CORPORATE CRIME AS THE POWER OF CRIME?

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Abstract

The corporate crimes in all the time are growing and creating serious jeopardy to the concept of rule of law in Indonesia, the enforcement of authority of law and justice are at stake. Corporations should not be separated from prosecution since the nature of crime is corporate crime by which the corporation crime performed only for the benefit of the corporation. By this concept, then the corporation can be expected legal liability along the offence committed for and/or on behalf of the corporation by the board or a representative of the corporation, whose names is mentioned in a corporate foundation, which is registered in authentic document issued by a notary containing the articles of association. If the criminalisation of the corporation began to dull, then the corporate crime that would have the power of crime to push back the society or crime against society, thus the culture is in some ways to change. This change will be a threat to the concept of rule of law in Indonesia.


Keywords: The Concept of Rule of Law, Corporate Prosecution, Criminal Power.

1. INTRODUCTION

Indonesia as a rule of law country, from time to time, has turned the law spirit back, even though the challenge and obstacle come into reality. Law spirit thereof is a society abides norms or laws which has not only

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security and order, but also fairness and benefit to civilised society.2

The real threats are seen when the formal institutions such National Police and Prosecutor shows weaknesses to handle corruption cases, hence ad hoc institutions, such as KPK (Corruption Eradication Commission), necessarily involves. Many law experts have in fact considered KPK performance as not optimum, by judging from its ability to reveal travel cheque case.3 Not yet the temptation to criminalise KPK power by the case of Polri (National Police) vs KPK (known as “Cicak dan Buaya” Case) affiliated to Century Bank’s case. While now their conflict reappears when KPK commence search and confiscation to the objects of proof in Sub Corps Traffic National Police accused corruption case.4

Barrier also occurs when law enforcement authorities get involve as an actor in litigation. At least from TII Survey, the National Police is the most bribed or corrupted institution (2008), with index point at 48 percent and estimated amount of Rp 2.273 Million per transaction. Notwithstanding that result, the view of money amount per transaction is far smaller than bribery in court or judicative. The approximate amount proportion of that of judicative is up to Rp. 102.412 Million per transaction.

In this matter, it should take into account of corporation role or intervention represented by its directors or boards. They will consider to committing the crime in order to preserve company reputation or goodwill so not at stake. The role of corporation thus is preeminently significant to determine the “color” or side (bad or good) of law enforcement in Indonesia, thereby a capital support from the corporation, so they would easily bribe the law authorities. We can see on Artalita Suryani’s case who

2 Indonesian Dictionary, civilized is defined as supreme value, norm, rules which stands by the controlled faith, knowledge and civilised technology - (Kamus Besar Bahasa Indonesia, madani berarti menjunjung tinggi nilai, norma, hukum yg ditopang oleh pengusahaan iman, ilmu, dan teknologi yg berperadaban.)
3 http://www.republika.co.id/berita/nasional/hukum/12/01/31/lyndhj-jimly-dunia-hukum-indonesia-hobrok
provided bribes to the Prosecutor, Urip, and the Correctional Institution.\(^6\)

Philosophically, bribery is \textit{mala per se} or \textit{mala in se} but not \textit{mala prohibit}ita. The concept of \textit{mala per se} is based on the thought of \textit{natural wrong}, which determines the certain types of crimes as a crime against integrity and disgraceful, not being prohibited by law, but it is factually against the rightful values. On the other side, the concept of \textit{mala prohibit}ita derives from the idea of which the action will be determined as guilty or wrong because the rules forbids or is against the norm so it is considered as regulatory offences. Bribery is classified as \textit{mala per se} crime because bribery intends to influence so the recipient will not do or not to do something that of their capacity, or has or has not done any action which or is against their duty or law.

Bribery case which involves witness(es) in prosecution shall be classified as felony or serious crime because it is not only related to bribery itself but also against the integrity principle of justice. This crime also creates a barrier to obtain justice which is categorized as crime against court administration. Consequently, criminalisation on corruption, includes bribery and collusion, has substantial reason to be heavily penalised, as it is no longer just conventional crime but extraordinary crime, due to the fact also that its corruption character is "\textit{krimitnogin}" (predicate crime) and "\textit{viktimogin}" (which potentially cause lost in many interest dimensions).

