Acta Universitatis Danubius

JURIDICA

Corporate Crime Liability as the Subject of Corruption Act based on the Return of State Financial Losses

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Abstract: The development of legal subjects in corruption has been changing. If formerly the punishment is only burdened to the subject of a person, now the legal entities, including corporation, are also burdened with the penalty. This study aimed to understand and analyze the liability of a corporate in its criminal act based on the return of state financial losses. The methodology used in this study was juridical normative (legal research) using statue and conceptual approach. The results showed that, conceptually, the return of state financial losses can still be done even though there are still some obstacles in terms of procedural or technical structure. However, the fact is criminal acts in the form of state money are not only received or enjoyed by the defendant, but also by the third party (non-defendant). Therefore, the penalty in the form of replacement money can be applied for corporate. Replacement money is one of the additional criminal penalty in corruption case that must be paid by the convict to the state with the amount as much as the property obtained from the corruption. In summary, an accurate and effective legal method or instrument is needed to return the state's financial losses.

Keywords: return of state financial losses; corporate liability; corruptor; corporate crime

1. Introduction

The issue of company as the subject of crime cannot be separated from the civil code. This happens because there are other legal subjects who have rights and can engage in legal affairs as individual or person. This view is different from the Indonesian Criminal Code (KUHP)[2] which treats individuals as legal subject only.

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[2] Republik Indonesia, Undang-Undang Nomor 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Pidana (KUHP) beserta Perubahan-perubahannya.

The importance of the role of the corporate in society has led to a shift in the criminal face in Indonesia. The shifting refers to the criminal acts of the corporate. As it is commonly known that the final draft of Criminal Code Bill 2015 (RUU KUHP) has entered corporate liability. Besides, it is also very important to place corporate crime liability rules within the general requirement of KUHP as a guide to the acts outside KUHP. Thus, it may create diversity and consistency within corporate criminal liability regulations. It requires a concept of how to repay the state's financial losses, especially for corruption case committed by the corporate.

The state has made a strong proof on the basis of the financial losses suffered by corporate crimes. Those assets are presumed come from corruptor or are used by corruptor in developed areas which usually become the financial centers. Therefore, eradicating corruption also mark the social interests and due to the effect of corruption, it is necessary to pay attention to returning the state's financial losses. (Abd, 2015) Generally, the corporate crime happens if its act is fulfilling the elements as written in Article 2 Paragraph 1 of Acts number 31/1999;

"*anyone who illegally commits an act to enrich oneself or another person or a corporation, thereby creating losses to the state finance or state economy, is sentenced to life imprisonment or minimum imprisonment of 4 years and to a maximum of 20 years and fined to a minimum of Rp200.000.000, (two hundred million rupiahs) and to a maximum of Rp1.000.000.000, (one billion rupiahs)*", and written in Article 3 Paragraph 1;

"*anyone with the aim of enriching oneself or another person or a corporation, abuses the authority, opportunity or facilities given to him related to his post or position, which creates losses to the state finance or state economy, is sentenced to life imprisonment or minimum sentence of one year and maximum sentence of twenty years or the minimum fine of Rp50.000.000 (fifty million rupiahs) and maximum fine of Rp1.000.000.000 (one billion rupiahs).*" Therefore, can the deviating behavior taken by the state financial management department be regarded as a corporate act? (Joko, 2020)

There are some studies on corporate liability in corruption act. Butarbutar (2015) discussed the form of corporate liability of corruption in the commodity procurement and construction services sectors. He indicated that the form of corporate liability can be shaped by the theory of corporate transfer, including; vicarious liability theory, identification theory, strict liability, organ theory, company culture theory, doctrine of delegation, reactive corporate law, and doctrine of aggregation. These theories can be used freely according to the

situation faced, but still pay attention to the *geenstraf zonder schuld* principle *(actus non facit reun nisi mens sir rea)* and to the valid laws. (Butarbutar, 2015) The other study was done by Suhariyanto (2018) who found that the penalty of replacement money can be imposed to the corporation, if it is proved committed by one of the corporate management and corporate collect the corruption result. Hence, even if the corporate is a non-defendant, it still can do the replacement money for state financial recovery. (Suhariyanto, 2018) Based on the explanation above, this study aimed to know and analyze the application of corporate crime liability toward corruption based on the return of state financial losses.

