

Corporate Criminal Liability based on Economic Analysis of Law

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Abstract: Corporate crime is an extra ordinary crime that must be eradicated by extra ordinary efforts. However, the effort is not directly proportional to the criminal law policy which is the basis of law enforcement. The Indonesian Criminal Code, only recognizes natural persons as criminal law subjects who are criminally justified, and does not recognize corporations as criminal law subjects. Corporate criminal liability and punishment in Indonesia's are criminal law system still refers to the paradigm that puts people as perpetrators of crime. So although it is clear that the perpetrator of the crime is a corporation, but the responsible is natural person. The main problem is that up until now law enforcement against corporate crime has not been able to deter the perpetrators / corporations, or has not been able to effectively cope with corporate crime. Criminal threats as regulated in Indonesia's criminal legislation are not feared by corporations (corporate criminals) because they are very weak in their application. Renewal of the punishment model for corporate criminals is very urgent to put forward, as part of corporate criminal liability.

1 INTRODUCTION

The development of human civilization does not always bring any changes for a better condition, but also for the development of various forms of crimes, where the human/community is growing fast, the crimes in the community are growing rapidly as well. The development of crime can not be separated from the development of society itself. Likewise, corporations actually give many positive contributions to the development of a country, especially in the economic field. It turns out that on the other side, corporations also often create negative impacts, such as pollution, depletion of natural resources, fraudulent competition, tax manipulation, exploitation of workers, producing goods that are harmful to the users, as well as fraud to consumers fraud, and other forms of actions constituting corporations' crimes / criminal acts.

A very great corporate power gives a major influence to the lives of the people, from the womb to the grave. Our lives can not be released and controlled by corporations. Corporate crime can deplete natural resources, human capital, social capital, even institutional capital. Corporations could undermine confidence in the government's functions and establish a democratic manner. Corporations spend millions of US dollars in the forms of

company contribution, in order to receive government subsidies, debt relief and tax (Arief, 1996). This means that corporate crime has become a very scary thing.

Therefore, the idea of criminalizing the corporation through the criminal policy is intensified. Even since the congress of the 5th United Nations on Crime Prevention and Development of Offenders, held in Geneva has given recommendations to expand the notion of crimes against 'acts of abuse of economic power against law (illegal abuses of economic power) (Susanto, 1998), such as violations of tax laws, labor, environmental pollution, consumer fraud, fraud in the marketing and trading by trans-national firms.

Due to some juridical-normative weaknesses of the Indonesian Penal Code, some efforts have been made to renew the Criminal Code as part of a comprehensive reform of the national laws. The reformulation efforts have been initiated and carried out intensively since 1964, although it has never been free from the influence of political, sociological, and philosophical as well as practical considerations as the reasons to implement such a legal reform in Indonesia (Assiddiqie, 1995).

Therefore, it is necessary to make a research on what might be causing the law to be ineffective. Sentencing policies and corporate responsibility in

the perspective of the criminal law policy in Indonesia based the economic analysis of the law should also be studied in the hope that it may reveal the legal issues related to corporate responsibility.

Corporation criminalization should not sacrifice the economic interests of insane labor community and really consider its cost and benefit in the stability of macro and micro economics. Therefore it is necessary to make a criminological study and an economic analysis of law. This study will aim to examine and present a new concept of criminal sanction and of criminalization for the doers of any corporation crimes that which better insure social and economic justices for all people.

The legal problems to be philosophically explored are as follows: (1) describe philosophical basis that the corporation must be accounted for and convicted of criminal offenses committed by and / or for the corporation and (2) provide model is used to determine the conversion of criminal sanction on the corporation liability based the economic analysis of law.

2 METHOD

This study was designed as a normative legal research, more specifically the study of criminal law and economic law. Where will examine the urgency of corporate punishment and the regulation of the criminal model by using economic analysis of law. Because that is normative legal research, the approach method used in this research is statue approach, historical approach, comparative approach, and conceptual approach.

