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Optimising Corporate Punishment in Corruption in Indonesia: Issues

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Corruption has a negative impact on the lives of people and the state. Corporations as perpetrators of criminal acts of corruption become essential thoughts to be presented in the context of enforcing criminal law of corruption relating to corporate responsibility. Indonesia is not the only country that has difficulty accounting for crimes for corporations. Therefore, Indonesia needs to learn from the general development of corporate criminal responsibility in various legal systems. The purpose of this study is to obtain an overview and analyse solutions related to the optimisation of corporate punishment in criminal acts of corruption. Normative juridical research methods. This article concludes that corporate criminal liability certainly experiences certain obstacles. These constraints raise an optimisation problem that is closely related to the recovery of state financial losses in corruption committed by corporations. Synergising with this, the issue of optimising criminal punishment against corporations in criminal acts of corruption is due to the criminal law system that still focuses on criminal liability with natural human characteristics. However, the principle of delinquent society non-protest can be said to be irrelevant in a contemporary way. The existence of formal criminal law (criminal procedural law) which is not yet clear is a contributory factor that is not yet optimal in the criminal prosecution of corporations that commit criminal acts of corruption in the context of recovering state financial losses.

Keywords: *Corporations, Corruption, Criminal Law, and State Losses*

Introduction

The industrial revolution and increasing world population are influential factors in developing the role of corporations in society. Individual scale producers may not be able to meet the daily needs of many people. These needs require the role of corporations who have the resources to produce large quantities of goods and services. Modern corporations not only take part in supplying the basic daily needs of the community, such as food, housing and clothing, but they also dominate all aspects of life such as civil, traditional or ways of life in society. Corporations

control the world monetary system, which involves banks, capital markets, large amounts of public money and natural resources such as oil and gas. In addition, in several countries, private corporations are also involved in activities that are the main task of the government. For example, in the United States and the United Kingdom, private corporations run private prisons, based on contracts between the government and corporations (Maradona, 2018).

Modernisation of the industry has provided opportunities for corporations to meet the high demand for goods and services from customers, which can generate enormous profits for the corporation. In addition, the growing interconnections between countries in the world in the era of globalisation also provide opportunities for corporations to get extraordinary benefits. Corporate activity has evolved from being only a national scope to a multinational reach. The development of organisational activities has had a positive impact on society by producing products and services for people's daily lives, creating many job opportunities, and by becoming a major actor in research and development of modern technology in all aspects of life. Moreover, through corporate social responsibility programs, many companies share their profits to help the community, and this has a positive impact on society (Kanyam, Kostandini, & Ferreira, 2017).

Apart from the positive influence of corporations on society, negative things from corporate activities have emerged. As a business entity, a corporation is established with the primary objective to achieve the most significant profit for the corporation or corporation owner. Instead of following good corporate governance to make a profit, some corporations gain advantages illegally and cause harm to society. In general, the methods used by corporations to obtain illegal benefits are such as fraud, cases related to the environment, consumer crime, and including criminal acts of corruption as the theme of the discussion in this study.

Speaking of corporations as perpetrators of criminal acts of corruption, it needs to be explained to initiate this discussion that, Indonesia is not the only country that has difficulties in bringing criminal responsibility to corporations. Therefore, in the context of this problem, Indonesia needs to learn from the general development of corporate criminal responsibility in various legal systems. To have a comprehensive understanding, it is also essential to discuss arguments for corporate criminal liability, even though Indonesia has recognised corporations are subject to criminal law.

Method

This research is descriptive, normative juridical to describe the problems that are related to the optimisation problem of corporate criminal punishment in corruption in Indonesia, and then the issues are analysed. The study was conducted using library data (secondary data research) in the form of primary legal materials, secondary legal materials, and tertiary legal materials.

The legislative approach is carried out by examining all laws and regulations relating to the legal issues being examined.

Results and Discussions

The purpose of criminal law is to create an orderly society in which citizens are safe and dignified against the dangers of other members of the community (criminals). Criminal law, through criminal liability, authorises some people to punish others for criminal responsibility by involving law enforcement. The basic principle of criminal responsibility initially only concerns the responsibility of individuals because criminal law is developed in the ideas and moral attitudes of individualism that emphasise individual moral values. Because criminal sanctions were initially designed only for individuals, sanctions against legal entities (corporations) for a criminal offence will produce several theoretical dilemmas, which are used as arguments for corporate criminal liability (Prabowo, Sriyana, & Syamsudin, 2018).