2. Methodology

This study used juridical normative methodology using statue and conceptual approach. The data were obtained from library sources, involving legal materials, such as the 1945 Constitution of the Republic of Indonesia, the regulation of Indonesia law, books, articles, journals and research studies which related to the corporate and criminal acts liability. The analysis is done by describing the legal material based on quality and validity, comparing opinion, and evaluating legal material.

3. Result and Discussion

3.1. Corporate Crime Definition and Scope

Crime is derived from the simplest crime, such as thievery until the complex crime, such as corporate crime. Corporate crime is a product from decisions which made individually for personal benefit. The scope of corporate crime also explained by Steven Box (Hatrik, 1995), including; a). Crimes for corporation is a legal offense done by corporation due to reach the corporate's goal to obtain a profit; b). Criminal Corporation is a corporation that have the sole purpose of committing crimes; c). Crime against corporations is a group of crimes against corporation, such as thievery or embezzlement of corporate's property.

3.2. Corporate Development as Legal Subject

The development of corporate concept as a criminal subject is the result of changes in society when conducting business activity (Hatrik, 1995). Van Bemmelen

pointed that there are many reasons that makes the formulation of corporate crime liability unacceptable in the criminal law, those are (Hatrik, 1995);

1. Intentions and errors are limited to natural persons;

2. If material acts are the conditions, several crimes can be sentenced, and only natural persons can commit the crime;

3. Cannot commit crimes and deprivation of liberty against the company;

4. Prosecution and punishment of the company may harm innocent people;

5. In practice, it is difficult to determine whether to prosecute and punish only officials or companies, or to prosecute both.

In Indonesia, the recognition on corporate crime liability is started to be known from the Article 15 Paragraph 1 of Law no 7/Drt/1995 on economic crimes;

"it has been determined that if a corporation commits a criminal offense, then the corporation that can be prosecuted and convicted and disciplinary action is the corporation itself, which gives the order to commit a criminal offense, or second-both (the corporation and the one giving the orders)"

In the draft of RUU KUHP which issued by the Directorate General of Legislation, Ministry of Law and Human Rights, in 2004, stated that corporation has been approved as a criminal subject. This was written in Article 47 which stated that *"corporation is the criminal subject"*[1], while the Article 48 read as; *"the criminal act is done by the corporation if it is done by people who have functional position within the corporate organization structure, who act for and under the name of the corporation or for the sake of the corporation based on the work relationship or other relationship in the scope of corporate either individually or together."*[2]

The justification of corporate liability as the criminal subject can be seen through some things below (Muladi, 2007):

a). based on the integralism (political philosophy) or everything is measured based on the balance, harmony, and suitability between individual benefit and social benefit;

[1] RUU Kitab Undang-Undang Hukum Pidana (RUU KUHP): *http://www.djpp.depkumham.go.id/kerja/sosruu.php.*

[2] RUU Kitab Undang-Undang Hukum Pidana (RUU KUHP): *http://www.djpp.depkumham.go.id/kerja/sosruu.php.*

b). based on kinship principle as in Article 33 of the 1945 Constitution of the Republic of Indonesia;

c). to eradicate the *"anomie of success"* (success without rules);

d). for consumer protection;

e). for technology development.

Changes and developments in the position of corporation as subject of criminal law have gradually developed, in general, it can be divided into three stages (Muladi & Dwidja, 1991);

1. First Stage

This stage is marked with efforts to limit the nature of the offenses committed by the corporation to individuals (*naturlijk persoon*). It assigning the "managing task" (*zorgplicht*) to the board of management. Hence, this stage is the basis for Article 59 of KUHP which reads;

"In cases where by reason of misdemeanor punishment is imposed upon directors, members of a board of management or commissioners, no punishment shall be pronounced against the director or commissioner who evidently does not take any part in the commission of the misdemeanor."