Statue approach is used to examine juridical-normative provisions relating to corporate criminal law provisions. Historical approach is used to trace and analyze the legal principles of corporate criminal liability that have been applied, are still valid, and have been applied in several jurisprudence in Indonesia. Comparative approach is used to analyze the points of differences and similarities between common law systems and civil law systems and Islamic law systems. While the conceptual approach is used to analyze the concept of criminalization of corporate crime and the concept of corporate punishment.

The results of the study are based on the results of primary legal materials and secondary legal materials. Primary legal materials such as the Indonesian Criminal Code as *lex generalis* and various laws outside the Criminal Code as *lex specialis*. Whereas secondary legal materials in this study include writings or expert opinions contained in various literature such as text books, theses,

dissertations, and scientific journals. The legal materials collected are analyzed using a theory or concept that is determined. Furthermore, the legal material was analyzed by using deductive-inductive thinking method in accordance with the character of legal reasoning, using a descriptive-prescriptive and comparative method of "normative qualitative analysis" with a starting point on the work of "juridical construction" about the criminal liability of corporations.

3 FINDING AND DISCUSSION

3.1 Corporation and Corporate Crime

Corporation is a term commonly used by experts on criminal law and criminology to refer to what exists in other fields of law (in particular in the field of civil law), called a legal entity (*recht persoon*). Since a legal entity is created by the law, then, except its creation, its death is also determined by the law. While Marshall B. Clinard give provide some traits to an entity said to be corporation: it is an artificial legal subject, it has unlimited life span, it obtained the power to perform certain activities, it is owned by the shareholders, the shareholders are merely able to the shares they possess (Susanto, 1995). And Ronald A. Anderson, Ivan fox, and David P. Twomey concluded that "The corporation is as a legal person.

Dealing with corporate crime, Simpson stated "corporate crime is a type of white-collar crime". Simpson, then cites the opinion of John Braithwaite, which defines corporate crime as "conduct of a corporation, or employees acting on behalf of a corporation, the which is proscribed and punishable by law". Clinard and Yeager (in the Vedas, 1993: 3), give the sense that "a corporate crime is any act committed by the corporation that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law".

Theoretically, the causes of such a corporate crime can be seen from various aspects of the legal system,(Mersky and Dunn, 2002) namely: firstly, if it is examined from the legal substance, corporate crime is very significantly correlated with the absence of legislative policy (criminal justice system) in Indonesia governing the corporate crime explicitly. Criminal system and criminal liability in criminal law positively adopted in Indonesia are still focused on natural persons (*natuurlijke person*). So that the corporate crime is still not considered as a 'serious crime'.

In China, even in some developed countries too, as shown by Zhang's publication (Yingjun, 2012),

the case also happens in that way: that there is a deficiency of various policy legislations in regulating the criminalization of corporate crime and accountability system. Even some substantial ambiguity is found in some products related to laws. In Indonesia, the ambiguity is not only at the level of its legal interpretation, but it is rather contradictory between the Criminal Code as a holding corporation and provisions in the criminal law in some laws outside the Criminal Code.

Secondly, the structure of the legal context seems to show some ignorance of the law enforcement agencies on aspects of corporate crime and criminal liability for corporations. The structure of law enforcement is still very conventional in interpreting legal subjects. Since it is considered that the subject of criminal law is only natural person, it is the only human persona who is considered to have *mensrea*.

Thirdly, from the aspect of legal culture, it is shown that the issue of Corporate Social Responsibility (CSR) and Corporate Criminal Responsibility (CCR) has not yet become an integral part of the perspective and culture of the corporate work existing in Indonesia.

3.2 Criminal Policy about Corporate Crime

On the other hand, regarding the *criminogent* factors of criminal acts made by corporations, perhaps it needs to be associated with the opinion of Lord Acton who once declared that "growing niche power to corrupt and absolutely power corrupt absolutely". It is clear that the corporation is closely related to power. Power in this context is not only defined as a state power, but the power of a particular organ which has the power to control anything. Even David C. Korten (1997) once wrote a report on the results of his study of the corporation, in which he revealed that now the corporation has ruled the world. If it is associated with Acton's above statement, then when the corporation has mastered the world also some irregularities committed by the corporation will appear. This was further exacerbated by a condition that the corporation is intentionally set to benefit as much as possible with the smallest cost.