Whilst Financial Minister of Indonesia, Sri Mulyani Indrawati asked for supports from many private sectors in order to not spoiling or ruining the public sector bureaucracy by giving bribes. Bureaucrat is not such a heavenly angel. Tempted continuously with bribes would eventually result in weakness or flaw.\(^7\) According to Financial Minister, economic and nation reform can only be manifested if there is commitment to reform fundamentally the attitude, mindset, and culture of all involving parties. This due to the facts in many cases, that act of bribery or offering gift is legitimated by the culture. This act therefore constitutes corporate crime.

We may easily hear the phrase “Corporate Crime” from any crim-
nal news in media. Law enforcement authorities, such as Police, generally handles the conventional crimes that can be recognised in real or factually in daily activities. There are several factors that affect that matter. Firstly, crimes, which were reported to, are often categorised as conventional crimes. Research has shown that the Police activities are most conducted based on the reports, so the conventional is the Police quality to handle.

Secondly, perception on how people see the corporate crime or white collar crime as not serious and influenced crime; Thirdly, view and legal basis of who will be constituted as penal code subject in Indonesian Penal Code; Fourth, the objective of the criminalisation on corporate crime are more intended for correction and compensation, which are different from the conventional crime objective which is to arrest and punish; Fifth, law enforcement officials little knowledge on corporate crime; Sixth, the corporate crime is often involve a high social status person. Those factors would affect the law enforcement.

The involvement of corporation in judicative or law enforcement in Indonesia, happens not only once or twice, but far more, corporation has become a significant role to decide either the dark or bright side of law enforcement of Indonesia. People address that conspiracy as a judicial mafia or law mafia, whilst the others have opposed to that by stating that those mafia are never existed in law enforcement in Indonesia. Many pros and cons on the Indonesian law enforcement system need to prove the existence of the involvement of corporation.

II. PROBLEM QUESTIONS

Apart from the discussion on the existence of conspiracy in law enforcement in Indonesia by corporation, it is important to be noted, and the writer believe, that the involvement of corporate crime itself is such a power which can control the society behavior. The problem now is how to recognise that involvement in criminalisation regime and secondly how that corporate crime can be viewed as a power of crime.

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III. WRITING METHOD

Research is a way for people to strengthen, build, and develop knowledge. Bambang Sunggono addressed the research as an effort or work to digest or re-search which can be done by a certain method with careful method, being systematic to any issue, so as to use it for educative purpose and solving that issue.* Therefore, the research method is a technique which can be used for investigating or revealing the truth behind that conducted research. This piece of writing is resulted from normative legal research. This is supposed to scrutinise the quality of the regulations or laws and its implementation thereafter, so the object of this writing is based on the regulations and the doctrines exist in society.

This writing is using secondary data. This data is meant to be information which is obtained indirectly from the society that uses documents collection in educational books as reference for study. This different than the primary data in empirical research which collects data from interview, surveys, and other direct data. This secondary method research collected data which can be classified into three materials, those are: 1) Primary Legal Material, is a law materials which has enforcement power that is national law resources, which can be obtained from Lembaran Negara RI as a positive law in Indonesia and based on Law No. 12 of 2011 regarding Law Forming; 2) Secondary Legal Material, is a material of law as complementary and supports for primary legal material, and 3) Tertiary Legal Material which is materials obtained to give a guidance or explanations of primary or secondary resources.

IV. CONTENTS

A. MULTINATIONAL CORPORATIONS POWER IN INDONESIA

Since the liberalisation system of trade has changed into global economic and free trade such WTO (World Trade Organisation) or APEC (Asia Pacific Economic Committee), it poses a great challenge for many developing countries including Indonesia. This because the free trade zone allows the imbalance competition, between industrial coun-

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tries, New Industrial Countries (NIC’s), and developing countries. In terms of capability comparison, it is surely between those parties are not similar. This issue causes a concern of which developing countries would be in disadvantage in competition with developed countries.

Many developed countries, as known, produce many arrays to have non-tariff protection, although in this free trade era, such as patent or educational or scientific privileged rights which creates a stumbling block to developing countries’ science and technology. Moreover, with political as reasons, those developed countries will surely have the ability to force developing countries to follow the scenario. This free trade scene could hence be seen as a modern colonisation or domination by the developed countries. Doha Round emphasized that world trade would be in appropriate balance if the developing countries have more accesses. If this imbalance persists, world trade liberalisation would then pose a major economic crisis to the developing countries.

