

THE POLITICS OF CRIMINAL LAW IN SENTENCING PERPETRATOR OF TAX CRIME IN INDONESIA

Simon Nahak

The Doctorate Program of Laws, Faculty of Law,
Brawijaya University, Malang,
INDONESIA.

ABSTRACT

Politics of the Criminal Law in sentencing perpetrator of tax crime in the system of Indonesian positive law is stipulated partially in the Law of General Rule and Taxation Procedure, Investment Law, Law on the Eradication of Money laundering, Criminal Code, Code of Criminal Procedure as well as Law on the Eradication of Corruption and its Procedural Law. It is formulated by prioritizing confinement and imprisonment instead of fine payment. The idea of tax law is to collect and cut the tax for the maximum State's Revenue. Unfortunately, the Law on General Rule and Taxation Procedure formulates sanctions in forms of confinement, imprisonment and/or fine payment for the perpetrators of tax crime committed by tax payers, tax official and the third parties. Consequently, the sanctions do not maximize the amount of the tax received for the State's revenue. This makes the State suffer losses, especially when the tax payers are imprisoned. Therefore, to maximize the State's revenue obtained from tax collection, the tax payer and the third parties are only given sanction in monetary way (fine payment). However, for the tax officials committing crime, an alternative sanction chosen among confinement, imprisonment and penal in monetary way is formulated. It is not applied accumulatively.

Keywords: The politics of criminal law, sentencing, perpetrator of tax crime

INTRODUCTION

Republic of Indonesia is a unitary state founded with the goals as stipulated in the Preamble of the 1945 Constitution of the Republic of Indonesia (the 4th Amendment),.....” *to protect all the people of Indonesia and the homeland and to advance the public welfare, to educate the citizens, and to participate in the maintenance of the world order based on independence, eternal peace and social justice.*”

The preamble in the 1945 Constitution of the Republic of Indonesia implies that in order to attain the Nation's goals, the State collects and cuts the taxes of the tax payers. However there is a problem of tax crimes in which the tax payers evade tax collection and tax cut. The state has taken firm action by amended the Law of the Republic of Indonesia Number 6 Year 1983 for four times. The latest amendment is the issuance of the Law of the Republic of Indonesia Number 16 Year 2009 on the General Rule and the Taxation Procedure.

PJA Adriani writes that tax is:

“Belasting noen ik de heffing, waardor de overheid zich door middel van juridische dwang middelen verscheft om de publieke uitgaven te berstrijden, zuls zonder enige prastatie daartegen overte stellen”. Simple translation: Tax is the collection carried out by the government based on legal coercion in order to balance the general expenses without a special compensation for it (Adriani PJA: 2009, 22).

According to the tax law expert above, the tax payers do not get direct compensation because the money is given to the State as the resource to improve the prosperity of the people.

Therefore, the Indonesian Tax Law needs to be renewed in order to redirect it towards the acquisition of the maximum revenue for the state.

The expert explains further that the Article 1, point 9 of the Law of the Republic of Indonesia Number 17 Year 2003 on the State's Finance (the Government Gazette of the Republic of Indonesia Year 2003 Number 47, and the Additional Gazette Number 4286) stipulates that "the State's revenue is money in the State's saving, therefore the State Constitution and the Law on the State's Finance stipulate that it is part of the State's income."

The Article 1 point (1) of the Law of the Republic of Indonesia Number: 28 Year 2007 on the Third Amendment of the Law Number 6 Year 1983 on the General Rules and Taxation Procedure stipulates that "Tax is the obligatory contribution to the State imposed on the individual or institution and it has coercive nature based on the Law. The tax payer does not receive a direct compensation because it is used by the State to improve the prosperity of the People".

The explanation on the concept of compensation for the State's financial loss which is paid by the tax payer, tax official and the third party needs firm and clear justification. This is because there are contradicting opinions among the experts of the state law, the state's administration law, criminal law and taxation expert against the law enforcement officials who apply imprisonment against the perpetrator of tax crime.

