian komprehensif terhadap tindak pidana dengan ancaman minimum khusus* (L. Santoso (ed.)). Arti Bumi Intaran.

Transparency International. (2023). *Corruption perceptions index*. Transparency International. https://www.transparency.org/en/cpi/2023/index/idn

Triantono, T., & Marizal, M. (2021). Parameter keyakinan hakim dalam memutus perkara pidana. *Justitia et Pax*, *37*(2). https://doi.org/10.24002/jep.v37i2.3744

Unas, S. (2019). Kajian yuridis terhadap bentuk putusan hakim dalam tindak pidana korupsi. *Lex Et Societatis*, *7*(4). https://doi.org/10.35796/les.v7i4.24704

Westen, P. (2006). Two rules of legality in criminal law. *Law and Philosophy*, *26*(3), 229–305. https://doi.org/10.1007/s10982-006-0007-7

2615-7977 (ISSN Online) | 2477-118X (ISSN Print)