

CORPORATION CRIMINAL RESPONSIBILITY MODEL BASED ON RESTORATIVE JUSTICE APPROACH IN INDONESIA

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Abstract

Based on delinquency non-potes doctrine, perpetrator and criminal responsibility are done by human (natuurlijk persoonen). Modernity can not be avoided by the development of corporation function. A research is needed to be conducted to answer questions whether criminal law is effective to overcome corporate crime and which corporation criminal responsibility model that can keep the balance of the protection of society and corporation interests through restorative justice approach. This study focuses on finding a win-win solution model of corporation criminal responsibility policy to keep the balance of the protection of society and corporation interests. This study used normative juridical method based on the secondary data,. The result of this research shows that criminal law with its retributive approach and its action which focus on the perpetrator is ineffective to handle corporate crime, because it ignores the victim To overcome those problems, corporation criminal responsibility model based on restorative justice approach in the form of “dual track system selective” is introduced.

Keywords: *Criminal Responsibility, Corporation and Restorative Justice*

1. Introduction

In its introduction, corporation was emphasized on cooperation instrument (association) than the purpose to provide capital. Its existence was as a medium to regulate the works and the formation of legal entity for individual groups, such as trade union, council of churches, university, or region.¹⁵⁹ It did not function as profit motive, but as the medium to organize social activities of the society. Along with the development of science and technology, there is a displacement of

¹⁵⁹ Marsall B Clinard dan Peter C. Yeager, *Corporate Crime*, New York: The Free Press, A Division of Macmillan Publishing Co.Inc, 1980: 22-23.

corporation instrumentalization from non-profit motive organization to profit motive organization which is oriented in gaining profit.

That development is significant with the development of crime committed by the corporation. The development of modern society, especially the corporation instrumentalization as a medium to gain profit, causes some negative and immoral behaviors to emerge, like some factors that causes criminal act (*kriminogen*). Steven Box¹⁶⁰, on his book entitled "*Power, Crime and Mystification*", says that the existence of corporation in modern society has negative influences in the form of profit priority through market development and control as the organization goal, anomic of success, weak law enforcement, loose control system, and immoral subculture that motivate corporate crime in modern society. In the relation of money laundry, corporation is usually used as a medium to accommodate and disguise money, asset, or properties gained from crime.

The raising number of corporate crime is incomparable with the law enforcement. There is only a small numbers of corporate crime in which corporation is presented as a defendant in the court. It is caused by the low understanding of the law from the law enforcement officers; the complexity of investigation and the difficulty of verification; the lack participation of the victim because the victim does not experience the effect directly; the assumption that criminal act is an unfortunate mistake; the criminal doer has power and influence economically and politically; and the fear of the law enforcement officer towards the criminal doer gives economical effect and resulted in the low professionalism of law enforcement officers.¹⁶¹

2. Research Method

This study focuses on finding a win-win solution model of corporation criminal responsibility policy to keep the balance of the protection of society and

¹⁶⁰ Steven Box, *Power, Crime and Mystification*, London: Tavistock Publication Ltd, 1983, page. 64

¹⁶¹ Muladi, *Identifikasi Teoritik dan Konseptual Pertanggungjawaban Pidana Korporasi Serta Kebijakan Kriminal Untuk Mengatasinya*, Semarang, Learning Material of Corporate Crime of Master Program, Faculty of Law, Semarang University, 21st of May 2015, page. 42.

corporation interests. Therefore, this study used normative juridical method based on the secondary data, such as Act, court judgment, and literary studies.

3. Result and Discussions

When the criminal responsibility was compiled in the Netherlands, the compiler of Criminal Code (1886)¹⁶², accepted the principle *Societas/universitas delinquere non potest*” which means legal entity can not perform criminal act. It is a reaction towards the absolute power practices before French Revolution in 1789, which enables “collective responsibility” towards one’s mistake to happen. Therefore, according to the basic principle of Criminal Code, a criminal act only can be performed by human (*natuurlijke person*).