The theoretical basis for rejecting corporate criminal liability is the fact that corporations are human creations and exist as a tool to support their business and social activities. As a human creation, the corporation is incapable of acting and does not have the will to do something. Corporations can only act through individuals acting on behalf of the corporation or as corporate agents (Clark, 2017). However, states of mind with legal significance, such as knowledge, intentions, crime or trust, only arise from corporate agents, while corporations do not have that capacity. As such, criminal liability can only be assigned to individuals. Mueller (1957) argues that the development of corporate criminal liability is like a weed that grows in the land of criminal law. As a weed, it grows without anyone cultivating or breeding it. The usefulness of corporate criminal liability is the concept of polarisation, with its advantages and disadvantages and each supporting argument.

The absence of actus reus and men's rea corporation in criminal acts is the most persuasive counter-argument against corporate criminal responsibility in countries that have the same legal tradition, the Common Law System, such as the US and UK (Beale, 2008). On the other hand, in Civil Law System countries, the influence of the principle of "societas delinquere non potest", which means that corporations cannot be convicted, leads to the rejection of the application of criminal law to corporations (Beale & Safwat, 2004). Both legal systems have the same basic arguments for corporate criminal liability, namely that the original character of criminal law is incompatible with corporate characteristics. Criminal sanctions are imposed on perpetrators based on their moral mistakes in response to wrong manifestations in criminal offences. The essential elements of a crime, namely actus reus (act) and men's rea (perpetrator or person), were initially only applied to ordinary people.

Criminal sanctions can only be imposed on individuals because only individuals who can physically commit a crime can form intentions. Conversely, corporations are only legal creations of the legal fiction that cannot commit a crime by themselves and have no intention of themselves. It is illogical to make corporations criminally responsible based on their behaviour and intentions. Still, instead it must be based on attributions of the behaviour and intentions of individuals in the corporation. Attribution of actus reus and men's rea from natural persons in corporations, to corporations, is contrary to the basic principles of legal thinking that in criminal law everyone must be held responsible and convicted according to their actions (Prabowo, 2014).

In the context of corporate criminal liability, to a certain extent, individuals within the corporation can be held liable for their own mistakes, but their behaviour can also lead to the criminal liability of their employers, which in this case is the corporation. Dual responsibility, both by individuals and corporations, based on the individual behaviour of individuals in the corporation, is an overlapping responsibility because the real perpetrators are individuals. Furthermore, criminal attribution when imposing sanctions on corporations based on the behaviour of individual people within the corporation is an unfair punishment because parties in the corporation, such as employees and shareholders, who are not directly involved with the violations, will also experience effects from criminal sanctions (Prabowo, Cooper, Sriyana, & Syamsudin, 2017).

Civil and administrative sanctions are more appropriate to protect companies from unjustified reputation damage. These regimes have characteristics similar to criminal law, namely the imposition of responsibility towards corporations and prevention goals. Furthermore, Prabowo and Suhernita (2019) stated that the preventive effect is the objective of corporate criminal liability and corporate civil liability. In addition, to achieve the impact of prevention, criminal sanctions such as fines, probation, ban, and revocation of licenses can easily be made available in the civil law regime for corporations, which are less stigmatised by the public compared to the criminal law regime.

Although there are obstacles both in terms of theoretical and practical aspects coupled with counter-arguments against corporate criminal liability, it related to the substance of this research. According to Asep N. Mulyana that the eradication of corruption involving subjects of corporate law in Indonesia has shown a trend Positive, this can be seen through several indicators, namely: 1) An increase in handling corruption cases with corporate actors. In the beginning, in Indonesia, there was no corporate punishment until 2010, until finally, the Prosecutor's Office pioneered law enforcement officers in committing criminal acts against corporations. The prosecutor's step was then followed by the Corruption Eradication Commission (KPK) and the Police. This can at least be seen from the handling of the case; 2) In terms of positive law, the laws and regulations that place corporations are subject to criminal

law have also increased, totalling 62 pieces. The Prosecutors' Office itself has prepared rules regarding criminal prosecution.

