

Principle of Proportionality in Corporate Crimes Based on Actions Against the Law

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Abstract

Context of corporate crime, the principle of proportionality places position that in accordance with provisions in Article 1365 of Civil Code, an act against law in civil law must contain following elements: 1. The existence of an act; 2. The act is against law; 3. There is an error on part of perpetrator; 4. There is a loss for victim; and 5. There is a casual relationship between act and loss. By looking at perpetrator and loss to victim of corporate crime, based on value of justice, it must be seen from side of default and unlawful acts which are considered as fraud and money laundering in context of civil and bankruptcy and may be punished.

Keywords: Corporate Crime; Law; Public

Introduction

Corporate crime is one of discourses that arise with advancement of economic and technological activities. Corporate crime is not a new item, but an old item that is constantly changing packaging. No one can deny that development of times as well as the progress of civilization and technology is accompanied by development of crime and its complexity. On the other hand, provisions of Criminal Law that apply in Indonesia have not been able to reach them and are always behind in formulating them. Many companies often, deliberately even repeatedly, flout the law; they commit acts that violate law but easily escape prosecution. Even though community was very disturbed by corporate actions. The public's view form of corporate crime is very different from their view on street crime. In almost every case, the effects of corporate crime are more detrimental, more costly, more pervasive, and more debilitating than other forms of street crime. (Anwar, 2018)

Globalization efforts, among others, have shown the existence of a corporate dimension, namely growth of corporations continues to increase very rapidly in terms of number and size in line with their role. This shows that economic, social, and political activities are largely influenced by corporate behavior. It is undeniable that corporations have an important role in globalization efforts through development process in economic field. The role of corporations in development of their activities can increase economic growth through state revenues in form of taxes and foreign exchange, as well as providing wide employment opportunities for community; however, government policies are oriented towards efforts to increase economic growth by building various industries whose operations are mostly played by corporations. Not infrequently in their activities show deviant behavior. This deviation in corporate behavior in its activities is then known as corporate crime.

A corporate crime has certain characteristics. Among characteristics of corporate crime are: 1. The criminal act of the corporation brings profit (economical or not) or is carried out with an economic motive for company; 2. The corporate crime has negative consequences for other people or has widespread negative consequences for the community. For example, crimes in environmental sector that cause widespread harm to society; and 3. Corporate crimes are usually carried out in sophisticated and unconventional modes. For example, it is done through financial engineering which is difficult to detect. (Munir Fuady, 2017)

Furthermore, regarding criminal acts committed by a company or corporation, so that it is charged with criminal responsibility, is a new development and has long been the theories that impose civil responsibility on these legal entities or on their members. Therefore, until now, there are pros and cons to the prosecution of legal entities. Opinions that are pro against corporate criminal acts present the following reasons: (Alhakim & Soponyono, 2019) 1. Just convicting management the company is not strong enough to suppress this corporate crime; 2. Because it turns out that corporations are increasingly playing an important role; 3. To better protect society by punishing companies; and 4. Crime against corporations is an effort not to punish weak parties such as management or employees the company.

As for parties who are against the punishment of corporations, they state their reasons, which are actually very legal and technical in nature, including: 1. The problem of error or intentionality in a criminal act only exists in natural humans; 2. Material behavior as required by some crimes can only be carried out by natural humans. For example stealing, killing, molesting; 3. A crime which constitutes deprivation of a person's freedom may not be subject to a crime; 4. Criminalizing a corporation are same as convicting an innocent party, because there is no element of *criminal intent* in a legal entity and there are humans; and 5. In practice, it turns out that it is not easy to determine the norms when it is only company that is responsible for crime, or only management, or both.

Although there are still pros and cons to punishment of legal entities, a clear trend universally that more and more countries in the world are adopting, regulating, and approving implementation of criminal acts by legal entities or corporations. The types of crimes committed by corporations are very diverse, which are basically identical to their line of business or form of activity. Therefore, the meaning, formulation and scope of this corporate crime are also very diverse. Regardless of meaning, formulation and scope of corporate crime, J.E. Sahetapy (J.E. Sahetapy, 2002) explained "Types of corporate crime are often used in various contexts and names. It is not surprising that in the United States, each state compiles its legislation there are approximately 20 formulations related to corporate crime. At the same time, it should be noted that term corporate crime is often used in context of *white collar crime, organizational crime, organized crime, georganiseerde misdaad, groepsriminaliteit, misdaad onderneming, crimes of business, syndicate crime*. For time being there is no intention to describe meaning and differences of various terms. Even Simon and Eitzen, for example, don't use term *crime* (crime), but use term (*elite deviance*). Simon and Eitzen explained that... "*elite deviance may be either criminal or noncriminal in nature.*"

Furthermore, Munir Fuady in his book entitled "*Dirty Business (Anatomy of White Collar Crime)*" describes *white collar crime* as follows:(Munir Fuady, 2004) The term "*white collar crime*" is often translated into Indonesian as "*white collar crime*" or "tie crime".^b *White collar crime* was first proposed and developed by an American criminologist named Edwin Hardin Sutherland (1883-1950) in early 1940s, which was put forward in a speech from Sutherland which is always remembered and that's when concept of white collar crime first emerged, namely his December 27, 1933 speech to *The American Sociological Society* in Philadelphia in 1939. Then, Sutherland published a book entitled *White Collar Crime* in 1949."