According to Jan Remmelink¹⁶³, in the beginning the law states that human (individual) can be the subject of criminal law, while corporation can not. That point of view can be traced from the history of the formulation of Article 51 Sr. (Article 59 of Criminal Code), especially from the formulation of the offence begun with *frasa hij die*, or whoever.

Jonkers cites the Supreme Court judgment on August 5th 1925 that according to our criminal law principles (Netherlands), legal entities can not perform offence. The reason is because our criminal law is based on personal mistake saying that is addressed to an individual, so that the law regarding the main crime has the characteristic of personality, especially independence crime. It goes with Criminal Fine, because according to Dutch Indies system, corporation can not be punished with Criminal Fine, because the person that is charged with Criminal Fine is able to choose imprisonment in addition to pay the fine. Jonkers says although corporation can not be accounted for criminal law, in reality they often commit criminal act.¹⁶⁴

¹⁶² Muladi, *Demokratisasi, Hak Asasi Manusia dan Reformasi Hukum Di Indonesia*, Jakarta, The Habibie Center, 2002, p. 157

¹⁶³ Jan Remmelink, *Hukum Pidana, Komentar atas Pasal-pasal Terpenting dari KUHP Belanda dan Padanannya dalam KUHP Indonesia*, Gramedia, Jakarta, 2003, p. 97.

¹⁶⁴ Jonkers, *Buku Pedoman Hukum Pidana Hindia Belanda*, Bina Aksara, Jakarta, 1987, p.289-290.

3.1. Corporation Criminal Responsibility

The regulation of corporation as a subject for criminal law emerges because of different history and experience in each country, including Indonesia. However, in the end there is a similar view related to the development of industrialization, economy, and trading which change the view that the subject of criminal law is not limited to human (*natuurlijke persoon*), but also corporation because certain crime can be performed by corporation.

The role of corporation as non-state actor, national or trans- or multi national corporation (MNC's) in modern society in this globalization era has a strategic function not only in economy, but also significantly affected the political and defense policy. Corporate crime is a complex crime with its characteristic as “*crime by powerful*” because it is performed by the perpetrator who is financially and politically powerful. Corporate crime is also one kind of “*white collar crime*”.

The development of economy as the effect of industrialization and trading development has encouraged each country to set a regulation that corporation is a law subject, because in its practice, corporation does both economy activity and criminal act. The confession of corporation as the subject of law has raised attention all over the world. It is proven by the coordination of the 14th international conference about *Criminal Liability of Corporation* in Athena started from July 31st to August 6th 1994. The conference has been successful in motivating the countries, which have not regulated corporation as the subject of criminal law yet, to confess corporation as the subject of criminal law and account for criminal.

Based on the comparison research in some countries, the punishments for the corporation are varied, for example:¹⁶⁵

- a. Fine or financial punishment such as pecuniary penalties;
- b. Seize the criminal profit;
- c. The expropriation;
- d. Close the building used to commit a crime temporarily or permanently;

¹⁶⁵ Muladi and Diah Sulistyani, *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Responsibility)*, Bandung, PT Alumni, Second Edition First Printing, 2015, p.71-72

- e. Close the company temporarily or permanently;
- f. Revoke the permission temporarily or permanently;
- g. Administrative action, done under administrator who is temporarily chosen by the court;
- h. The announcement of adjudication;
- i. Prohibition to do certain thing like setting a contract with the government or public institution temporarily or permanently;
- j. Restoration order, or an order to do something that has been neglected by the corporation or not to something contempt the court that has been done by the corporation;
- k. Mandatory management oversight, probation; and
- l. Community service order.

Brickey¹⁶⁶ says that basic punishment for corporate crime is just paying fine, but if the corporation is punished to close all corporations, it is called “*corporate death penalty*”. The punishment in the form of limitation to the corporation activity is similar to imprisonment or “*corporate imprisonment*”. Even additional punishment like publication is the punishment that the corporation feared the most. Based on Article 10 *United Nations Convention Against Transnational Organized Crime*, it has been determined that corporation can be accounted of criminal, private, or administration law, and the criminal responsibility for corporation does not erase the individual responsibility.

