ACCOUNTABILITY OF CORPORATE CRIMINAL LAW IN INDONESIA

Pramugara Wirawan, Rinta Nanda
Diponegoro University, Indonesia
Gedung Rektorat, Semarang, Central Java 50275
e-mail: pramuwira@gmail.com

ABSTRACT: *The lack of handling corporate corruption, while the involvement of private corporations in many corruption cases in Indonesia is very massive, cannot be separated from legal construction so far based on criminal liability that tends to judge the individuals' fault. By applying agency theory and based on a normative juridical approach by inventorying adequate legal materials, two main conclusions are generated. First, criminal liability of corporate corruption has fulfilled the aspects of philosophical and sociological juridical, as the purpose of criminal law in society is to fulfill a sense of justice for the occurrence of social symptoms in the corporation. Second, the reconstruction of criminal liability against corporate corruption must be carried out within the framework of reforming the formation of corruption criminal law in the future through the application of non-fault liability. In connection with the criminal act of corruption which is related to the recovery of state/regional financial losses and considering the corporate criminal liability model that impacts on public benefit, as well as legal certainty and justice, it is necessary to renew corruption law which confirms the notion of corruption and formulate the criteria of piercing the corporate veil, strict liability, vicarious liability, and secondary liability.*

Keywords: *corruption, corporation, liability, blameworthiness, reconstruction.*

INTRODUCTION

The problem of corporate corruption and cronyism in Indonesia has been developing since the 1950s by involving certain institutions such as family-owned companies that deal with authorities, certain foundations, certain state-owned enterprises, as well as certain private companies [1]. Besides, based on the handling of corruption (TPK) involving private parties during 2014-2017, the Corruption Eradication Commission (KPK) has handled 164 cases out of 345 cases, or 47.82% of the total cases, the perpetrators are private parties [2]. However, from 164 cases involving the private sector only one new corporation has been charged as a TPK actor.

The handling of 164 cases of private parties corruption conducted by the KPK during 2014-2017 turned out to have only touched a corporation, even though long before the issuance of Supreme Court Regulation (PERMA) Number 13 of 2016 concerning Procedures for Handling Corporate Criminal Acts, the Prosecutor's Office successfully implemented the corporate corruption criminal responsibility towards PT. GJW in 2010 (as stipulated in First Court Verdict Number 812/Pid.Sus/2010/PN.Bjm on June, 2011 and Appeal Verdict Number
04/PID.SUS/2011/PT.BJM on August 10, 2011), which in that year was still based on several Laws governing the imposition of corporate crime, such as the Law No. 7 of 1955 regarding Economic Crimes (Drt TPE Act), Law No. 40 of 2007 regarding Limited Corporation (PT Law), and Law No. 20 of 2001 regarding Corruption Eradication (PTPK Law). It must be realized that criminal acts of corruption involving the private sector, especially corporate corruption, are still rife to this day so that it takes hard and extraordinary efforts to prevent and eradicate corporate corruption [3]. There have been several studies that justify the responsibility of corporate corruption, such as Hess and Ford who proposed that improvements in corporate culture ethics as an effective solution

in combating corporate corruption behavior that always continues as a habit in business practices [4], Wibisana and Marbun emphasized that the rise of employee violations of corporate corruption cannot be separated in order to provide benefits to the corporation, with the result that corporations should pay monetary sanctions compared to their employees given the availability of an internal control system and a strict sanction system within the corporation [5], and Thompson who revealed the emphasis on institutional corruption turns out to lie in the pattern and legitimacy of the functions that exist within the institution that provides benefits to the institution [6].

However, some researches as mentioned above, although concluding the justification and the rise of corporate corruption, but they have not conducted a legal reconstruction study of corporate criminal liability yet, that should be one of the important and urgent solutions in overcoming the problem of corporate corruption in Indonesia. The need for a reconstruction study shows that the reconstruction of accountability is an act or process to rebuild, re-create, or reorganize existing models of accountability until it becomes more ideal to solve problems that can provide good outputs, outcomes and benefit in overcoming crime which is detrimental to state finances [7].

Considering that legal reconstruction studies are rarely carried out on existing models of accountability related to corporate corruption, the importance of tackling corporate corruption is increasingly widespread, the Criminal Code (KUHP) which still formulates criminal liability based on natural human error, therefore criminal acts must meet the provisions of *mens rea* and *actus reus* which refers to the fulfillment of the principle of legality and the principle of culpability (fault) [8], then this article will conduct a study of two important issues. First, how is corporate criminal liability (corruption) arrangements in Indonesia? Second, how is the reconstruction of corporate corruption criminal responsibility in Indonesia? Second, how is the reconstruction of criminal liability for corporate corruption in Indonesia?

