

THE IMPLEMENTATION OF PROCEDURAL LAW OF RESPONSIBILITY ENFORCEMENT OF CORPORATE CRIME IN INTEGRAL CRIMINAL JUSTICE SYSTEM

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Abstract

Privatization of business in various countries greatly affects economic growth and development, so it makes corporate's activity increasingly dominating legal subjects of Person and State. It also tends to cause corporate crime. The issues are about what the causes of criminal procedural law implementation which is not effective are, how to anticipate those causes in order to create impartial judiciary, and how to reform corporate criminal procedural law "ius constituendum" that is holistic in order to create equal formulation between Person and Corporation. Then, it can be concluded that, First, corporate criminal procedural law "Ius Constitutum" which is still centric and fragmented, causes responsibility enforcement of corporate crime not effective, Second, it is necessary to be anticipated by creating a systematic and integral corporate criminal procedural law, Third, reformation policy of corporate criminal procedural law "ius constituendum" that is holistic and hierarchically equal with Law must be formulated soon. Therefore, it is recommended that in Prolegnas 2018, that policy becomes the priority to be discussed and legalized.

Keywords: corporation, enforcement, criminal procedural law, integral

Abstrak

Privatisasi bisnis diberbagai negara sangat mempengaruhi pertumbuhan ekonomi dan pembangunan, sehingga membuat aktifitas korporasi kian mendominasi subjek hukum Orang dan Negara yang juga bertendensi dapat terjadinya tindak pidana korporasi. Permasalahan yang diangkat adalah seputar apa penyebab implementasi hukum acara pidananya tidak efektif, bagaimana mengantisipasi guna menciptakan peradilan yang imparsial, serta bagaimana reformasi hukum acara pidana korporasi *ius constituendum* yang holistik guna tercipta kesetaraan perumusan antara Orang dan Korporasi, kemudian ditemukan dan dapat disimpulkan *Pertama*, bahwa hukum acara pidana korporasi *Ius Constitutum* yang masih bersifat instansi sentris dan terkotak-kotak, menjadi penyebab penegakan pertanggungjawaban pidana korporasi tidak berjalan efektif, *Kedua*, perlu segera diantisipasi dengan membuat hukum acara pidana korporasi yang sistematis dan integral, *Ketiga*, harus segera dirumuskan kebijakan reformasi hukum acara pidana korporasi *ius constituendum* yang bersifat holistik yang hierarkinya setara Undang-undang, oleh karena itu disarankan agar pada Prolegnas 2018 hal tersebut dimasukkan sebagai prioritas guna dibahas dan diundangkan.

Kata kunci: korporasi, penegakan, hukum acara pidana, integral

Introduction

The privatization of businesses originally managed by the government and then handed over to the private sector in many countries has made corporate's activity more dominant in influencing economic growth and development either national or global. Although the corporation is a fictional entity, as fiction theory pio-

neered by Carl Von Savigny (1779-1861) for his increasingly meritorious position in the economic field since he was introduced 1234 by Pope Innocent IV who perpetuated the "university/ *societas delinquere non potest*" (legal entity cannot be convicted), in which because the virtues he has given to humanity and humanity have been elevated by human beings on a par

with the human (*natuurlijke persoon*) to be the subject of the *rechtspersoon* law so that the terminology is only related to the term civil legal entity.

Now, sociologically, the tendency of corporate domination toward the State and the legal subject of People nationally and globally is increasing, it can be seen from the research of Indonesia Corruption Watch in which corporations dominate the control of land in Indonesia, which is about 57.4 percent of the land controlled by the corporations from total land owned by the Government of Indonesia,¹ as well as research by Sarah Andersen and John Cavanagh², revealing that from 100 largest economic entities consisting of states and corporations; 51 is the Corporations while the State is only 49 in number, in which Gross Domestic Product (GDP) or Sales of the corporations 'General Motors' placing 23rd position, 'Wal-Mart' 25th position, 'Exxon Mobil' 26th position, 'Ford Motor' 27th position, and 'Daimler Chrysler' 28th position, is much higher above the State of Indonesia which only places 31st rank.