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The main purposes of formulation policy of corporation criminal responsibility are:¹⁶⁷

- a) Deterrent effect;

¹⁶⁶ *Ibid*

¹⁶⁷ Muladi and Diah Sulistyani, *Op-Cit*, p. 5

- b) Just retribution;
- c) Rehabilitation, both towards corporation or criminal act effects;
- d) Symbolic message that there is no crime that will be free from punishment;
- e) Moral condemnation of society;
- f) Efficiency, predictability, and consistency toward criminal law principle; and
- g) Justice.

We can not forget that the existence of corporation has a huge effect in fulfilling society and country's needs. There is hardly one fulfillment of human needs that missed from corporation intervene. In other words, the efforts to fulfill human needs are attached to corporation. Corporation country has an important role as the economy pillar, especially in increasing the state income (tax income), providing job fields, and fulfilling society's needs. The relationship between the country and the society on one side, and the relationship with the corporation on the other side is called mutualism symbiotic.

In relation to the law enforcement of corporate crime, there is a dilemmatic condition between the urgency to punish and keep the corporation alive. The punishment or imprisonment towards corporation is not only about law, but also social problem in the society. The punishment that emphasizes on retributive approach will cause more negative effects, especially for innocent people who rely on corporation. Therefore, punishment for the corporation especially the punishment to close the corporation should be done carefully and wisely. The innocent people like labors, stocks broker, consumers, and other parties who rely on corporation, including the government, should be protected from harm.¹⁶⁸ Muladi states:¹⁶⁹

“Considering the huge effect of corporate crime punishment in the relation to its role as state tax source, employee, costumer, stock broker, and other's fate,

¹⁶⁸ Chech Suzuki's statement in responding Responsive Regulation theory from John Braithwaite, as cited by Rofinus Hotmaulana Hutahuruk in his book, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restorsive: Suatu Terobosan Hukum*, Jakarta, Sinar Grafika, 2013, p.95.

¹⁶⁹ Muladi, *Identifikasi Teoritik dan Konseptual Pertanggungjawaban Pidana Korporasi Serta Kebijakan Kriminal Untuk Mengatasinya*, Semarang, Learning Material of Corporate Crime of Master Program, Faculty of Law, Semarang University, 21st of May 2015, 20th slide.

so there is an opinion that criminal law acts as *ultimatum remedium* by using “*Restorative Justice*” not as *Primum remedium*.”

Refers to Muladi’s statement, criminal law will be implemented for the corporation with improper facilities. It means, before it reach criminal law facility and other facilities (private and administration law), the settlement out of the formal process (like Restorative approach) should be the priority. In this case, criminal law is used as subside facility. However, in certain conditions, the use of criminal law can be set as priority (*Premum remedium*). In relation to this problem, Clinard and Yeager¹⁷⁰ give 11 (eleven) criteria as follows:

1. The degree of loss to the public;
2. The level of complicity by high corporate managers;
3. The duration of violation;
4. The frequency of the violation by the corporation;
5. Evidence of intent to violate;
6. Evidence of extortion as bribery cases;
7. The degree of notoriety engendered by the corporation;
8. Precedent of law;
9. The history of serious violations by the corporation;
10. Deterrence potential;
11. The degree of cooperation evinced by the corporation.

Mulyadi’s opinion and Clinard and Yeager’s implementation of corporate crimes criteria signals that every criminalization of corporation should be executed selectively and limitatively, the execution of criminal law should only be the last resort (*ultimum remedium*) and the way of solving the case should be in *win-win solution* as well as in Restorative approach.

3.2 Restorative Justice Approach in Indonesia

Restorative approach is a justice system in solving criminal cases where every related parties are involved in finding the solution right after the case

¹⁷⁰ Marsall B Clinard and Peter C. Yeager, *Op-Cit*

happens, and, avoiding its implication in the future. Restorative approach is an attempt of achieving justice named as restorative justice which is concerned with rebuilding relationships after an offence, rather driving a wedge between offender and their communities, which is the hallmark of modern criminal justice system, like what has been stated by Rick Sarre¹⁷¹.