The civil nature of a contractual relationship can be a criminal act if the elements of fraud are met. On the other hand, a case can be in default if the criminal elements are not met. Therefore, basic knowledge and analysis are needed so that the public in general, and law enforcement officers in particular, can sort out a case in a contractual relationship. Because two legal actions have different settlement paths. Therefore, this research is concerned with principle of proportionality in corporate crime relations to see and describe aspects of civil and criminal law.

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Research Methods

The research used in this research process uses type of analytical *juridical law research*.(Michael, 2019)

Discussion

Application of the Principle of Proportionality to Corporate Crimes on the Basis of Unlawful Acts in the Civil Context

Van Dunne defines civil law, especially in 19th century, is "A regulation that regulates matters that are very essential for individual freedom, such as people and their families, property rights and bonds. Public law provides minimal guarantees for private life.(HS Salim, 2005)

The consequence in context of principle of proportionality is in study of legal protection, where legal protection is related to protection of one individual with another individual, while scope regulates family relations and in community association. Thus, it can be said that understanding of civil law described by experts above, main study is on the regulation of protection between one person and another. Whereas in the theory of legal science that legal subjects are not only people, but also legal entities, so above definition needs to be refined. Therefore, interpreting civil law is whole legal rules (both written and unwritten) that regulate relationship between one legal subject and another legal subject in family relationships and in social interactions.

Content of corporate crime, principle of proportionality places position that in accordance with provisions in Article 1365 of Civil Code, an act against law in civil law must contain following elements: 1. The existence of an act; 2. The act is against law; 3. There is an error on part of the perpetrator; 4. There is a loss for the victim; and 5. There is a casual relationship between the act and the loss.

An act against the law begins with an act of the perpetrator. It is generally accepted that the action here is intended, either doing something (in an active sense) or not doing something (in a passive sense), for example not doing something, even though he has a legal obligation to make it, which obligations arise from the applicable law (because there are also obligations arising from a contract). Therefore, for unlawful acts, there is no element of "agreement or agreement" and also no element of "allowed cause" as contained in the contract.

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Existence of a loss (*schade*) for the victim is also a condition for a lawsuit based on Article 1365 of the Civil Code to be used. In contrast to losses due to default which only concern material losses, losses due to unlawful acts in addition to material losses, jurisprudence also recognizes the concept of immaterial losses, which will also be valued in money.

The Operation of the Principle of Proportionality Against Corporate Crimes on the Basis of Unlawful Acts in a Criminal Context

According to Barda Nawawi Arief, viewed from point of view of criminal law policy, sense of policy of using, operationalizing and functionalizing criminal law, central problem or main problem actually lies with problem of how far authority and power to regulate and limit human behavior (citizens and officials) with criminal law. (Arief, 2018) From description above, it appears that central issue concerns authority and regulation of authority itself in functionalization of criminal law policies. The powers functionalization of criminal law policies include authority to formulate or legislative policies, the authority to apply or apply judicial policies, and authority to execute or executive policies.

Criminal liability imposed on corporations was first developed in countries that adhere to *Common Law System* such as 15 K and United States as a result of industrial revolution 11 that began in these countries. There are several theories of corporate criminal 12 ility which are used as basis for imposition of criminal liability on corporations. Theories of corporate criminal liability include identification theory, substitute liability theory and absolute liability theory.

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Several existing theories of corporate criminal liability are expected to provide a legal basis for imposing corporate criminal liability on victims of corporate crime in context of unlawful acts. This is main problem which is expected to be accommodated in future, so that criminal law policies related corporate crime can be operated effectively while still paying attention to and adhering objectives of social policy, namely the protection and welfare of the community. (Disemadi & Jaya, 2020)

Context of working principle in proportionality, corporate crime is formulated not only in context of criminal liability, but also has a more comprehensive look at reconstruction and reformulation of criminal liability for victims of corporate crime 7, including provisions regarding: 1. provisions regarding when a crime can be committed is said to be a criminal act committed by a corporation; 2. who can be prosecuted and sentenced for crimes committed by corporations; and 3. types of sanctions that are appropriate to subject of crime in form of a corporation that is oriented towards providing compensation to victims.

Conclusion

Context of 8 corporate crime, the principle of proportionality places position that in accordance with provisions in Article 1365 of Civil Code, an act against law in civil law must contain following elements: 1. The existence of an act; 2. The act is against law; 3. There is an error on part of perpetrator; 4. There is a loss for victim; and 5. There is a casual relationship between act and loss. By looking at perpetrator and loss to victim of corporate crime, based on value of justice, it must be seen from side of default and unlawful acts which are considered as fraud and money laundering in context of civil and bankruptcy and may be punished.

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appropriate to subject of crime in form a corporation that is oriented towards providing compensation to victims. The formulation of these provisions must be strictly regulated to minimize possibility of corporations releasing themselves from responsibility for the crimes they have committed. It is impossible to provide compensation for losses suffered by victim by corporation, if corporation in question cannot be snared, prosecuted, and sentenced to a crime based on existing laws and regulations.

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