The main punishment that can be imposed on the corporation is simply fine crime (fine), but when a

sanction is imposed in the form of corporate closures, it is basically a "corporate death penalty". Meanwhile sanctions in the form of restrictions on the corporation's activities, are then tantamount to imprisonment or confinement. Additional penalty can still be imposed, even additional punishment in the form of the announcements of the judge's decision is a sanction which is greatly feared by any corporation (Brickey, 1995).

However, remembering that corporations are employers, then the application of sanctions of closing the corporation should be carefully and cautiously considered. Impacts of such a sanction against the corporation can impinge on people who are innocent, such as workers, consumers, shareholders and so on. Conversely, if the crime committed is very heavy, then in various countries, it is considered to implement the announcement of the verdict (adverse publicity) as a sanction for corporate costs, because the impact to be achieved not only on the financial impact, but also a non-financial one.

If it is associated with the theory of Marc Ancel and confirmed by Peter Hofnagels (Hofnagels, 1969) it is obvious that a legal system will affect the law enforcement in achieving the goals of the law itself. The theory can be described as follows:

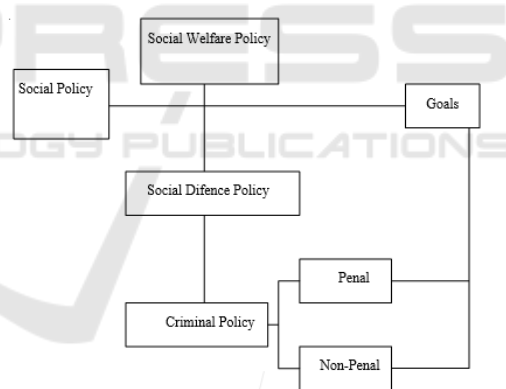


Figure 1: Integrated Criminal Policy Concept

From the scheme above it is clear that the policy of crime prevention (criminal policy) is a sub-system of social policy that can be done through two approaches, criminal law (penal) and non-penal. Meanwhile, with respect to the above scheme, Hofnagels also provides a related scheme as follows:

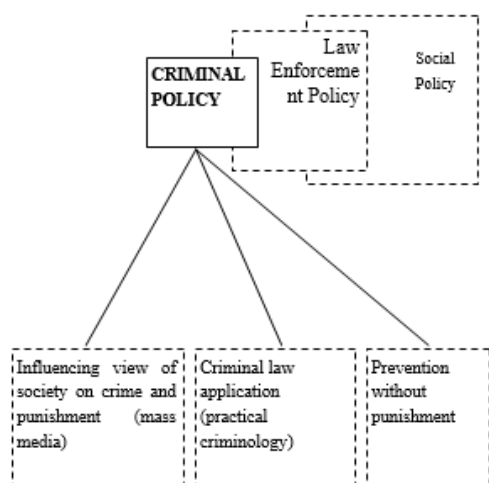


Figure 2: Criminal Policy as Part of Law Enforcement

Criminal policy or crime prevention policies according to the above two scheme it is very decisive and is determined by the law enforcement policy. So that any law enforcement against corporate crime will not be effective if they are not progressive crime prevention policies. A fundamental question in this case is that ‘how is it possible to prosecute corporate crime and corporate crime of the perpetrator is not recognized as subjects of criminal law by the criminal law itself?’

In Malaysia, where the criminal law is more backward than that in Indonesia, but it rather more developed in the implementation to respond to developments in the crime, including corporate crime. Great changes have taken place in Malaysia, most of which has some implications on the collective endeavor of the components of society and partly because of other development-mutatis mutandis that has brought great improvements in various aspects of social life and law in Malaysia (Yaqin, 2002).

3.2 Economic Analysis of Law in Corporate Criminal Law

An economic analysis of this criminal law emerged in 1764 when Cesare Beccaria published a book entitled *On Crimes and Punishments*. According to him, the imposition of criminal sanctions should be designed (designed) to a certain level to eliminate the advantage obtained by the offender (Hylton, 1998). Beccaria’s thinking about this criminalization then influence not only to famous thinkers of utilitarianism school, Jeremy Bentham, but also lawyers and experts in criminal law at the time. The

most amazing thing is that the concept of punishment offered by Beccaria changes the perspective of criminal law in European countries with a greater emphasis on criminal individualization.