Politics of the Indonesian Tax Crime Law with an Orientation towards the Maximum Gain of State's Revenue

The political existence of the tax criminal law against the criminal sanctions formulation for the perpetrators of state income oriented tax crime is based on tax as the main source of state revenue, contributing 80% of the total revenue in the State Budget (APBN).

The political purpose of the criminal law is to create social welfare and to provide social security to the general public. According to the laws, tax is the collection and withholding of tax from taxpayers and third parties, who voluntarily transfer a portion of their wealth to the state to be used for the national welfare. Therefore, in the interest of state revenue, in the event that taxpayers and third parties conduct tax crime, they must be ordered by law to repay the state's financial losses by applying fine penalty. When it is not successful, imprisonment is applied.

On the other hand, taxation criminal acts conducted by tax personnel is formulated, applied and executed based on the General Taxation Provisions and Procedures Law with imprisonment or maximum fine penalty in order to maximize tax revenues.

It is more appropriate to impose fine penalty, not imprisonment and/or confinement, to taxpayers and third parties committing tax crimes. Imprisonment and or confinement will reduce state revenue, as taxpayers and third parties are obliged to pay tax whereas tax personnel as tax officials do not have the obligation to pay and transfer a portion of their income as tax for the national welfare, including their own. Tax personnel are responsible for maximizing tax collection, improving service quality that is in favor of taxpayers, providing assurance to the public that tax officials are fair and of high integrity, and optimizing prevention of tax evasion and avoidance.

Tax crime committed by tax payer and third parties are more suitable to be sanctioned by penal in monetary way (fine payment) than confinement or imprisonment. The reason of it is that the application of confinement or imprisonment will reduce the State's revenue. This is because tax payers and third parties have an obligation to pay taxes. On the other hand, tax officials do not have obligation to pay and submit part of his income to the tax for the

people's welfare, including themselves, maximizing tax collection, improving service quality that supports tax payer, guarantee the public that the tax officials are fair and have high integrity, optimizing the prevention of tax embezzlement.

For the tax officials who commit crime, it is more appropriate to sentence them by confinement and up to maximum imprisonment as well as maximum amount of the fine. The reason of it is that tax touches all aspects of people's need. A further consequence of it is that the formulation of the criminal sanction for the perpetrator of tax crime influences the life of the people. Therefore the regulation on tax collection and tax cut must be approved by the House of Representatives.

The tax collection carried out by the government must be based on the law. It is impossible to collect the tax based on the order of the president, government regulation or other lower regulations.

The fourth principle of Pancasila rules that democracy is led by inner wisdom within consultation and representation. It is also further elaborated in the original version of the Article 23 point (2) of the 1945 Constitution which stipulates that all taxes must be regulated by the law. Therefore, Article 23 point (2) is the source of tax law which also implies the philosophy of tax.

The real philosophy in the context of tax collection/ tax cut for the State's revenue is that people's sovereignty requires people's approval in deciding the amount of tax which has to be paid to the State. People's approval is important because tax is equal to cutting a piece of tissue from their own body (H. Rochmat Sumitro: 1993, 14). The involvement and the form of approval in House of Representative are formulated in the laws.

The philosophy of the Article 23 point (2) of the 1945 Constitution of the Republic of Indonesia rules that the tax collection cannot be executed unilaterally by the State. If it is carried out without people's approval, it is equal to economic oppression against the people. The coercive nature of the tax and the submission of the wealth to the State cannot be implemented unilaterally. The reason of it is that it needs people's approval as stipulated in the constitution.

The unilateral tax-collection without the people's approval is equal to robbery against people's belongings. The philosophy of the Article 23 point (2) of the 1945 Constitution of the Republic of Indonesia is equal to the one of the United States of America who states that: "Taxation Without Representation is Robbery". Even in the 17th century, the British Parliament obliges the King of England to approve Bill of Right of which Article 12 states that "nobody shall be prosecuted for refusal to pay tax which is not approved by the parliament". Therefore, there is also a similar principle in England saying: "No Taxation Without Representation" (Erly Suanda :2000, 9).