The dominance of corporations in the field of economy and land has a negative tendency to commit criminal acts whose effects are far more dangerous than those committed by legal subject of people. The implementation of material corporate criminal law spread in various laws and the obstacles of formal corporate criminal procedural law which is still fragmented, have become "*causa causae est causa causati*" (the cause of a cause which becomes the cause of the subsequent cause), which causes (*causati*) the demand of people's justice not fulfilled yet because (*causae*) the criminal corporations who can be ask for their responsibilities are limited. Therefore, the implementation of criminal procedural law needs to be re-

formed holistically and integrally so that responsibility enforcement of corporate crime is effective.

The legal issues raised in this paper are: *first*, what are the causes of procedural law implementation of responsibility enforcement which is not effective so that it is urgent to be systemized?; *second*, how is the impact of sociological development of the corporation on the birth of corporate crime anticipated in order to create an impartial judiciary in the Indonesian criminal justice system?; *third*, how is the reformation of corporate criminal procedural law "*ius constituendum*" that is holistic according to the hierarchy of legislation so that it can create equality of formulation between legal subject of person and legal subject of corporation?

Discussion

Domination of the Legal Subject of Corporation of the State and Legal Subject of Person and the Urgency of Systematization of Corporate Criminal Procedural Law and Its Obstacles

Corporations have been firmly subject to criminal law and now tend to dominate the countries as shown in Table 1 below. Although corporate dominance increasingly goes international, the implementation on the procedures of criminal responsibility enforcement and corporate crime is still different from each state jurisdiction.

Even in one of the European countries namely Germany, until now that country does not recognize the existence of criminal responsibility toward corporation, because Germany still admits that the responsibility is charged per person. However, in practice, many other countries, such as the Netherlands or France, have applied criminal responsibility toward the corporation,³ with various theories, doctrines and teachings of corporate criminal responsibility.

¹ Fitriyan Zamzani (ed), *Republika*, Monday November 10th 2014, "*Separuh Lahan Dikuasai Korporasi*", available on Website: <http://www.republika.co.id/berita/koran/hukum-koran/14/11/10/net7c450-separuh-lahan-dikuasai-korporasi>, accessed on February 10th, 2016.

² Sarah Andersen, and John Cavanagh, December 2010, *Report on the Top 200 Corporation, Institute for Policy Studies*, available on Website: <http://www.Corporations.org/system/top100.html>, accessed on November 15th, 2016.

³ H. Santhos Wachjoe P, "*Pertanggungjawaban Pidana Terhadap Korporasi*", *Jurnal Hukum dan Peradilan*, Vol. 5 No. 2, July 2016, p. 163.

Table 1. The Data of 100 Biggest Economic Entities 51 Corporations and only 49 Countries