The characteristic of restorative justice is persuasively restorative. It means restorative approach does not defeat one particular side, but maintain the relation of both parties in sustainable business and sustainable relationship (maintaining the relation between corporation and society/consumers), building responsibility (compensating damages), and raising awareness of doing self control arrangement and correction (improving monitoring system and quality of the product or ethical quality).

The regulation of criminal law in eradicating corporate crimes in Indonesia tends to use repressive and retributive response relying on criminal law as its main basis. In this case, law are only going to achieve deterrence effect, retribution, corporate self-rehabilitation or rehabilitation to the affected party of corporate crime as the symbolic message that there is no any crimes able to escape from criminalization and the moral condemnation of society, efficiency, predictability, and consistency to the criminal law, and the medium to achieve justice.¹⁷² Even if the criminalization of corporate crimes is multi purpose, but the repressive and retributive spirit are more prominent.

The eradication of crimes (especially corporate crimes) with penal policy is criticized by experts due to its limited ability and weaknesses. At least, the weaknesses can be seen from two perspectives, the limited ability of criminal law from the perspective of the nature of the crimes and from the perspective of how the criminal punishment/sanctions is functioned. Naturally, crime is a humanity and social problem. The causes of crimes are complex and out of range of criminal

¹⁷¹ Rick Sarre, *Restorative Justice: A Paradigm of Possibility*, in Martin D. Schwartz and Suzanne E. Hatty, eds, *Controversies in Critical Criminology*, 2003, p.97-103

¹⁷² Muladi and Diah Sulistyani, *Op-Cit.* p. 5

law. Thus, it is normal if law has limited ability to eradicate crime.¹⁷³ From this statement, Sudarto opines that: “the use of law becomes the eradication of a symptom (“*Kurieren am symptom*”) not as the solution of its causes”.¹⁷⁴ According to Sudarto’s opinion, it can be concluded that criminal punishment is not the way to cure or eliminate the causes of crimes, but, it becomes the symptomatic cure or simply the writer can say as temporary solution from the occurring criminal phenomena. The criminal punishment is given in order to give deterrent effect for the offender, so, the offender is prevented to do criminal act again (special and general preventive effect).

The limited ability of law from the perspective of its function/work means seeing the way of how criminal law is worked or functioned. Functionally, the work of criminal law needs more variation of supporting medium whether in the form of organic law, institution and implementing agency, infrastructures, or the operationalization of criminal law enforcer in the society. These apparatus is especially needed in facing modern and transnational crimes.¹⁷⁵ From the previous statement, Barda Nawawi Arief¹⁷⁶ identifies several causes limiting the ability of criminal law in eradicating crimes in the following explanation.

- a. The causes of law is too complex that it is out of range of criminal law;
- b. Criminal law only becomes a sub-system of the social control medium which is not able to solve several cases of crimes as complex humanity and societal problems (as the socio-psychological, socio-political, socio-economic, socio-cultural, and other related problems);
- c. The use of criminal law in eradicating crimes only becomes “*kurieren an symptom*”, thereby the criminal law is only considered as “symptomatic cure”, not as “causative cure”;

¹⁷³ See Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan and Pengembangan Hukum Pidana*, Bandung, PT Citra Aditya Bakti, 1998, p. 44

¹⁷⁴ Sudarto, *Hukum Pidana and Perkembangan Masyarakat*, Bnadung, Alumni, 1983, p. 35

¹⁷⁵ Barda Nawawi Arief, *Op-Cit*, p. 46

¹⁷⁶ Barda Nawawi Arief, *Loc-Cit*

- d. The sanctions/punishments of criminal law only becomes “*remedium*” which has contradictive/paradoxal nature and contains negative elements and side effects;
- e. The criminalization system is fragmentaire and individual/personal-based, not structural/functional;
- f. Limited types of criminal sanctions/punishment with rigid and imperative formulation; and
- g. The work/function of criminal law needs more variation of supportive media and costs.