In the subsequent development, the concept of Beccaria was stagnant and a new life was obtained in the early 60s after Calabresi and Ronald Coase published their essay on unlawful acts (torts) and social costs (social costs). The second paper was the first attempt how to apply an economic analysis of law (Posner, 1998). This economic analysis of law is growing after Garry Becker was related it to the issue of crime, racial discrimination, and so forth (Cooter and Ullen, 2002).

In connection with the crime and the criminal act, an economic analysis (empirical economics) at least gives three important contributions, namely; first, the economy provides a simple model of how individuals behave before the law, which are more specifically to analyze how the individual responds to the presence of criminal sanctions. Most of us do the best of what we have, or in the language of economics, we maximize the advantages in doing a particular activity. Second, the economic is relatively rigid in doing empirical analysis. The main priority in the empirical economic analysis is to distinguish between relation and cause. This is because economists assume that the Men in their behavior is rational and they have specific purposes. Third, the economy provides a clear metric in evaluating the success or failure of a policy of criminal law. In this case, the normative criteria used is efficiency, and efficiency itself has implications for optimal enforcement. In practice, this view is implemented in the form of a comparison between the costs and benefits of a policy (Miles, 2005).

In general, it can be said that the main principles used to understand the economic analysis of criminal law are rationality and efficiency. The principle of rationality contains an understanding that human in performing a particular activity, including crime, think rationally with the main objective to maximize the expected profit/utility (Hovenkamp, 1992). What is meant by rationality here is to choose the means which are the best for voters’ purposes (Posner, 1998). For example, someone who wants to keep warm when the winter comes will compare all the means that can be used to create warmth in relation to costs. The means that needs the least costs will be chosen as a means to realize the warmth.

The concept of rationality is actually derived from a micro-economics theory, a rational choice theory. This theory is related to a number of

assumptions about how The people respond to incentives. The use of this theory is very important in relation to the interaction between the rule of law and society. This is because the law was not present in the vacuum chamber. The presence of the rule of law will impact on a person's behavior (Korobkin, 2000).

Definition of rationality (rational choice) itself is not a single sense, meaning that there is no notion of rationality that is widely accepted. Russel B. Korobkin and Thomas Ullen argue that there are at least four notions of rationality. First, a man is a rational maximized of his ends Rationality here is not being followed by what means are used to maximize its objectives (profit). The term this rationality coined by Richard Posner is the weakest and the most general term. Second, the term rationality is conceived with the expected profit.

This term according to Ali (2008), is more powerful than the first, because it has to specify the means by which the offender will realize / satisfy the objectives and preferences. If the concept of rationality above is associated with criminal law, the assumption being born is that offenders are rational economic beings who weigh the costs of doing evil with the benefits to be gained. When profits are greater than the costs incurred, the offender will commit a crime (Miles, 2005). Conversely, if the benefits are smaller than the costs, the perpetrators would be deterred for committing a crime. In other words, individuals behave rationally to maximize benefit they get (individuals behave rationally to maximize Reviews their utility).

Cost-benefit analysis is very important in relation to the effort of preventing crime which also closely related to the allocation of the available budget, while the cost-benefit analysis is also concerned with how many resources should be allocated to tackle the crime. Gary Becker (Barnes, 1999) presents his thinking with regard to the concept of rationality with criminal law, namely the optimal criminal justice policy.

Another principle of economic analysis of criminal law is the efficiency which implies the savings or implementation in accordance with the objectives. Efficiency is related to the goals and the means used to achieve the goal. If the tool to achieve costs higher than the goals attain, then it is said to be inefficient. Conversely, if the use of facilities need less costs compared with the objectives to be achieved, then it is said to be efficient.