Country/ Corporation	GDP/ Sale in USD Million	No	Country/ Corporation	GDP/ Sale in USD Million	No	Country/ Corporation	GDP/ Sale in USD Million
United States	8,708,870.00	35	Greece	123,934.00	69	AT&T	62,391.00
Japan	4,395,083.00	36	Thailand	123,887.00	70	Philip Morris	61,751.00
Germany	2,081,202.00	37	Mitsui	118,555.20	71	Sony	60,052.70
France	1,410,262.00	38	Mitsubishi	117,765.60	72	Pakistan	59,880.00
UK	1,373,612.00	39	Toyota Motor	115,670.90	73	Deutsche Bank	58,585.10
Italy	1,149,958.00	40	General Electric	111,630.00	74	Boeing	57,993.00
China	1,149,814.00	41	Itochu	109,068.90	75	Peru	57,318.00
Brazil	760,345.00	42	Portugal	107,716.00	76	Czech Republic	56,379.00
Canada	612,049.00	43	Royal Dutch/Shell	105,366.00	77	Dai-ichi Mutual Life Ins.	55,104.70
Spain	562,245.00	44	Venezuela	103,918.00	78	Honda Motor	54,773.50
Mexico	474,951.00	45	Iran, Islamic rep.	101,073.00	79	Assicurazioni Generali	53,723.20
India	459,765.00	46	Israel	99,068.00	80	Nissan Motor	53,679.90
Korea, Rep.	406,940.00	47	Sumitomo	95,701.60	81	New Zealand	53,622.00
Australia	389,691.00	48	Nippon Tel & Tel	93,591.70	82	E.On	52,227.70
Netherlands	384,766.00	49	Egypt, Arab Republic	92,413.00	83	Toshiba	51,634.90
Russian Federation	375,345.00	50	Marubeni	91,807.40	84	Bank of America	51,392.00
Argentina	281,942.00	51	Colombia	88,596.00	85	Fiat	51,331.70
Switzerland	260,299.00	52	AXA	87,645.70	86	Nestle	49,694.10
Belgium	245,706.00	53	IBM	87,548.00	87	SBC Communications	49,489.00
Sweden	226,388.00	54	Singapore	84,945.00	88	Credit Suisse	49,362.00
Austria	208,949.00	55	Ireland	84,861.00	89	Hungary	48,355.00
Turkey	188,374.00	56	BP Amoco	83,556.00	90	Hewlett-Packard	48,253.00
General Motors	176,558.00	57	Citigroup	82,005.00	91	Fujitsu	47,195.90
Denmark	174,363.00	58	Volkswagen	80,072.70	92	Algeria	47,015.00
Wal-Mart	166,809.00	59	Nippon Life Insurance	78,515.10	93	Metro	46,663.60
Exxon Mobil	163,881.00	60	Philippines	75,350.00	94	Sumitomo Life Insur.	46,445.10
Ford Motor	162,558.00	61	Siemens	75,337.00	95	Bangladesh	45,779.00
DaimlerChrysler	159,985.70	62	Malaysia	74,634.00	96	Tokyo Electric Power	45,727.70
Poland	154,146.00	63	Allianz	74,178.20	97	Kroger	45,351.60
Norway	145,449.00	64	Hitachi	71,858.50	98	Total Fina Elf	44,990.30
Indonesia	140,964.00	65	Chile	71,092.00	99	NEC	44,828.00
South Africa	131,127.00	66	Matsushita Electric Ind.	65,555.60	100	State Farm Insurance	44,637.20
Saudi Arabia	128,892.00	67	Nissho Iwai	65,393.20			
Finland	126,130.00	68	ING Group	62,492.40			

Table is processed by the researcher based on the research of Sarah Andersen, and John Cavanagh, "Report on the Top 200 Corporation, Institute for Policy Studies".

Because corporations cannot act or think for themselves, the Court applies the principles of common law agents to indict agents acting

within their scope of work.⁴ The term of agency principles (representative) is the relationship of duties and responsibilities arising from the ap-

⁴ Zaki Anwar, *at.al* (ed), "In re ChinaCast Education Corp. Securities Litigation", *Harvard Law Review*, Vol. 129, June 2016, p. 2273.

pointment of a corporation leader to an agent (its representative), to which the agent is appointed to act or is approved not to act in the interests and purposes and objectives of the corporation. On this basis, the actions of the management of corporations and/or corporation agents committing criminal acts in the interest and purpose of the corporation shall be regarded as corporate crime.

According to Marshall B. Clinard and Peter C. Yaegar's opinions in Made Darma Weda's book, they state:

"A Corporate crime is any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law".⁵

Thus, the crime committed by corporations can occur in various branches of law in which it is regulated criminal sanctions against corporation as perpetrator of crime.

Penal policy is one means to overcome the problem of corporate crime. Therefore, the use of penal sanctions against corporate crime should be taken account the urgency and effectiveness,⁶ particularly, how the criminal procedure should be systematic and integral, in order to create a simple, straightforward, low-cost corporate justice. Furthermore, it does not cause disparities in giving sanctions and variations in the application of different criminal responsibility models when judge decides in court.

There are differences in the implementation of corporate criminal responsibility enforcement procedures in each state jurisdiction. However, considering corporate dominance of state and people legal subjects, and the urgency to criminalize corporations systematically as well as the high integral in Indonesia, a corporate terminology, *rechtspersoon*, in corporate criminal procedural law has been further expanded into legal entities and non-legal entities (*rechtspersoon/geen rechtspesoon*).