By seeing the provisions, the compilers of the Criminal Code is previously influenced by the *societas delinquere nonpotest* principle or the legal entities cannot commit criminal acts. The difficulties that arise with the Article 59 KUHP are related to the provisions in the criminal law which caused an obligation for owner or an entrepreneur (Muladi & Dwidja, 1991).

2. Second Stage

The second stage is marked with the recognition that arose after the First World War in the formulation of laws that criminal acts can be committed by an association or business entity (corporation). At this stage, the corporation can become an offense to be responsible for its members, but there is still no direct criminal liability.

3. Third Stage

In this stage, the possibility is opened to sue the corporation and asked for its liability according to the criminal law. To punish a corporation with the type and

weight that is in accordance with the corporate characteristic is hoped that the corporation can be forced to comply the regulations.

The superscript numeral used to refer to a footnote appears in the text either directly after the word to be discussed or – in relation to a phrase or a sentence – following the punctuation mark (comma, semicolon, or period). Footnotes should appear at the bottom of the normal text area, with a line of about 5 cm set immediately above them[1].

To help your readers, avoid using footnotes altogether and include necessary peripheral observations in the text (within parentheses, if you prefer, as in this sentence). *All* footnotes must be numbered consecutively (in Arabic numbers) on *each page*. Keep footnotes to a minimum or else list them in a special section before references.

3.3. Corporate Crime Liability

From the observation on some regulations of corporate crime liability, it can be concluded that the pattern is varied and does not have an absolute pattern (Muladi & Sulistyani, 2013). There are no uniform and consistent rules in corporate conviction regarding; (a) when the corporation commits a crime and when it can be accounted for (some formulate it and some are not), (b) who can be accounted for, (c) types of sanctions (some only regulate the main criminal, some are added with additional crime, and some are added with disciplinary action), (d) sanctions' formulation – alternative, cumulative, and combined between cumulative and alternative, (e) regulation of penalty in lieu of fines that is not paid by the corporation. (Barda, 2003)

Considering that corporate crime is very complex, in addition to having powerful criminal functions, law enforcement officers must also have additional skills and strong mentality.[2] Therefore, it is difficult for law enforces to establish corporations as legal subjects for criminal offenders. If the judges have successfully ruled a criminal conviction, it means that it can be classified as a new step in progressive law enforcement. (Budi, 2016)

Article 2 of Government Regulation (Perma) no. 13/2016 explains that the purpose and objectives of establishing procedures for handling criminal cases by

[1] The footnote numeral is set flush left and the text follows with the usual word spacing.
[2] Muladi and Sulistyani, *PertanggungjawabanPidana Korporasi (Corporate Criminal Responsibility)*.

corporation are to; (a) serve as a guideline for law enforcers in handling criminal cases with corporate actors and/or executives; (b) fill in legal vacancies, especially criminal procedural law; (c) encourage the effectiveness and optimization of the handling of criminal cases with corporate actors and/or management.

If a criminal act is committed or even only ordered by the corporate management, the corporation that commits a crime should be subjected to return of the assets. (Toruan, 2014) Regarding the criminal responsibility system itself, there are several systems that can be applied according to Reksodiputro[1], those are;

a. Corporate manager as the maker and the person in charge;

b. Corporate as the maker and the manager as the person in charge;

c. Corporation as the maker and the responsible person.

If it is viewed from the imposition of liability, there are four possible systems that can be implemented, including (Sjahdeini, 2006); (a) if the management of corporation has committed a criminal act, then the managers are liable for its criminal responsibility, (b) if the corporations committed a criminal act, the management is liable for the crime, (c) corporation committed criminal acts and liable for its criminal responsibility, (d) both managers and corporations committed criminal acts, then both corporations and their managers are in charge with criminal liability.

The corporate crime liability system also known in the Article 20 paragraph 1 of Law no. 31/1999 on eradication of corruption which reads; "in the event that the criminal act of corruption is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation or its board of directors."