3.4 Economic Analysis of Law and Optimisation of Criminal Law Enforcement

The main principle in the optimal criminal law enforcement is based on the idea of maximizing social welfare (to maximize social welfare) as stated by Garoupa. Whereas the Government in designing policies, including policies prohibiting certain acts (*in abstracto*), must pay attention to maximize benefits to be obtained. In the context of the economic analysis of criminal law, social welfare can be reached by taking into account the amount of benefits obtained the perpetrators from doing prohibited acts reduced by any losses caused by the act, and any expenses incurred in the context of law enforcement.

Losses due to criminal acts include social losses incurred, costs to be incurred by potential victims to take precautions to avoid becoming a victim, and that loss is directly experienced by the victim (Garoupa and Klerman, 2002). Meanwhile, the costs of enforcement of criminal law the costs of prevention, disclosure, arrests, and the imposition of criminal sanctions. They must be measured and compared to the amount of its profit obtained by the perpetrator in doing a criminal act.

If the losses due to crime (after refundable) and the costs to be incurred by the government to tackle the crime through law enforcement officers are greater than the amount of profits earned from the perpetrator of a criminal act, then the optimization of law enforcement will not be realized. Therefore, what needs to do is to use other instruments in preventing the crime occurred. In other words, deeds to be banned and it costs law enforcement when violations is greater than the benefits to be obtained, should not be prohibited and dealt with criminal law instrument.

Dealing with the economic analysis with regard to the principle of efficiency if it is related to the imposition of criminal sanctions for the perpetrators, the first to consider is the forms of criminal sanctions available to be inflicted upon him. Criminal penalty, which is a form of financial sanctions (monetary sanction), is an efficient punishment because it does not cost anything; it is only concerned with the obligations of the offender to pay a sum of money to the State. The State itself does not pay anything when sanction is given. Therefore, the efficiency of the penalty is no doubt in the economic analysis of criminal law.

However, to determine that criminal sanctions of fines is said to be efficient and to prevent the

perpetrator to commit the crime, depends on five factors (Shavell, 1985); First is the assets owned by the perpetrator. The smaller the wealth (assets), the less the existence of criminal penalties in preventing the perpetrator to commit the crime; second is to allow the offender not to be sanctioned. The higher the possibility, the higher criminal sanctions are imposed to prevent crime; third is the level of profits obtained from committing the crime; fourth is the possibility that criminal offenses will result in losses; and fifth is the amount of loss incurred.

Judging from the theory of punishment, economic analysis is appropriate to use the theory of early prevention deterrence. The assumption of this theory according to Barnes (1999) is that humans are rational beings. The implication is that when a person commits a crime, the criminal sanctions imposed shall exceed the seriousness of the crime. Prevention theory in question is a general prevention (general deterrence) and is not special precautions (special deterrence). The imposition of criminal sanctions is aimed at preventing a person or other person / people to commit crimes. Criminal sanctions are imposed so that the perpetrators and others do not do the crime, because if that's the case, criminal sanctions will be imposed for the second time.

Economic analysis of criminal law as described above, may only be able to prevent crimes related to the economy. That is, the motive of the perpetrators of crimes is to get economic benefits like corporate crime which is the focus of this study. As for any crimes that are not economically motivated, an economic analysis of criminal law is difficult to apply.

4 CONCLUSIONS

The recognition of corporations as the subject of criminal law is based on the reasons that (a) the execution of administrators is not sufficient to repress the offenses committed by or with a corporation. So it is necessary to punish corporations, corporations and administrators, or administrators only; (b) in socio-economic life, corporations are increasingly playing an important role; (c) if the criminal law is only determined on the individual side, then the purpose of the community's pervasion is ineffective, therefore there is no reason to always suppress and oppose the corporation's punishment; (d) corporal punishment is one of the attempts to avoid punishment of the corporations themselves.

The criminal liability system adopted by Indonesia's positive criminal law tends to use the doctrine of identification theory and the doctrine of delegation. Where in addition to looking at the error location of the manufacturer also pay attention to from where the source of acting authority is owned. Implementation of law enforcement against corporate crime perpetrators in Indonesia, should use economic analysis approach to law. So criminal liability to corporations can further realize social justice and economic justice

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