A Fragmented Criminal Procedural Law's Obstacles

The impact of corporate dominance in the economic field is like two sides of coin which have different impacts, positive and negative. On the negative side, corporate tendency to commit crime known as "corporate crime" has been detected by Indonesian lawmakers since 1955 with the aim to suppress criminal acts and create deterrent effect against corporations. Therefore, it is issued Emergency Law Number 7 Year 1955 on Investigation, Prosecution and Economic Crime Trial.

By regulating corporation as a subject of criminal in the Law, it means that every action of corporate management and /or its agent is considered as corporate action. Nevertheless, since Old Order era in 1955 until the present, Mental Revolution era, the enforcement of corporate criminal responsibility is relatively limited and corporate is considered as criminal which can be processed in Court. The reason is very clear (*causa patet*); corporate criminal law is spread out to more than seventy-seven outside Criminal Code. Therefore, it causes (*causati*) its interpretation to be done in a centric institution, and criminal procedural law regarding the procedure in handling corporate crime is still fragmented.

This condition potentially causes overlapping of authority which is fragmentary, "centric" and/or "sectoral egoism" and it does not show as a unity of criminal law enforcement system. Moreover, each sub-system has created "internal rules" in the form of circulars, decree and so on whose purpose is to harmonize and/or to promote the harmonization of general rules.⁷ For instance, the Attorney General's Regulation Number: PER-028/A/JA/2014 Concerning Handling Criminal Cases Guidelines on Corporate Law Subject, this explains that fragmentary and complementary nature of this Regulation is seen in Article 3 stating "At the time this Regulation applies, any provision or guidance

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Sulistyanta, "Implikasi Tindak Pidana Di Luar KUHP Dalam Hukum Acara Pidana (Studi Kasus Taraf Sinkronisasi)", *Jurnal Dinamika Hukum*, Vol. 13 No. 2, May 2013, p. 180.

related to the handling of criminal cases with corporate law, shall remain valid as long as it is not contradictory to Attorney General's Regulation". Furthermore, there is also Supreme Court Regulation Number 13 Year 2016 concerning Procedures for Handling Criminal Acts by Corporations.

Systematization of Criminal Procedural Law on Enforcing Corporate Responsibility in Integral Criminal Justice System

The development of corporate criminal law is always influenced by sociological development of the corporation; therefore, along with the development and progress mentioned above, there is also a new crime. That development requires the renewal of criminal law both material and formal (criminal procedural law). Criminal procedural law has a strategic role in the framework of criminal law enforcement. The strategic role of the criminal procedural law lies in the character of the regulation as a mechanism to enforce law and justice.⁸

These new forms of crime have metamorphosed in various corporate business activities and the types are also increasingly diverse like economic sectors: disobedient to court decisions, not paying court fines, investment fraud schemes, Ponzi scheme fraud, mass marketing fraud, health care fraud, fictitious after sales service, kickbacks, unbundling of tests and services to generate higher fees, durable medical equipment/DME fraud, pharmaceutical drug diversion, outpatient surgery fraud and internet pharmacy sales, and financial institution fraud sector such as fictitious bank account, securities/commodities fraud, fair finance, illegally banking transactions, corporate fraud and many more.

Rapid development of corporate crime needs to be anticipated by making a systematic and integral criminal procedural law in Indonesian criminal justice system so as to create an impartial and impartial judiciary. Although there are various norms in the material legislation governing corporate crime; however, if its cri-

minal procedural law is still fragmented, it becomes a major obstacle in the enforcement for legal structural institutions. 'Systematic' means to establish a system within a legal section in particular or general field of law, it can be assumed that various regulations are not like a forest which is difficult to harvest; however, it is like a garden which has regular and beautiful plants so as to provide maximum utility for society",⁹ especially this can be a systematic procedural law concerning to procedures of handling integrated corporate criminal cases which are from inquiry, investigation, pre prosecution as well as to sentence and punishment by judges in court.