Specifically, Muladi¹⁷⁷ identifies several factors of incapacities or limited ability of criminal law based on functional perspective in handling corporate crimes:

- a) The offenders (corporation owners) have financial or political power;
- b) The professionalism/specialization of law enforcer, including civil servant investigator is still weak;
- c) The victim is less sensitive or passive;
- d) The proving system is complex;
- e) The coordination between institution is low;
- f) The participation of the society is not enough

Seeing the quality, damage, and steps of corporate crimes occur, all corporate crimes act should not be solved by restorative approach. Otherwise, in several cases, the criminalization of corporation still has to be executed and not implementing restorative approach if the criminal act is *mala pers se* (not *mala prohibita*), and, there is a real prove of occurring criminal elements. Based on this statement, Muladi¹⁷⁸ states several guidance as follows:

“There should be no discretion for recidivists and the offenders of deceit, fraud, misrepresentation, counterfeit, subterfuge, illegal circumvention, concealment of facts and *mala pers se* manipulation”

¹⁷⁷ Muladi and Sulistyani, *Op-Cit*, p. 100

¹⁷⁸ Muladi and Sulistyani, *Loc-Cit*

According to Muladi's guidance, the provision of discretion should be selective and measurably executed. The form of discretion can be through the settlement of criminal act which is not based on formal way (criminal justice system), but through restorative approach.

The settlement through formal way usually resides bias feeling for the victim. The justice will be considered as achieved if the justice system has been executed fairly, the parameter only based on the procedural law which has been followed. But, in restorative justice, the achievement of justice is reached when there is a harmonious relation between victim and crimes.

The settlement of criminal act through restorative approach is chosen as alternative choice in criminal law system. Therefore, there should be a system of settlement that can implement the restorative approach. In order to reach this, Van Ness¹⁷⁹ introduces four model of restorative approaches: 1). *Unified system*, 2). *Dual Track System*, 3). *Safeguard system*, and 4). *Hybrid System*.

1. Unified model. It is a radical model since it forces to restore the authority of dispute settlement to the country. The country is considered stealing conflict from every parties, thereby the conflict is restored to its "owner" and mandating the attempts of achieving justice from the occurring criminal cases by the victim and the offender and determining the settlement of the conflict by themselves. The country does not has absolute right in conflict settlement, so, the processes of restorative approach are hoped to restore all process in criminal justice system¹⁸⁰. Based on the writer's perspective, this system is too radical and ruling out the role of the country as the representative of the society in solving the corporate crimes act where the equality between victim (society) and the offender (corporation) is not balance and tend to harm the victim. Although the settlement is determined by the agreement of every parties.

¹⁷⁹ Van Ness, *legal Issues*, <http://www.restorativejustice.org>, in Rufinus Hotmaulana Hutaauruk, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restoratif Suatu Terobosan Hukum*, Jakarta, Sinar Grafika, 2013, p. 141-146

¹⁸⁰ Abstracted from Van Nees in Rufinus Hotmaulana Hutaauruk, *Loc-Cit*

2. Dual Track System. In this system, restorative approach is an alternative companion from the traditional process (criminal justice system). Every disputants have a discretion to choose the settlement of criminal case. If the agreement leads the settlement of the cases through restorative approach, the formal process (criminal justice system) will not be undergone. In contrast, if the restorative approach is not achieved, the settlement of the cases will be through the process of criminal justice system. In this case, restorative approach is primarily needed. This system is applied in Japan and can work well with the full supports from the justice officials (police, prosecutors, lawyers, and judges).¹⁸¹ Based on the writer's perspective, this system is quite ideal, since it is not concerned on repressive/retributive approach giving the chances of every parties to solve the criminal cases in win-win solution. Nevertheless, there should be clear criteria or limitation to certain cases where the settlement is through the justice system as the main medium.

3. Safeguard System. This model is designed to solve criminal act through restorative approach, where every restorative programs is used as the main medium to solve the problems of criminal acts, so, there will be a transition from the criminal justice system to restorative justice system. In this system, not all cases is solved by restorative approach, several cases will be solved by criminal justice system.¹⁸² This system is similar to Unified System, but, it is more moderate and not radical, because the role of the nation is still considered with the existing settlement through criminal justice system for several cases.