The legal argument states that tax payer and the third party do not need to be put in confinement or prison because tax crime is not similar to other crime. The reason of it is that the Finance Minister can ask the General Attorney to stop the investigation of tax crime before the transfer of the case to the court.

It refers to the Article 44 B point (1) and (2) of the Third Amendment of the Law Number 28, Year 2007 on the General rule and Taxation Procedure which stipulates:

1. *For the sake of the State's revenue, on the request by the Finance Minister, the General Attorney can stop the investigation of a tax crime six month after the submission of the letter of request at the latest.*

2. *The cancellation of the investigation of the tax crime as stipulated in the point (1) can only be executed after the tax payer pays the tax debt which has not been paid or not fully paid or shall not be returned and added by administrative sanction in form of four times multiplication of the unpaid tax, not fully paid tax or the tax which shall not be returned.*

The stipulation affirms that although there is a tax crime committed a tax payer and third party, the General Attorney can stop the investigation process on the request of the Finance Minister. It is after the tax payer and the third party pay the tax debt or not fully-paid tax. Therefore, it is clear that the existence of the tax crime law has an orientation towards the State's revenue.

The principle of criminal sanction formulation for tax crime perpetrators in Indonesia gives priority to fine penalty or imprisonment, as criminal law aims to provide deterrent effects to crime perpetrators. Particularly for tax crime perpetrators, criminal law is used as the final means or aids (*ultimum remedium*) in the event that other legal sanctions (administrative, civil and other out of court solutions in the form of penal mediation) are not successful. The political actualization of criminal law in undertaking tax crime is in accordance with the second principle of the state ideology (*Pancasila*), Just and Civilized Humanity, to achieve the fifth principle, Social Justice for all Indonesians. Therefore, the formulation of tax crime sanctions according to the criminal law undergoes the following process: Formulation Stage, to regulate criminal provisions based on Law of the Republic of Indonesia Number 298 Year 2007 regarding General Taxation Provisions and Procedures as the legislative institution; Application Stage, to impose punishment to tax crime perpetrators by law enforcement officers, as the judicative institution; and finally Execution Stage, decision implementation by the relevant authority, in this case the Directorate General of Tax, as the executive institution.

Considering the criminological aspects, tax crime is considered White Collar Crime, as the perpetrators normally have high social status and skills in a variety of financial and power dimensions are needed to commit the crime.

The above explanation affirms that tax crimes are White Collar Crimes, which must be prevented in order not to harm state revenue. Therefore, prevention efforts through criminal law politics are needed during the formulation, application and execution stages according to the General Taxation Provisions and Procedures Law as Special Law based on special law principle overrides general law principle (*Lex Spesialis de rogat lex generalis*).

The politics of the Criminal Law in Sentencing Perpetrator of Tax Crime within the System of Positive Law in Indonesia

The decision on the sanction in sentencing system cannot be separated from the formulation of law which is basically a State's policy or legal policy made by House of Representatives and president. The policy is a formal agreement between House of Representative and government, in this way the president, to regulate the life of the community, nation and state.

Hence, it can be concluded that law cannot only be seen or read as imperative stipulations or obligations with *das sollen* characteristic, but it must also be seen as a part of real subsystem (*das sein*). It is possible that law is determined by politics during its material formulation, articles, implementation as well as enforcement.

This analysis proves that State's policy or legal policy is implemented when House of Representatives and the President determine any acts punishable or not by law (criminalization or decriminalization) in forms of criminal sanctions and their criminal elements in a law. The criminalization is interpreted as the decision of the lawmaker to

elaborate criminal sanction and its elements in the law including grade of the sanction, the number of sanction, criminalization and decriminalization of certain acts as ruled by the politics of criminal law in sentencing formulation for perpetrator of tax crime. Such policy is applied and executed according to the law of General Rule and Taxation Procedure, The Law on the Prevention and Eradication of Money Laundering, Investment Law, Criminal Code, Code of Criminal Procedure as well as Law on the Elimination of Corruption including its Procedural Law which is in force at the moment.