However, according to Asep N. Mulyana, classic problems that usually arise, such as approaches in law enforcement involving corporations are often still directed at individuals rather than the nature of the corporation itself. This can be seen from the many Prosecution Letters made by the Public Prosecutor which in the sound of the petitum states about the replacement money charged to the corporation, but is still subsidised to the person or its management if the corporation's assets are not sufficient.

It is realised indeed, the main note in law enforcement against criminal acts of corruption is the action that still prioritises individual legal subjects compared to corporate-based law enforcement. This is mainly due to the legal resources in Indonesia, namely the Criminal Code, which still prioritises the legal subjects of people in their convictions. Therefore, it is still embedded in the Indonesian Law Enforcement Officials mindset that criminal prosecution of corruption cases is private or personal while the trend of law enforcement on corruption has shifted to legal entities or corporations (Prabowo & Cooper, 2016).

Another issue is that the approach to eradicating corruption tends still to emphasise the aspect of quantity rather than quality. This is due to the public perspective that assesses the good performance of the Law Enforcement Officials seen from the process of taking action in eradicating criminal acts of corruption. This encourages the Law Enforcement Officials to continue to process or raise it to the prosecution stage for corruption cases which have a smaller loss or are not comparable to the operational handling. In addition to this, another noteworthy note is the legal politics of eradicating corruption which prioritises the enforcement approach rather than prevention. This is still correlated with the public perspective that assesses the performance of the Law Enforcement Officials is considered good if the action process. The actual prevention of corruption is a far more straightforward, and cheaper approach. It does not cause noise or anxiety for all groups, so optimising corruption prevention is as important as enforcement.

When explored in more depth, it can be said that the handling of criminal cases committed by corporations is still minimal, said to be minimal because the practice of law enforcement in Indonesia is recorded that there are still few actions taken by Law Enforcement Officials against corporations suspected of committing criminal acts. The lack of Law Enforcement Officials actions towards corporate crime seems to be out of proportion to the consequences of the crime it inflicts, according to David C. Korten (2002) related to the consequences of corporate crime, including: a) Draining natural resources by eroding forests, fisheries, reserves of mining goods, introducing toxic chemicals, disposing of hazardous waste, thereby damaging soil, water and air; b) Drain human resources by creating substandard working conditions that

cause workers to be drained, not passionate, injured, sick, until disabled for life; c) Drain capital, social, divide labor unions, provide workers with low wages, dismantle factories where people depend on them and force to open factories in places where labor costs are low and take violent actions that encourage conflict and tension in the community; and, d) Drain institutional capital and undermine the function and trust of the public in government institutions by funding campaigns to obtain government subsidies, debt relief and taxes, weakening environmental health standards, and labour which are essential for the continuation of human life in the future.

According to Asep N. Mulyana, there are at least four factors as a cause of the lack of legal proceedings against corporate crime, which results from the characteristics of the crime, regulations governing corporate criminal liability, the professionalism of law enforcement officials, and difficulties in identifying victims of corporate crime. These are explained as follows.

A. Nature and Characteristics of Corporate Crime

In general, corporate crime is difficult to see and be known (low visibility), because it is usually covered by routine company activities that involve professional expertise and complex organisational systems. The hiding from the disguise of purpose or intent is due to the professionalism, respectable social status and education level of the perpetrators. In addition, corporations involved in a crime will hide the violations committed (concealment of violation) by minimising formal evidence or by making a double record so that it appears as a business activity in general (Muladi, 1992).

In a large scale business entity in the form of a transnational corporation, for example, the difficulty in exposing an alleged crime is hampered by the scope of business in various places, even in several countries that have different legal systems. Likewise, the organisational structure is so long and complicated, causing the occurrence of unclear responsibilities (discussion of responsibility) of each organ of the company (Muladi, 2002).

Other characteristics inherent in corporate crime usually involve political or economic power, so it is often also called crime by powerful. Crimes committed by corporations or those involving corporations are complex crimes because they not only involve many people and networks but also use the political power and economic resources they have.

In detail, the nature and characteristics of corporate crime that are identical to white collar crime as stated by Hazel Croall (2001), are 1) Low visibility; 2) Complexity; 3) Diffusion of responsibility; 4) The diffusion of Victimization; 5) Difficult to detect and prosecute; 6) Lenient sanctions; 7) Ambiguous laws; and, 8) Ambiguous criminal status.