Concern of that crisis could be obvious, by the fact that many developing countries now are not yet ready to face the competition. The governments rather prioritise any difficulties or domestic problems. Even though there is concern that that liberalisation would quite similar to neo-imperialism, which means that the involvement of developing countries has more risk, but it is such an obligation or inevitable circumstances to developing countries to actively participate in world trade competition.

Globalisation beside brings the advantages to human life, but also create problems, such as modern crimes in economy. Rapid social access produces issue on security system or complexity in marketing or distributions. Abundant wealth also makes people are anxious to protect assets, as modern technology generates malicious crime such as cyber crime, imitation money, credit card hacking and such, as well as sea sand theft ad trafficking, money laundering, and new precedent of crimes. This is worsened by the complex and bureaucratic regulations, which

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involves bribery and distortion. Those new type of crimes will definitely not occur without professional or organised criminal. Besides, as globalisation effects, most prominent corporate crime are price fixing (illegal agreement to amount of price), false advertising, such as in medical and pharmacy ads, environmental crime\textsuperscript{12} and financial banking crime, such as, cyber crime, money laundering, or illegal logging.

Great effect from major increasing assets derived from selling activity by giant companies or conglomerate who are able to gather million or billions dollar, places companies to have immense power and influence in economic, social, and political elements. This means that giant companies would be able to influence those elements in a country. For example, the US Campbell Soup Company was envisioned to control 95 percentage of all soups substances and four food companies provide 90 percent of all served breakfast.\textsuperscript{13} In addition, I. S. Susanto stated that the corporation power in economy is well executed whereby affects not only investment decisions, price determination, location, research, and product design, but also social and politic influence such as labour, social problems, and life quality.

Subsequently, it will not be surprising if this significant corporate power manifestation has greatly influenced everyone whole life. Air that we breathe, water for drink, foods, clothes and shoes, roads and vehicles, daily news that we hear, see, and read, future plans, even our personal behaviour like how many kids we desire, all of them are related to corporation, both products and pollution. Life, health, and safety matters for most citizens directly or indirectly controlled by giant corporations, such as the level of price or inflation rates, the quality of the products, and employment (jobless) rates.\textsuperscript{14}

\textsuperscript{11} Muladi, Demokratisasi Hak Asasi Manusia, dan Reformasi Hukum di Indonesia (Democratization of Human Rights and Legal Reform in Indonesia). The Habibie Center, 2002. p. 155-156.
\textsuperscript{14} Ibid.
Multinational Corporations (MNC) existence in Indonesia has a long history since the colonisation era. In Netherland colonisation period, Dutch companies lasted until the independence proclamation of 17 August 1945, even the Previous Order or New Order along 1966. In the period of 1965-1968, Richard Robinson pointed out that:

"there is little doubt that the Buppenas technocrats were convinced by the IMF/IBRD ideology of free-market economics, which limited the state to providing the fiscal and monetary conditions for capital accumulation, and trusted in mechanisms of the market to generate maximum growth and efficiency."

What the underlying reason of MNC arrival in Indonesia is that benefit expectation is far higher than their domestic investments or in other countries. Relative advantage from this investment was depending on the economic or politic factors, as stated by Robert Gilpin:

"Direct investment are intended to establish a permanent source of income or supply in the foreign economy; consequently, they create economic and political relationships of a lasting and significant character."

Both national and transnational corporate activities admittedly produce a positive effect in terms of society development. For instance, in the certain communities, it changes the mindset and behaviour from traditional into modern. A lot of job opportunities in the corporation as well as increases the local government income, obtained from tax and foreign income. Nonetheless, it cannot be forgotten that those progress and benefits have also brought an economic threat for society.