The urgency of the reconstruction of corporate corruption criminal responsibility lies in the complexity of its definition, both by lawmakers, the government and public, where this complexity is even more confusing when corruption is seen as a phenomenon deeply embedded in the recognition of certain cultures which linking public spaces and private parties' space with one another other [9]. This urgency is further strengthened by the firmness of the regime legal that should have the ability to implement agency theory (in addition to anticipating the limitations of agency practice) in seeking prevention and / or recovery of losses to victims (in this case the state) and in deciding the level of sanctions imposed on the principal and/or the employee, whose tendency is the agent of the principal [10]. Of course, the implementation and consideration of agency theory in corporate criminal liability cannot be separated from the common sense which asserts that: 1) business efficiency can be realized if the principal or employer oversees the behavior of his employees or employees or as a principal means to always maintain the intensity or level of legal entity concern for its employees [11], and 2) corruption, which is a form of abuse of the authority of public officials for personal gain, is rooted in the process of negotiating economic rents, the majority of which is inherent in almost every economic transaction with the private sector [12]. The limitation of agency theory in anticipating accountability of corporate corruption in the future uncertainty related to the term of the contract, where the contract between the principal and the agent still faces many obstacles in practice, including information asymmetry, rationality, fraud, transaction costs that are not small, the focus of shareholders is only to maximize the level return on investment, unclear role of directors (limited to monitoring managers), and the assumption that managers are opportunistic and ignore their competence [13]. Of course, limitations in the practice of agency theory need to be minimized through the reconstruction of accountability models that not only provide output well but must also provide outcomes good in tackling the rise of corporate abuse as a means of committing criminal acts of corruption.

METHOD AND REASERCH

This research is adequate to use the doctrinal method, or also known as normative research, due to the understanding of the law as a building with a norm system and its coverage scope to the conception of the law, principles of law, rules of law or legal substance [14], vertical and horizontal synchronization of law, history of law and legal comparison [15]. The normative juridical method will examine library materials or secondary data in the form of primary, secondary and tertiary legal materials, starting with an inventory of laws and legal principles related to corporate corruption responsibility in Indonesia. Primary legal material consists of binding legal materials in the form of laws and regulations relating to corporations, crime, corruption, state finances, and state / regional losses, such as the Criminal Code, TPE Drt Law, PT Law, Law No. 15 of 2006 concerning the Supreme Audit Board (BPK Law), Law No. 1 of 2004 concerning the State Treasury (PN Law), Law No. 17 of 2003 concerning Public Finance (KN Law), PTPK Law, and PERMA No.13 of 2016. Secondary legal materials include using textbooks, expert opinions, articles, and research results related to crime, corruption, and corporate responsibility. Whereas tertiary legal materials, such as language dictionaries, legal dictionaries, websites, and other tertiary legal materials, are used to be able to provide more explanations or instructions on primary and secondary legal materials used in this study. Literature obtained systematically compiled will be critically examined and analyzed based on the order of the laws and regulations, as formulated in Article 7 of Law No. 12 of 2011 concerning The Formation of Laws and Regulations in order to realize legal certainty (as the legal certainty implies the need for clarity, does not have the double meaning, does not cause conflict and that certainly must be implemented [16]), and then a conclusion will be drawn.

RESULT AND DISCUSSION

3.1. On Corporate Criminal Liability (Corruption) Arrangement in Indonesia

Corporate liability is one of the main issues that raise the pros and cons in some circles, especially regarding the consequences of violating the law in the agency relationship in which inherent legal rights and obligations between the principal and agent [17]. Arguments that justify corporate (criminal) liability cannot be separated from the existence of fictional theories pioneered by von Savigny and John Salmond, and organ theory pioneered by von Gierke. In order for a group of people or an organization to assume rights and obligations, fiction theory builds the assumption that the actions of certain groups of people or organizations are as if human actions, although in reality the actions of a group of people or organization are only based on legal attribution, not because of free will that only belongs to natural human [18]. Whereas organ theory asserts that a legal entity, which is a collection of a group of humans, does indeed exist in society, because it has real thoughts, desires, and authorities, and has a collective consciousness that is separate from the consciousness of each individual in the group [19]. Furthermore, the two theories are increasingly developing and becoming arguments in support of corporate (criminal) accountability in several minds. Kusumaatmadja and Sidharta emphasized the existence of corporations as supporters of rights and obligations based on law, which can be prosecuted based on their main characteristics in the form of their desires and abilities to own wealth, debts, and their rights and obligations, achieve certain goals, and be sustainable and not sustainable [20]. Kansil stated that corporations, which act utilizing their management, as carriers of rights that are not souled can be carriers of human rights but cannot be sentenced to prison (except for a fine) [21]. Utrecht insisted that the organ as the personification of several separate rights and obligations is a combined reality of several people who carry out certain essential functions on the legal entity [22]. Then, Fuady explained the similarities between corporations and humans based on their rationality and personality, their ownership of their assets and debts, their