The penal system based on the accumulative criminal sanction as applied in Australia only give 10 years of maximum sanction to the perpetrator of tax crime. On the other hand, Indonesia only applies accumulative criminal sanctions in forms of confinement, imprisonment for maximum 6 years and/ or penal in monetary way (fine payment). The forms and qualifications of tax crime and criminal liabilities of the perpetrators of tax crimes are violation and crime, while the criminal liabilities fall upon individual tax payer, corporation, tax officials as well as third parties.

The application of Violations and Crimes classification to tax crimes, which disadvantage the state revenues, in the Criminal Law leads to the need of the same classification in the General Tax Provisions and Procedures Law.

The General Tax Provisions and Procedures Law is included as a problematic legislative phenomenon and can disturb the efforts of overcoming tax crimes since the Law does not mention the juridical classification of "violation or crime". Therefore, from the formulation/phrasal point of view, there is lack of clarity.

Classifications of tax crimes and violations are necessary as the punishment of tax crimes are not only the forms of confinement, imprisonment and/or fines, but also administrative punishments or sanctions in the forms of payment of administrative interest and fines. Administrative sanctions are normally applied for administrative violations, whereas penal sanctions are applied for tax crime perpetrators who are proven to have neglectfully and intentionally (*culpa* and *dolus*) violate the General Tax Provisions and Procedures Law.

According to the theory of corporate crime liability, tax criminal liability related to the liability of tax crime perpetrators in connection with the actions of Corporate Taxpayers, such as a company or a corporation, there are two types of doctrine, namely strict liability and vicarious liability. However, as explained by Muladi, considering that corporate liability should as much as possible take error factor into account, a new theory was introduced by Viscount Haldane, which was known as 'theory of primary corporate criminal liability' or later on known as 'Identification Theory'.

There are three corporate liability doctrines, each of which has distinctive characteristics and views, namely, Identification Theory Doctrine, Vicarious Liability and Strict Liability Doctrine

Based on the aforementioned explanation on corporate criminal liability, tax crime liability is liability based on fault or culpability of the individual taxpayer, who must honestly do their obligations, as if an individual taxpayer does not do their obligations, they are subject to sanction. Their failure in doing their obligations includes tax disobedience, manipulation, avoidance and evasion.

Tax crime liability in the event of a tax crime lies not only on the individual taxpayer but also legal institution tax payer (corporation, company, association, foundation and cooperative).

Sentencing tax crime perpetrators in order to return the loss of state income is conducted by the authorized institution in the application stage as a judicial policy and the sentence

implementation is conducted by the authorized institution in the execution stage as an execution/administrative policy.

Sanctions based on criminal law should not be used to sentence acts that do not disadvantage/endanger state interests, but only for formulation of criminal law sanctions related to tax and with the character of *ultimum remedium*, that is as the final means or medium in the event that other mediums cannot prevent tax crimes. Its application must be firmly observed from the economic and financial aspects in view of the maximum income for state revenue.

The Politics of Criminal Law in Sentencing Perpetrator of Tax Crime in Indonesia in the Future

The politics of the criminal law in sentencing perpetrator of tax crime in Indonesia in the future consists of penal and non-penal policy. Penal policy concerns the works of the law enforcement officials in criminal justice system as the executor of the criminal sanction against the perpetrator of tax crime committed by the civil official in the General directorate of Tax. The law enforcement officials consist of the Indonesian National Police, Public Attorney Office, judges and prisons.

The attention of the criminologists on crime prevention through criminal sanction is seen through international congress, such as the 7th *International Congress on Criminology* in 1973 in Belgrad (Yugoslavia) covering *Policies System*, in the 9th congress held in 1983 in Vienna Austria covering topics on “*status and criminology and its institutional relations “the public policies proper to criminal justice system”* and the 10th congress held in 1988 in Hamburg (German) covering topics on “*Crisis of penal sanction: “new perspectives”*”. A book on the history of international criminology explains the new perspective of the criminologists “*the penal system as a basic item of the criminological research”*”.