Error principle (*geen straf zonder*) is the basic principle of criminal conviction. Even if people commit a crime, they are not always convicted. Those who make mistakes will be sentenced to punishment. Furthermore, to be responsible for corporations in criminal law, it is necessary to pay attention to the following matters;

1. The principle of error will not be left behind by the wrong structure of the corporate caused by the mistakes of the member of board managers or director;

[1] Erlangga Kurniawan, "Konsep Pertanggungjawaban Pidana Korporasi Di Indonesia," *Ercolaw*, last modified 2019, accessed April 28, 2021, https://ercolaw.com/wp-content/uploads/2019/12/Konsep-Pertanggungjawaban-Pidana-Korporasi.pdf.

2. The principle of error does not absolutely applicable fundamentally (*adegium resipsa loquitor*).

By imposing very high fines, the perpetrators of corporate crimes will bear the economic risk, which is paying a very large cost that must be borne, so it will exceed the target of criminal proceeds. It is hoped that this punishment will have a wide impact for corporate crime which contradict the value of public justice.

Corporate crime liability does not come from the research experts, but from the cause of legal formalism. The judge within the common law system has done an analogy toward human as legal subject, thus corporation also has legal identity and control the wealth of the administrator who created it. (Weissmaan & Newman, 2007) The corporate must bear responsibility in the criminal law. First, the corporate is the main actor in world economy, thus the existence of the criminal law is considered to be the most effective method to influence the behavior of the corporate's rational actors. (Bucy, 2007) Second, the corporate's profit and social losses are very large. Therefore, it is unfair to impose only civil sanctions to corporate. (Priyanto, 2004) Corporation acts through its agents is often caused significant losses within the society, hence, it is hoped that the appearance of criminal sanction can be used to prevent or repeat the criminal act itself. (Moohr, 2007)

The doctrine of *respondeat superior* provides three model of corporate crime liabilities, including direct corporate criminal liability, strict liability, and vicarious liability. (Reid, 1995) Direct corporate liability has strong connection with the identification theory or doctrine. As long as a certain behavior is related to the corporation, the recognition of the actions of a certain corporate's agent is regarded as a behavior of the corporate itself.

Strict liability is defined as criminal act which is not requiring any mistakes of perpetrator for one or more of *actus reus* (Heaton, 2006). Strict liability is liability without fault. Thus, there is no problem regarding the existence of *mens rea* because the main element of strict liability is *actus reus* (action) and what should be proven is *actus reus* (action), not mens rea *(error)* (Hanafi, 1997).

Vicarious liability is defined as individual legal responsibility of wrongdoing committed by another person (Reid, 1995). This theory is also limited to certain situations where the employer (corporation) only responsible for the wrongdoing of employee who is still within the scope of his job (Clarkson, 1998). The rationality

of applying this theory is because the employer (corporation) has control and power and the benefits they get are directly owned by the employer (corporation).

Reorientation and reformulation of criminal responsibility for victims of corporate crimes, include provisions regarding:

1. provisions regarding a criminal act can be said as criminal act that was committed by corporation;

2. the subject that can be prosecuted and convicted for crimes that committed by the corporation;

3. types of sanctions related to the subject of criminal acts in form of corporations that oriented towards providing compensation to victims.

Abd Razak Musahib stated that what could be seized in this case included: 1. Every wealth that obtained from the corrupt business/activities. 2. Every wealth obtained from the business or corrupt activities that generate the profits from the act of providing any false misleading, omitting information, destroying information, or giving any false instruction (Musahib, 2015).

3.4. Corporate Crime Liability Based on Return of State Financial Losses

At the theoretical level, regional losses are shortages of money, securities, and goods which is real and has definite amount as a result of an act against the law, whether it intentionally or unintentionally. The Act against the law in form of corruption. This Corruption Crime proves that the number of corruption cases in this country is a means of occupation carried out by the official's state, therefore there is an imbalance between the eradication of criminal act of corruption and the number of corruptors. The applied constitution does not make deterrent effect on corruptors.