B. Professional Law Enforcement Officials

In reality, there are still many Law Enforcement Officers who are not accustomed to handling criminal cases with corporate legal subjects, even some of them still do not understand and understand the procedures and procedures for handling them. The incomparability between the professional ability of Law Enforcement Officials and the perpetrators of crime is one of the main obstacles in the detection and prosecution of corporate crime.

According to Michael L. Benson and Francis T. Cullen (1998), the limited prosecution of corporate crime is caused by the difficulty in proving the evil intentions (mens rea) of the corporation. Judging from the object of his actions as an invisible crime that is difficult to prove, like a bribery crime which is covered as if it were a promotional and advertising expense so that it seemed like a legal business activity.

Lack of expertise and cooperation with victims and other institutions is one factor that makes at least the case of corporate crime handled by Law Enforcement Officials. In fact, crimes committed by corporations often take advantage of carelessness and negligence of victims on the basis of public trust in corporate business activities.

This condition is increasingly felt ironic when there are still some of the Law Enforcement Officers who think that only the subject of individual law can be processed and subject to criminal sanctions. They are of the view that a corporation is a mere body of human beings and only those within it carry out activities so that when a crime occurs only the people in the corporation can be processed and held accountable for their speech.

C. Products of Corporate Criminal Liability

At least the handling of criminal cases against corporations conducted by Law Enforcement Officers, can not be separated from the pattern of regulation of corporate criminal liability varies greatly and does not have a standard pattern. The consequences that occur in law enforcement practices can cause confusion, which is due to unclear regulation and ambiguous laws.

According to Muladi and Diah Sulistyani (2013), variations in the regulation of corporate responsibility include the following: 1) General provisions of the law which do not state that everyone in the formulation of a criminal offence includes a corporation; 2) Definition and scope of the corporation; 3) Types of sanctions that can be imposed on corporations, both in the form of criminal or action; and 4) Investigation procedure and criminal justice system process if conducted against a corporation.

On the other hand, the limited knowledge and experience of Law Enforcement Officials have become a separate issue that has contributed to the lack of proper handling of corporations.

D. Victims of Corporate Crimes

In general, conventional crime victims are targeted at a particular individual so that the causes and consequences of a criminal event are easily identified. Unlike the case with victims of corporate, crime does not only aim at individuals but often more detrimental to the government, the environment and the business world.

The nature of corporate crimes committed without violence (non-violent) but often accompanied by a variety of fraud and misdirection that resulted in a fatal impact, both for the community and the environment. It is the nature of the crime without violence that makes the victim not know that he is a victim of corporate crime so that Law Enforcement Officials receive no report.

The characteristics of victims of crime that are "the diffusion of victimization", cause the limitation of reports received by Law Enforcement Officials regarding alleged corporate crimes. Sometimes a person already knows he is a victim of corporate crime but is not willing to report because he does not believe in the ability and professionalism of Law Enforcement Officers to follow up on their reports (Box, 1971).

In addition, the reluctance of victims of corporate crime to report suspected criminal acts is because they were involved in the crime. In this case, directors and employees who are company organs often do not want to report malicious activities in their business and business activities because they are part of a series of activities.

Based on the description above, on this occasion, the author intends to build propositions that the discussion around corporate criminal liability certainly experiences certain obstacles. These constraints raise an optimisation problem that is closely related to the return of state financial losses to corruption committed by corporations. I want to explain the problem of optimisation, starting with the intended use of the word 'optimisation'. Optimisation comes from the optimal word which, according to the Big Indonesian Dictionary is the best, most profitable. Optimising means making perfect, making the highest, making maximum. Optimisation means optimisation. Strictly speaking, Optimisation is the process of finding the best solution, but not always the highest profit that can be achieved. The optimisation goal is to maximise profits, or not always the smallest costs that can be suppressed if the optimisation goal is to minimise costs (Siringoringo, 2005).

Furthermore, according to the Business Dictionary (2019), optimisation is finding an alternative with the most cost effective or highest achievable performance under the given constraints, by maximising desired factors and minimising undesired ones. In comparison, maximisation means trying to attain the highest or maximum results or outcomes without regard to cost or expense.

Based on the definition of the Business Dictionary it can be understood that optimisation is how to find alternatives with the most cost-effective or highest performance that can be achieved under given constraints, by maximising the desired factors and minimising undesirable ones. In comparison, maximisation means trying to achieve the highest or maximum results or results without regard to costs or expenses.