ability to develop, grow, and survive, as well as their ability to act with legal rights and obligations attached [19].

The thought against corporate criminal liability is based on the enforcement of liability which is only limited to the field of civil law, because crime and material behavior in criminal offenses, and sanctions in the form of deprivation of liberty can only be done by natural humans, and the practice of determining the basic norms in deciding the imposition of criminal penalties is very not easy [23]. Corporate excuses not as legal subjects are further strengthened through justification of accountability based on mistakes that are only inherent in natural human actions in the Criminal Code, and the interpretation of inner attitudes (mens rea), which is an absolute requirement in criminal liability, as a criminal trial involving an investigation of sanity, knowledge, and allegations against violators [24], which of course refer to natural human actions only. Though it must be realized, that although traditional basic criminal principles state that criminal sanctions must address the liability of individual offenders without harming innocent third parties, corporations have proven to be the drivers of industrialization and economic globalization that can cause intentional large losses to individuals, groups, and certain natural environments through neglect and/or abuse of power [25]. Thus, the assumption that *mens rea* is only possessed by natural people is refuted by linking the impact of losses caused by collective violations of individuals in the corporation as connoting faults or showing disgraceful behavior (blameworthiness of conduct) corporation [26].

The emergence of the pros and cons of corporate criminal responsibility must be addressed in a philosophical and sociological juridical manner. The philosophical juridical aspect relies on the purpose of criminal law to fulfill a sense of justice, as the fruit of human spirituality itself [27] in society. Furthermore, the juridical aspect of sociology rests on the understanding that society always experiences business dynamics and globalization, which cannot avoid the enactment of agency relationships within the scope of business and organizations. This means that legal relations in agency relationships cannot be separated from social symptoms whose desires always want to fulfill a sense of justice given that the agency relationship is inherent in fiduciary relations, both contractually or legally, between agents (as those who receive authorization to act on behalf of the principal) with other parties [28]. Agents, who in the context of corporate law always strive to increase the value and profitability of corporations, often face problems in terms of managerial control and conflicts of interest between individuals which include directors, shareholders, board of commissioners, employees, and third parties outside the organizational structure such as regulators , customers, and suppliers, so agency theory is needed that can help implement various governance mechanisms in overseeing the actions of agents and principals so as not to deviate from applicable regulations [13].

In terms of corporate responsibility, agency theory is feasible and realistic in seeking information system problems, impact uncertainty, and corporate risk management through its scope that covers: 1) positivist agency theory (positivism agency theory), which identifies problems between principals and agents in achieving goals by limiting the opportunism of the agent through contracts based on the (outcome-based) impact and information systems, and 2) study the principal-agent,which examines the determination of the optimal contract-related behavior (behavior-based contracts) versus impact occurs between the principal and agent [29]. The scope of agency theory further confirms that the regime's legal justification for acting fairly in the event of a violation of law in the sphere of corporate business. The core understanding of justice in question must express fairness, putting everything desired in its place [30], which ideas of include “liberty, equality, and rewards for services contributing to the common good” [31]. The formulation of justice as fairness at the same time shows the limits of legal practice based on position and position, the determination of the existence of power and responsibility, as well as the

determination of the rights and obligations [31] of each party involved in an agency relationship whose habitat thrives in the form of legal entities. Thus, the foundation of fairness will further strengthen the role of the regime legally recovering state or regional losses through consideration in the form of corporate propriety to bear monetary sanctions, limited financial and non-financial capabilities of employees or agents in returning state losses along with other monetary sanctions, and corporate viability as the surest beneficiary because it is “authorized” or as a “policy breaker” [7]. However, the corporate fairness in bearing the monetary sanctions is increasingly strengthened when the corporation must also “going concern" given the number of employees and other economic activities that must revolve in connection with the existence of the corporation [32].