Restoration of corrupted assets that committed by corporations can be returned directly through a court process based on the "negotiation plea" system or plea-bargaining system, and through indirect repayment, such as the process of confiscation based on court decision (Article 53 s/d 57 KAK 2003) (Sumaryanto, 2020).

Theodorus M. Tuanakota formulated at least 5 concepts or methods for calculating state losses, it is included: 1. oerall loss of state finances (total loss) 2. There is a difference between the spread of state finances 3. The price of the contract with the

value of the State's finances balance 4. Revenues that belong to the state but still not deposited to the State finance 5. expenditures that are not related to the budget and used for personal needs or certain people (Musahib, 2015).

According to 2003 KAK, return of state finance losses is a law enforcement system carried out by state victims of corporate crime. By revoking, seizing, eliminating rights to assets of corruption through a series or mechanisms procesess both civil and criminal, corporate assets, both domestic and foreign, that should be tracked, confiscated, submitted and returned to the state as the victim of corruption, in order to recover state financial losses and prevent the subject of corruption to use the assets of corruption to commit other criminal acts, and the last is giving a deterrent effect for the perpetrators or potential perpetrators of corruption (Sumaryanto, 2020).

The provision above is a direct reversal of burden proof on the restoration of assets, by giving permission to the local state court to order the criminal subject to pay the amount of compensation to the damaged country. It is expected to achive public justice by the return of the assets from the criminal subject. (Sumaryanto, 2020)

In restoring financial losses due to corruption, it should be based on stronger evidence, that these assets are suspected as the result of corruption that used in developing areas which generally kept in financial centers, this is an agenda for Indonesian to really take all the money in every regions no matter how small the amount of it. Thus, the eradication of corruption should consider the interests of people in society. moreover, to eradicating corruption, it should pay attention to the return of state finansial losses as a because most of corruption always involves finansial problem. (Musahib, 2015)

The return of state financial losses ia an effort to recover the condition of state financial still face many obstacles, both at the procedural level and the technical level. At the procedural level, it requires certain legal instruments that appropriate with the modus operandi of criminal act and the object of legal problem. In the case of corruption, the result of state finansial losses is not only received by defendant (criminal subject), but also received by third party that is not declared as defendant. (Sibarani, 2018) In such cases, the procedures to recover state financial losses by third parties requires appropriate and effective legal instruments. (Musahib, 2015) However, this legal instrument is highly dependent on government's policy and law.

It seems that it is impossible to return state financial losses that caused by corruption because the amount is very large, both from material and immaterial losses. besides, another obstacle as the process of tracking and investigating corrupted assets include as the biggest challenge in prosecuting corruption (Musahib, 2015). The return of finansial losses of criminal act like corruption is imposed in article 4 of Law no. 31 concerning on the Eradication of Corruption. In this article, it is stated that the return of state financial losses or the state economy does not eliminate the conviction of criminal perpetrator of corruption. The return of financial losses is still carried out through the confiscation process. In addition, there are other penalties, such as: (1) Confiscation of tangible or intangible movable property, or immovable property used or acquired due to corruption, including the company owned by the convicted person and the price of the commodity that replaces these goods, (2) Replenishment payment. Supplementary money is one of the additional penalties in criminal cases of corruption. If the offender is unable to fulfill the following obligations, the offender must pay to the state the same amount as the obtained assets that damaged from corruption: if there is an inability of the convict to pay the replacement money, it can be replaced with corporal punishment as a subside penalties, (3) The closure of all or part of company for maximum period of a year, and (4) revocation of all or part of the rights or profits.

4. Conclusion

Based on the results of discussion, conceptually, the return of state financial losses can be carried out even though it still faces many obstacles both from procedural and technical levels. In fact, criminal acts that are not conducive to national finances will not only be accepted or enjoyed by the defendant, but also by third parties (including corporation) who are not defendants. Therefore, the legal entities of the company can impose the penalties in form of substitute money. This is one of the additional penalties that the convicted person should pay to the corrupted country within the equal amount of assets obtained from corruption.

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