When referring to one of the meanings of the word optimal, which is 'most profitable', the problem of optimisation is the recovery of state financial losses against corrupt acts committed by corporations experiences constraints of the desired goals, namely to achieve things the most profitable. The proposition that I want to build, at least in accordance with the opinion of Romli Atmasasmita, which states that: The value of state financial losses that were saved during five years during the 2007-2012 period amounted to 20.82% of the total losses of Rp. 180,309,318,403.96 and amounted to 20.82% of USD 37,261,549.65. Neither from the Republic of Indonesia Attorney General's Recapitulation Report on eradicating corruption in the 2009 - July 2014 period to save state financial losses of Rp. 6,646,065,225,970.00 and USD 9,174,643.11 (equivalent to Rp. 114,701,388,161.22, assuming an exchange rate of USD = 12,502 per 31 December 2014), and BATH 3,835,192.76 (equivalent to Rp. 1,458. 255,343.13 assuming an exchange rate of THB = IDR 380.23 as of December 31, 2014). In addition, the total number of state financial losses saved by the KPK during 2009-2014 is Rp. 728,445,149,242.00. Even though the report of the Attorney General's Office of the Republic of Indonesia and the Corruption Eradication Commission has shown an estimate of the number of state financial losses that were saved, the report on the total number of state financial losses during that period has not been recorded in detail. It should also be pointed out that the total value of state financial losses saved by the KPK in nominal terms, is still smaller when compared to the amount of the APBN allocation realised by the KPK of Rp. 3.02 trillion (Atmasasmita & Wibowo, 2016).

Viewed from another angle, Rimawan Pradiptyo (2019) said there were social costs of corruption which reached Rp. 509.57 trillion. Rimawan made calculations about losses due to corruption. Rimawan said that losses due to corruption are not only losses of state finances, but there are also social costs of corruption which he said to reach 2.5 times the amount of state financial losses. In full, Rimawan said that: Based on data held by UGM from 2001 to 2015, state losses due to corruption in Indonesia amounted to Rp. 203.9 trillion. However, the total financial penalty was only Rp.22.26 trillion, equivalent to around 10 per cent. "If we take into

account the social costs of corruption, say 2.5 times the social costs of our corruption is a minimum of Rp. 509.75 T. The state loss is Rp. 203.9 T, but the total financial penalty is around Rp. 21.3 T, the gap is very far Rp. 488.5 T because we calculate the damage.

Synergy with the description above Indonesia Corruption Watch (ICW) notes, the return of state finances for corruption cases in 2018 is still not optimal. ICW noted, the number of state losses suffered based on 1,053 decisions issued by the court against 1,162 defendants was Rp. 9.29 trillion. With a state loss of Rp. 9.29 trillion, efforts to recover losses can be said to have not been maximised (Kompas, 2019).

Referring to the statements above, it is estimated that law enforcement in eradicating corruption has proven to be counter-productive to the objective of establishing the Corruption Eradication Law, which demands high efficiency on the sustainability of development. The problem of optimisation in corruption committed by corporations should immediately get the best solution.

The optimisation problem related to the calculation of profit and loss in applying criminal law and criminal sanctions was voiced by Modderman in the Netherlands, but at that time Modderman explained that sentencing does not always have to be prioritised, but rather a last resort (ultimum remedium). Modderman also reminded that punishment should not make the disease “worse” than someone has suffered because of it. In the language of economics, Modderman's opinion can be said that criminal law and its sanctions should function as an efficient and effective means of law. In line with the calculation of profit and loss from criminal sanctions, John Gardner has warned in the introduction to the book Hart (2009) by stating: What good comes of criminal punishment? How does it help to make the world a better place? Criminal punishment, and more generally, the criminal justice system that makes it possible, requires a considerable investment of money, time, and energy. It has high costs and many casualties. If the system is to be justified, there must be compensating benefits.

Conclusions

The problem of optimising criminal punishment against corporations in criminal acts of corruption is due to the criminal legal system, which still focuses on criminal liability with natural human characteristics. However, the principle of societas delinquere non potest can be said to be irrelevant in a contemporary way. The existence of formal criminal law which is not yet clear is a contributory factor for not optimally punishing corporations that commit corruption in the context of recovering state financial losses.

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