The main source of criminal procedural law is the Criminal Code Procedure (Law Number 8 Year 1981). Then it becomes wider due to the emergence of a special criminal law which also regulates criminal procedure law (specifically). Peculiarity of the nature of criminal procedure law may be "addition" and or "extension" to what has been stipulated in the criminal code procedures on both the subject and the object.¹⁰ In Attorney General's Regulation Number: PER-028/A/JA/2014 Concerning Handling Criminal Cases Guidelines on Corporate Law Subject, and extension of corporate understanding in Supreme Court Regulation Number 13 Year 2016 concerning on Procedures for Handling Criminal Acts by Corporations, the norms of both regulations have also extended the forms of corporations which are merge, segregate to dissolution, and other notions such as the definition of the corporate environment, corporate statements, and Restitution. Restitution is a compensation of the corporation to the victim or his family.

According to B. Arief Sidharta, the process of dispute settlement through judiciary can take place in an impartial and objective manner, and then the process must be done through procedures that can guarantee impartiality and

⁸ *Ibid.*

⁹ Moeljatno, 2008, *Asas-asas Hukum Pidana*, Jakarta: Rineka Cipta, p.13.

¹⁰ Sumardi and Putu Sudarma, "Penerabasan Prinsip Kerahasiaan Bank dalam Rangka Pemberantasan Tindak Pidana Pencucian Uang", *Jurnal Hukum Kertha Patrika*, Vol 29 No. 1, 2004, p. ii, available on website <http://jurnal.pdii.lipi.go.id>, accessed on April 24th, 2013.

objectivity which then standardized in a set of legal rules called Procedural Law. Associated with efforts to ensure impartiality of conflict resolution process, Procedural Law shall contain provisions and principles of evidentiary burden, the *audi et aliteram partem* (hearing all related parties), and the obligation to provide motivering of judiciary.¹¹ Therefore, further study is needed to decide whether or not procedural law of Supreme Court Regulation Number 13 Year 2016 is effectively implemented by the Judge in the judiciary, or it must be conceived again to create a corporation criminal procedure law *ius constituendum* which is at the same level as the Constitution.

Judge as one of judicial authority officials who carry out judicial process must have a great responsibility towards the outcome of a verdict. Ideally, a verdict created by judges in the courts does not generate any new problems in the future of the community. This means that the quality of the judge's verdict has an important influence on the community and affects the authority and credibility of the judiciary itself.¹² Primarily, judge's verdict is expected to satisfy the demands of public justice, since no corporation has committed a criminal offense that cannot be held accountable and escapes from the law.

Corporate Criminal Procedural Law Reformation with Justice as Fairness whose Hierarchy is Equivalent to the Law

The dominant condition of corporations is so strong in the economic field and tends to be criminalized; moreover, corporate crime *procedus ius constitutum* (*PERMA* and *PERJA*) is still one level below the law so it is not systematic and integral. Therefore, a regulation must be created to reform corporate criminal procedural law (formal) of *ius constitutum* which is holistic on the level of Law as hierarchy and regu-

lated in Law Number 12 Year 2011 on Formation of Laws and Regulations. As a result, it can create equality before the law between criminal acts with law subject (*natuurlijke persoon*), the one who formulates law in detail and rigid in material and formal criminal law (Criminal Code [KUHP]/Criminal Code Bill [RUUKUHP]-2015/ criminal code procedure [KUHP]) and equal with corporate law subject (*rechtspersoon/geen rechtspersoon*).

By reforming formulation of corporate criminal procedure policies (formal) on Law level in detail, hopefully there will be an impact. On one hand, corporation as offender will avoid doing any crime and on the other side, corporation who obliges business and law ethics (good corporate governance) including law subject, will also experience justice as fairness. According to the Decree of State Ministry/the Head of Capital Investment and Development Agency, Number: Kep-23/M.PM. PBUMN/2000, Good Corporate Governance is "the right corporate principle, which should be applied in the management of a company. It is carried out solely in order to ensure the interests of the company to achieve the purpose and objectives of the company."¹³

Criminalization of corporations provides a deterrent effect to corporations and characterizes the strength of law enforcement in a country. However, it is necessary to review further on Suzuki's warning in order to impose a criminal punishment in the corporation such as in the form of closing all or part of the business carefully. This is because the impact of verdict is very wide. Those who will suffer are not only those who do wrong, but also innocent people like workers, shareholders and consumers of a factory. To prevent the negative impact of corporate punishment, there should be consideration to ensure workers, shareholders. Therefore, criminal effects against corporations that have a negative impact can be avoided.¹⁴

¹¹ B. Arief Sidharta, "Etika dan Kode Etik Profesi Hukum", *Jurnal Ilmu Hukum Veritas et Justitia*, Vol. 1 No. 1, June 2015, p. 238.