As consequence, the corporation will always set the things out from any element that can object its goals, even if it is necessary to break the law by committing corporate crimes; for instance, damaging other

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reputation, natural resources undermining, illicit competition, tax eva-
sion, labour exploitation, importing and distributing hazardous prod-
ucts, fraud against consumer protection, etc. 17

B. CORPORATE CRIME CHARACTERISTICS GLOBAL

Corporate crime is a modern crime scheme which has been epidemic to all countries and causing significant loss to society. This phenomenon is comprehended by identifying the characteristics of corporate crimes, which are different to any conventional crimes. Generally those characters can be described as follows:

1. That has low visibility, as it always implicitly executed by normal or routine activities, associate with professional or complex organisation.
2. Complexity. It is always accompanying to lies, fraud, and stealing as well as it can be correlated to science, technology, legal, organised and engaging lots of people, in years.
3. There is a diffusion of responsibility, widely and complex organisation.
4. There is a diffusion of victimisation, such as pollution and fraud.
5. Obstacles in detection and prosecution as a result of unequal professionalism between those law enforcement authorities with the committers.
6. There is an ambiguity law which could lead to shortcoming in law enforcement.
7. Duplication in status of crime. Must be disclosed that the offence or crime are not stipulated in the law, but it is illegal instead.

In relation with corporate crime definition, there are also some related terms. To avoid any confusion, then it shall be distinguished between 1) crimes for corporation, 2) crime against corporation, and 3) criminal corporation. Crimes for corporation is another term than corporate crime. This can be determined that the corporate crime is orchestrated for company interest not vice versa. Crimes against corporation, or so called employee crimes, is crimes which committed by the employees

or staffs of against company such as embezzlement. This type of crimes can be performed by not only staffs, but also other people in society.

As to *criminal corporation*, the corporation is intentionally established to conduct crime. So the corporation here is only as a tool to cover or conceal the real crime (A mask to hide the real face). From that explanation, it is important to note the difference between *crimes for corporation*, *corporate crime*, and *criminal corporation* are the subject matters and the results. So the subject should be the company or corporations itself, whereas in criminal corporation, conducted by external parties and the corporation is such a tool to support. The result will be proportionated as the subject function. So more the doers in the crime, will also result in more. This is different though from the corporate crime which is intended for the corporate interests.

Corporate crime should be distinguished from the usual economic crimes since the corporate crime is in bigger context and conducted by high social status people (elite), not by small business. Crimes for corporation can be illustrated as *invisible hand theory*,¹⁸ which should have an action and direct effect, while the subject and the method cannot be detected. As a result, the loss will not be equal to the subject liabilities. Ironically, there are *lex specialist laws* which formulate corporations can be prosecuted as subject of crime, as a matter of fact, this is still only a theory without implementation which can be seen in many Prosecutor or Attorney-General’s accusation or *requisite*.¹⁹

Therefore, the question is how can law establish correlation or criminalise on corporate. A people movement to sound a criminalisation on corporation has been envisaged to enable corporate liabilities from corporate crimes. Experts have revealed theories to enabling corporate liabilities, at least seven theories or concepts; those are *identification*

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¹⁸ Different than *invisible hand theory* of Adam Smith in “The Wealth of Nation” (1776). This view focused on the fact that the good market should be formed by demand and supply. The government cannot make intervention in the market share in any form (such as price determination, fees, or etc) in order to create a equivalent price from free competition between the power of demands and supplies. Let the market grows by invisible power which redress the supply and demand balance.

¹⁹ As in writer knowledge, there is only one court decision in Local (magistrate) Court, which considered the corporation as guilty. (PN Nomor 812/Pid.Sus/2010/PN.Bjm).
doctrine, aggregation doctrine, reactive corporate fault, vicarious liability, management failure model, corporate mens rea doctrine, dan specific corporate offences

Those concepts nevertheless may not be applied to every corporate crime case, but logically, in corporate crime, a corporation can be held responsible if it is performed by person(s) who acted as executive board or corporate representatives and if their names are registered in a corporate establishment that is registration in authentic notary document, in Indonesian language, attached with the article of Association (AD/ ART) of the corporation, and obtaining its status as legal entity or corporation, which has been granted by the related Government Minister, as regulated under the Law No. 40 of 2007 in regards to Limited Company. Criminal deed which was conducted by those who acted as board or corporate representatives, as stipulated in the law, shall act on behalf of the corporation, both before and outside the court proceedings. The key phrase here is “acted for or on behalf of the corporation.” They are person(s) acted as executive board or corporate representatives whose names are registered in a corporate establishment that is registration in authentic notary document, in Indonesian language, attached with the AD/ART, and obtaining its status as legal entity or corporation, which has been granted by the related Government Minister as regulated under the Law No. 40 of 2007 in regards to Limited Company.