Considering the justification of corporate corruption responsibility can be strengthened by agency theory, the philosophical juridical study must express fairness in the formation of criminal law in Indonesia so that its validity can be accepted by the public and law enforcement can be possible to be implemented. An initial inventory of the establishment of (legal) corporate criminal liability can be initiated by extracting the TPE Drt Act which can impose penalties on corporations or against those who give orders, if economic criminal acts are carried out by or on behalf of a corporation (Article 15 paragraph (1) and paragraph (2) of Drt TPE Law). Then, the (positive) legal order which confirms that the corporation whose establishment deed was approved by the Minister of Law and Human Rights in Indonesia is the person with rights and obligations in the legal crossing, as formulated in Article 1 point (1) and Article 7 paragraph (6) of PT Law. Furthermore, the criminal offense of corruption is formulated in the PTPK Law by regulating losses on state finances based on the BPK Law, the KN Law, and the PN Law, as well as the procedures for handling corporate criminal acts based on PERMA No. 13 of 2016.

Translation of agency theory in handling acts Corruption of corporate corruption shows that the (positive) law state finances should seek to recover losses on state finances either through asset tracing or by imposing sanctions on principals, as parties related to the actions of direct actors, which occur through agents, who are the perpetrators act directly in the event of a corruption. The flow of handling cannot be separated from the corporation (or individual management) who are subject to Article 1 paragraph (3) of PTPK Law that have clearly caused financial losses to the state (Elucidation of Article 32 paragraph (1) of PTPK Law) can be convicted if there is a certain benefit or occur in the interests of the corporation and / or there is evidence of omission of a criminal act and not the existence of prevention efforts that should be done by corporations in avoiding or reducing the greater impact due to the occurrence of these criminal acts. This is further strengthened by the formulation that states that corporations imposed by the judge in the form of principal crimes, in the form of criminal fines, and/or additional crimes, in the form of confiscation of evidence, compensation, and restitution, and / or in the form of repairing damage resulting from criminal act, as regulated in Article 25 of PERMA No. 13 of 2016.

3.2. Reconstruction of Corporate Corruption Criminal Liability in Indonesia

The corporate liability principle which is realized in the form of regulations, its implementation is closely related to social phenomena which in its development are sufficient to be applied or not applied to a situation or situation. Salmond asserted that corporate responsibility is adequately applied in the event that violations committed by employees / corporate agents occur within the scope of his work, where the employee / corporate agent can have high authority in the corporation (such as a general meeting of shareholders) and/or are official office holders under supervision and direction of the highest authority of the corporation (eg, director or management).

In certain cases, a corporation is responsible for all violations or mistakes committed by agents who are not corporate employees but have the status of independent contractors [33]. Furthermore, the corporation is not responsible for violations or mistakes of its employees or agents (even though individually remains responsible) if the employee or agent is carrying out work that exceeds his authority (ultra vires), unless it can be proven that certain authorities within the corporation guarantee that the employees or agents are in accordance with their authority (intra vires) in the corporation [33]. More about independent contractors in corporate responsibility, Sykes argues that violators who are independent contractors or agents who do not serve the principal, the principal may not be responsible for acts against the law, except with regard to 4 (four) matters related to activities that are by nature dangerous, non-delegable obligations, certainty / clarity of authority or expertise of a person, and financial responsibilities and related proposals. Exceptions to activities that are indeed dangerous are activities that pose unusual and previously recognized risks, so special precautions are needed to anticipate any undue risk from a hazard or loss. Exclusions relating to obligations that cannot be delegated are differentiated from regulations, contracts, agreements, and charters, as can be likened to legal decisions which show that principals cannot circumvent responsibility for negligence in carrying out explicit or implicit contractual obligations by delegating the performance of obligations to an independent contractor. Exceptions to clear authority include vicarious liability on physical hazards / losses caused by negligent representation related to the certainty / clarity of authority or expertise of a person, which Sykes exemplifies in a health care business that promotes the expertise of its health personnel who are only independent contractors, so that if malpractice occurs by this personnel, then the business must be responsible for the loss/suffering of patients even if there is a risk allocation contract between the company and the independent contractor. This is because the company has promoted it to customers as its personnel and has adequate qualifications or expertise or certification. Whereas exceptions to financial responsibility and related proposals are based on the inability of independent contractors and nonservant agents to pay according to court decisions so that a "filed joint and some liability" is against the principal and agent [34].