¹² Tata Wijayanta, "Asas Kepastian Hukum, Keadilan, dan Kemanfaatan dalam Kaitannya dengan Putusan Kepailitan Pengadilan Niaga", *Jurnal Dinamika Hukum*, Vol. 14 No. 2, May 2014, p. 217.

¹³ Muskibah, "Tanggung Jawab Direksi Dalam Penerapan Prinsip Good Corporate Governance", *Jurnal Ilmu Hukum*, Vol. 2 No. 3, 2010, p. 128.

¹⁴ Sakeus Ginting, "Kebijakan Pemidanaan Korporasi Dalam Tindak Pidana Pencucian Uang", *Jurnal Magister Hukum Udayana*, Vol. 1 No. 1, 2012, p. 11.

Therefore, the purpose of reforming corporate criminal law is to create a criminal and penalization policy of rational and functional corporation that is in the form of; *first*, the law is capable of giving a deterrent effect and eliminating corporate crime to a tolerable threshold; *second*, the law is familiar with the corporate business climate; *third*, the law that leads the corporation is not solely profit oriented which justify all means; *fourth*, obligation to obey business ethics and principles of good corporate governance; *fifth*, the law is humanistic and upholds social responsibility.

Some approaches in the using criminal law must be policy-oriented, rational and using a functional, economical, value-oriented and humanistic approach;¹⁵ therefore, reforming corporate criminal law approach should able to restore the original function of corporation. When corporate is first appointed as law subject, they aim to exist for the benefit of human and humanity, with the principle “corporation for the benefit of human and humanity, not human for the corporate interests.”

Conclusion

Based on the description above, the author can summarize things as follows. *Firstly*, even if the corporation can serve as a legal subject and can be criminalized nationally or globally, but *Ius Constitutum* corporate criminal law which is still centrally and fragmented, has become the cause of the next cause (*causa causae est causa causati*) that enforce corporate criminal responsibility is not effective, so it is urgent to be systematized. *Secondly*, the sociological development of corporate law subject has created new forms of criminal acts that metamorphose into various corporate business activities with the increasingly diverse types of criminal; thus, it should be anticipated by making a systematic and integral corporation procedural law in Indonesia's criminal justice system, so that it will create an impartial and ob-

jective judiciary. *Thirdly*, considering the condition of corporation in the economic field is dominant, it the tendency to criminalize.

Therefore, it is essential to formulate a policy to reform the corporate criminal procedural law (formal) *ius constituendum* which is holistic and hierarchical on the level of the law so as to create equality before the law between the offense and the perpetrator of the legal subject (*natuurlijke persoon*) and equal with the subject of the corporate law (*rechtspersoon/geen rechtspersoon*), in the hope that the corporation offender becomes restrain to the crime, and be obedient to business and legal ethics (good corporate governance), while creating justice as fairness to all legal subjects.

Suggestion

In the future (*Ius Constituendum*), it is necessary to reform corporate criminal procedural law (formal) holistically into the same level as Law. It is regulated by hierarchy in Law Number 12 Year 2011 on the Establishment of Laws and Regulations, whose policies have systematized criminal procedure of law enforcement of corporate criminal responsibility integrally. Moreover, *Ius Constituendum* of Corporate Criminal Procedure Code is included as a priority in Prolegnas (*Program Legislasi Nasional/National Legislation Program*) 2018 to be discussed and enacted by the Parliament and Government. Hopefully, the implementation of integral corporation accountability for law enforcement can be effective in creating legal certainty and impartial justice in society.

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¹⁵ Dwidja Priyatno, “Reorientasi dan Reformulasi Sistem Pertanggungjawaban Pidana Korporasi Dalam Kebijakan Kriminal dan Kebijakan Hukum Pidana”, *Jurnal Syiar Hukum*, Vol. 9 No. 3, 2007, p. 214.

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