4. Hybrid System. In this model, the response of restorative approach or the response of criminal justice system is included into normative parts of the justice system. The provision or the determination of offenders is done in the criminal justice process. The process of determining the witness is using the concept of restorative approach.¹⁸³ According to this statement, Martin Wright¹⁸⁴ provides an

¹⁸¹ Abstracted from Van Nees in Rufinus Hotmaulana Hutaauruk, *Loc-Cit*

¹⁸² Abstracted from Van Nees in Rufinus Hotmaulana Hutaauruk, *Loc-Cit*

¹⁸³ Abstracted from Van Nees in Rufinus Hotmaulana Hutaauruk, *Loc-Cit*

authoritarian and democratic framework issues of restorative justice system. Based on the authoritarian restorative justice system, the decision making is made by two systems of court justice system where each system has its own limited authority. The democratic restorative justice system is out of the criminal justice system and the decision maker is the victim, offender, and members of the society.

According to the implementation of restorative approach in solving corporate crimes act, the writer proposes the *selective dual track system*. It means the settlement is through restorative approach which works hand-in-hand with the criminal justice system. The restorative approach is placed as the primary medium selectively. That is to say, not all corporate crime cases should be settled by restorative approach. The determination of the listed corporate crimes is done selectively using clear parameter, so, the specific cases will not be included in the restorative approach, but, through the main criminal justice system.

Based on the formulation of regulation, the settlement of corporate crimes act with *dual track system*, is a new thing in Indonesia. Although it is not that new. The similar regulation has been introduced in Indonesia, especially in the settlement of children/juvenile criminal act, where the settlement is primarily using restorative approach, according to Act Number 11 Year 2012 regarding Juvenile Criminal Justice System, especially about diversion. According to the provision of Article 1 number 7, diversion is the diversion of juvenile case settlement out of the criminal justice system. The settlement out of the criminal justice system is involving every involved parties: victim, offender, and society. If there is an agreement in settling the cases through restorative approach, the cases will be terminated or will not be process in criminal justice system. In this provision of diversion, there is a limitation where not every cases will be solved out of the formal system. In Indonesia, empirically, the settlement of corporate crimes through restorative approach has been executed from several dispute settlements of PT Bank Lipo Tbk case, BLBI (Bantuan Likuiditas Bank Indonesia/Bank of

¹⁸⁴ Martin Wright, in the website <http://restorativejustice.org> p. 55

Indonesia Liquidity Assistance) case, Merrill Lynch case, Musanto case, even PT Lapindo Brantas case.

Corporation is a law subject which is criminally acknowledged in the Draft of Law of the Book of Law (Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP))¹⁸⁵ in the Book I regarding the General Requirements, Second Chapter regarding Criminal Responsibility, Paragraph 6 regarding Corporation in Article 48 until Article 54. Even if it is not explicitly explained, the settlement of criminal act done by Corporation can be solved by using Restorative approach, where every active involved parties are actively involved in solving criminal cases, including the gate (legal basis) to settle the responsibility of corporate crimes through Restorative approach by using the provision of Article 152 alphabet d. Based on this provision, the authority of prosecution will be fallen if there is a settlement out from the process (out of litigation process). Therefore, the implementation of restorative justice concept to the corporate crimes act, which is a settlement process out from the formal justice system (*non-litigation*), will be the reason of terminating prosecution.

4 Conclusion

This research shows that the criminal law with retributive approach and more focused on the criminal act offender is not effective in overcoming corporate criminal act, since the criminal law is only handling symptom not the cause of the crime. Besides it neglects the victims as the damaged parties of corporate crime and it is proven that not all corporation is responsible for the crimes they do. It is because of the weakness factor of formulation of law whether from the perspective of material criminal law or sociology. It is related to enforce corporate crimes law with the confusion related to the negative impact to the society (consumer, workers, and national income). In order to solve the problem, a model of corporate crimes

¹⁸⁵ Rancangan Undang-Undang tentang Kitab Undang-Undang Hukum Pidana (*Draft of Law of the Book of Criminal Law*) Year 2015 (5th June 2015, delivered by the President to the House of Representative with Letter number R-35/Pres/06/2015).

responsibility based on restorative justice approach is introduced as “*dual track system selective*”.

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