Given a corporate corruption three (3) elements of the system of interaction that can not be avoided in the form of acquisition (gain), benefit (advantage),and the connection between the gain and advantage which causes always there is the attempt of normative corporations to avoid and/or remove traces of lawlessness it does, so it is necessary to reconstruct (as *Black's Law Dictionary* defines reconstruction as an action or as a process to rebuild, re-create, or re-organize) [28] interrelated parties, namely agents who are given the authority to act on behalf of the corporation by legitimizing the internal procedures of the corporation. Next Thompson described the gain as official results obtained by the corporation more than individuals who did, advantages as official benefits made by corporations were mostly done through access to formal forms rather than actions, and connections between gains and benefits as manifestations of a tendency to violate legal procedures [6]. Economic and moral considerations in corporate criminal responsibility are also inseparable from the diversity of the current forms of corporation with a mode as if decentralized, even though the handling is an integrated unit which turns out to be attributable to inter-corporation, so it is not possible to prove the mistakes of individuals who act in organizations [35], sometimes the violation of an independent agent or contractor is caused by corporate coercion, whether in the form of encouragement, support, and/or tolerance [36].

As for the reconstruction of (corruption) corporate liability, it must consider the values of public benefit (as economic considerations), legal certainty and justice (as moral considerations), in order to the accountability in question is transformed not only to liability based on mistakes but also to liability that are not based on fault. such as piercing the corporate veil, strict liability, vicarious liability, and secondary liability [7]. This refers

to the implementation of agency theory that seeks to prevent violations that can directly and indirectly endanger corporate continuity, thus requiring deeper identification of the formal and informal structures of the corporation, pressures and competition that occur both within the scope of the corporation and between corporations, and the compensation structure which is duly valid in a corporation [37]. The application of piercing the corporate veil in corporate corruption lies in its proper criteria to punish the actual beneficiaries and its efforts to prevent the domination of certain corporate organs, injustice and irregularities received by victims of corruption, oppression or criminalization received by independent agents / contractors it turns out that the corporation is controlled by other corporations both directly and indirectly [7]. The application of strict liability in corporate corruption lies in the criteria relating to public welfare activities, a risk assessment that is highly dependent on information in the corporation, and the effectiveness of its regulation as a prohibition so it does not need to prove *mens rea* because it can hamper the purpose of corruption legislation. The application of vicarious liability in corporate corruption lies in its proper criteria for pursuing unlawful acts committed by actual beneficiaries in the corporation, thus giving fairness to independent agents/contractors who are deemed to have made mistakes but can prove not to receive any additional benefits from the occurrence of corruption. Whereas the application of secondary liability in corporate corruption lies in its proper criteria to punish corporations, as secondary parties or intermediaries who have the right and ability to oversee the activities of other parties so as not to violate certain financial interests, who knowingly or voluntarily or neglect to ignore the formulation containing corruption and loss of state/region.

CONCLUSION

Two main conclusions are generated. First, the criminal responsibility of corporate corruption has fulfilled the juridical aspects of philosophical and sociological juridical to be implemented based on agency theory in the formation of law in Indonesia. The philosophical juridical aspect is inherent in the fulfillment of fairness, the implementation of which is "putting everything desired in its place", while the sociological juridical aspect is inherent in law as a social phenomenon in a corporation whose solution is through the application of agency theory to solve the problem of information asymmetry, corporate efficiency, conflicts of interest, risks and supervision that often occur between agents and principals. However, the fulfillment of the philosophical and sociological juridical aspects of the accountability of corporate corruption still has to go through the strict definition of the word corruption, bearing in mind that one of the urgency of reconstructing criminal responsibility of corporate corruption lies in the complexity of its definition, and the (positive) law in Indonesia itself has not confirmed the definition of corruption. Second, the reconstruction of corporate corruption criminal liability in Indonesia needs to be applied based on existing accountability models, namely the model of piercing the corporate veil, strict liability, vicarious liability, and secondary liability, given the dominance of criminal liability based on mistakes tends to only ensnare certain natural human violations that not necessarily a true beneficiary of a criminal act of corruption. In order for the reconstruction to meet public benefit considerations (as economic considerations), as well as legal certainty and justice (as moral considerations), a strict formulation of the model of responsibility piercing the corporate veil, strict liability, vicarious liability, and secondary liability in (renewal) regulations criminal law (corruption), considering that TPK relating to corporations is related to the recovery of state / regional financial losses.

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