C. CORPORATION AS THE POWER OF CRIME?

If there is a company involved in law dispute, so in economic theory, there are several issues need to be taken into account of, as follows:

1. Concerning that litigation process will not be efficient or time consuming and it is costly. In terms of economic theory, this so called inefficiency.

2. Open Litigation also means that minds and concentration are fully dedicated for, this results in the corporation credibility decline or plummeting to without any trust from its consumers or people. If this happens, the corporation can be determined as seated in “zero

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income”, therefore in the near time, there would be such business foreclosure or merger or accusation from another company.

3. Brand Image is the precious product that need to be protected as trust will only stick to the brand image company product. If this brand image and the trust towards brand image company are diminishing or faded away, due to an issue such as dispute arisen in litigation, therefore there is such negative perception against the brand image, this company hence would spend more costs to regain its trust.

Due to those above facts, the company would avoid litigation, especially public or criminal court. In another word, a company is likely to save the sum of money allocated for alternative dispute resolution beside courts. This money or cost will be valued as a marketing cost.

In the event of the company released a failure product due to negligence that causing such injury or even death, so this cost can be used as compensation to the victim if they will not report to Police or revoke the statement which hence will escape the company from criminal court proceedings.

In another term, this cost will be issued to the company representatives, to do whatever it needs, to avoid legal proceedings. The phrase “do whatever it needs”, are vulnerable to collusion or nepotism to investigator so as to retract or weaken the evidence as entry point, or make the prosecutor change the substantial provisions in the lawsuit, or influences to the judges to administer a lower sentence. Financial power or political influence as from legislative or executive power, will establish these corporate crime conditions.

The seven characteristics mentioned above uphold the corporation crime existence even spreading to all living aspects so the crime will have enough influence power of crime to control people/society (crime against society). The writer agrees to Ronny Rahman Nitibaskara’s opinion that stated that corporate crime is such a deviant trap and crime, when its tension gets severe in the parallel time, to achieve its sovereignty from not only one type of crime.22 When there are two phe-

nominal laws and political power. This is why, when people become or have no guilty feeling at the time they commit such deviance and crime, it can be ascertained then that the violation is consciously conducted. Therefore, there is a view of thing said to be the crime as solution, crime as a job, crime as a choice, crime as commodity, crime as economy pivotal to raise economic crime, criminal management, etc.

Deviant trap then will contagiously set up to the law enforcement authorities, which are supposed to enforce the law, but using law as a cloak to conceal illegality. The impact of corporate crime has indeed been widespread to the law enforcement sector. High technical features in modern law has made legal process, both litigation and alternative resolutions, as being identical to certain people in legal professions, which leads to collaboration between the law enforcement authorities and the criminal, therefore changing the use of law for crime (law as a tool of crime).25

When the crime which is being orchestrated by a certain corporate power grows to be sovereign as having those seven characteristics of corporate crime and far from law enforcement, the crime has gained enough criminal power to influence people (crime against society) and hence that social culture has changed in many ways. This transformation could then become threat to the concept of rule of law in Indonesia. This spirit shall be restored, altogether with people, to make the law and judicative as a supreme power. So is however great the power, both financial and political power of corporation does have, will never be invisible hand before the law. If the pressure from corporate crime gets harsher in this transition time, along with diminishing of supremacy of the law principle caused by the betrayal of the professionals law has started to take part in the criminal action, it is thus in the parallel time will achieve a prevalent position of crime. The consequence is the social culture will favorably accommodate that prevailing or sovereign felony.

V. CONCLUSION

Corporate crime from time to time will continue to expand and pose jeopardy to the rule of law concept in Indonesia and the supremacy of law is at stake. Corporation must not be released from law liabilities as its characteristic that is dedicated for corporation interest. With this concept, corporation can be held responsible as long as the crime is committed by the person who acted on behalf of the corporation, by the boards or representatives, whose names are registered under the authentic certification attached with the article of Association (AD/ART) of the corporation. If the criminalisation on corporation has become somewhat vague, the corporate crime will have a criminal power to influence people (crime against society) and consequently transform the social cultures. This conversion then become a threat to the rule of law concept in Indonesia.

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