According to the history book or year book on the activity and the development of *the International of Criminology* published in 1988, there are 39 courses on criminology and they can be divided into four periods. The fourth period covering the latest 10 years related to *criminal policy and applied criminology*.

The previous analysis signifies that according to *International Annals of Criminology*, 1988 on the policy on the perpetrator of tax crime and its international instruments are relevant with the criminal policy in the Indonesian criminal justice system.

Non Penal Policy is an effort to prevent tax crime by way other than criminal law policy. It consists of system policy, the improvement of the mental health of the community by using religious education which does not have only a systemic-approach orientation, but also an orientation towards national culture identity. The community must be provided with healthy environment (materially and non materially) which is free from criminogenic factors, organize and develop *extra legal system* or *informal and traditional system* existing in the community such as applying the local *adat* sanction in the form of fine payment, employing the press/ media, applying technology and employing the preventive-effect potential of the law enforcement officials

The relevance with international instrument for the prevention of tax crime, regulating the avoidance agreement of double international taxation, comparison with other countries, such as the Netherlands, Singapore and Australia.

The formulation of the politics of criminal law in sentencing perpetrator of tax crime is done in axiological way. It means the criminal tax law as the special law is aimed at protecting the public interest by generating the formulation of the criminal sanction which is positioned as

the last resort or “ultimum-remedium” or emergency punishment (strafnodrecht), protecting the interest of the victim and protecting the perpetrator of tax crime. It is created by formulating crime and its sanction in line with comparison in the Netherlands and Singapore because their laws show justice, usefulness and legal certainty in the way that the use alternative formulation.

The reason of choosing three nations as comparisons is that they have different legal systems. The Netherlands employ the European-Continental system in form of written laws (civil law system), while Singapore and Australia employ accepted customary laws (common law system). In the Netherlands, perpetrator of tax crime is usually given alternative sanction in which the perpetrator given administrative sanction will not be sent to jail. Alternative sanction is also employed in Singapore in which perpetrator will be given administrative sanction or imprisonment, but the sanction must not be given in combination. On the other hand, Australia use accumulative system in which they combine penal in monetary way and imprisonment with maximum period of 10 years.

CONCLUSION

In line with analysis in previous chapters, it can be concluded that:

1. The politics of Tax Criminal Law in Indonesia is oriented to bring about as much state income as possible in order to maximize state revenue as tax is the main source of state revenue, contributing 80% of the State Budget (APBN). The political purpose of the criminal law is to create social welfare and to provide social security to the general public. Therefore, for the benefit of the state revenue, tax crime perpetrators, particularly taxpayers and third parties, are penalized with fine penalty or imprisonment.
2. According to Indonesian positive law, the politics of criminal law in sentencing the perpetrator of tax crime is implemented in line with the Law of General Rule and Taxation Procedure, Criminal Code, Law on the Eradication of Corruption, Law on the Prevention and Elimination of Money Laundering as well as Investment Law. If Australian system is adopted, maximum imprisonment reaches up to 10 years. In Indonesia maximum imprisonment reaches up to 6 years, while the crimes are in forms of light violation and more serious ones.
3. The politics of criminal law in regards to the sentencing of tax crime perpetrators in the future in Indonesia in formulating the criminal sanctions should use alternative criminal sanctions: “shall be punished by a fine amounting to..... or imprisonment of a minimum of..... year(s) and a maximum of year(s) or imprisonment of a minimum of year(s) and a maximum of year(s)” as in the Netherlands and Singapore. In the Netherlands, only alternative criminal sanctions are applied against taxpayers who violate the law. Taxpayers committing tax crime will receive alternative criminal sanctions, and those who have received administrative sanctions will not be punished with imprisonment.

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