

# Corporate Crime as The Power of Crime in The Economic Justification

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## Corporate Crime as The Power of Crime in The Economic Justification

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### Abstract

A corporation with strong capital support from its company, with its core business seeking as much profit as possible, is very vulnerable to carrying out activities that violate the law even though economically or financially these activities are correct. The type of research is normative juridical with analysis using legal documents in the form of primary legal materials, secondary legal materials, and tertiary legal materials. The results of the analysis show that the business expansion activities carried out by PT Jiwasraya are business activities that are justified by the economy or finance. However, because one of these activities involves state finances, it fulfills one of the elements of a criminal act of corruption. Activities that are justified in business are still getting attention by law because the nature of the crime is corporate crime, namely corporate crime which is carried out solely for the benefit of the corporation. Corporate crime will have the power to suppress society, so that the culture of the community will in some ways change and will indirectly threaten the concept of the rule of law in Indonesia.

**Key Words:** The Corporate crime, Power crime, Economic Justification

### A. Introduction

Indonesia as a rule of law country, from time to time, has turned the law spirit back even though the challenge and obstacle come into reality. Law spirit thereof is that a society abides norms or laws which have not only security and order, but also fairness and benefit to civilised society. The real threats are seen when the formal institutions such National Police and Prosecutor show weaknesses to handle corruption cases, hence ad hoc institutions, such as KPK (Corruption Eradication Commission), necessarily involves. Many law experts have in fact considered KPK performance as not optimum by judging from its ability to reveal village funds case.

Monitoring of corruption in the village has been conducted by ICW (Indonesian Corruption Watch). Based on ICW's monitoring result, cases of corruption in village in the range of 2016-2019 have increased. In 2016, there were 41 cases which then increased to 96 in 2017, 181 cases in 2018, and to 271 in 2019.<sup>1</sup> Not yet the temptation to criminalise KPK power by the case of *Polri (National Police) vs KPK* (known as "Cicak dan Buaya" Case) affiliated to *Century Bank* Case, then the police assault began in 2012, after

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<sup>1</sup> Andriansyah Kartadinata, M. Ghaifari, Faisal Santiago, "Criminal Policy of Village Fund Corruption in Indonesia", *Proceeding of the 1<sup>st</sup> International Conference on Law, Social Science, Economics and Education*, Jakarta: Binapraja Press 2021, p. 366

the KPK probed irregularities in the procurement of driving simulators in a traffic police unit. The main source of money for Indonesian traffic cops, both officially and criminally, is well-known. The charge for a driver's license and the car tax are both legal sources of revenue for the police. Bribes are required in order to obtain a driver's license and pay vehicle taxes illegally. General Djoko Susilo was a strong contender for the position of next chief police commander at the time, owing to his generosity in donating substantial sums of money to police institutions.<sup>2</sup>

Barrier also occurs when law enforcement authorities get involved as an actor in litigation. At least from TII Survey 2019,<sup>3</sup> Indonesia ranked 85<sup>th</sup> out of 198 countries surveyed for the perceived levels of public sector corruption.<sup>4</sup> The upward trend is also caused by corporate actions (private sectors). They have a power, untouchable in the law, for example, the corruption case that ensnared Jakarta Governor as the suspect linked to the purchase of land in Cengkareng and Sumber Waras hospital, but so far the case has not been decided; the police, prosecutors, and KPK were too slow in dealing with this case.<sup>5</sup>

In this matter, it should take into account of corporation role or intervention represented by its directors or boards. They will consider to committing the crime in order to preserve company reputation or goodwill so not at stake. The role of corporation, thus, is especially significant to determine the "colour" or side (bad or good) of law enforcement in Indonesia, thereby a capital support from the corporation, so they would easily bribe the law authorities. We can see on Martin P Silitonga, as the Director of CV. Citra Lampia Mandiri (CLM), who was sentenced to 3 years and 6 month in prison and a fine of Rp.150 million, subsidiarity to 2 month in prison. Martin was found guilty of bribing South Jakarta District Court judges Iswahyu Widodo and Irwan.<sup>6</sup>

Philosophically, bribery is *mala per se* or *mala in se* but not *mala prohibita*. The concept of *mala per se* is based on the thought of *natural wrong*, which determines the certain types of crimes as a crime against integrity and disgraceful, not being prohibited by law, but it is factually against the rightful values. On the other side, the concept of *mala prohibita* derives from the idea of which the action will be determined as guilty or wrong

<sup>2</sup> Johanes D. Widodo, "Indonesia's Anticorruption Campaign: Civil Society Versus the Political Cartel", in *The Changing Face of Corruption in the Asia Pacific: Current Perspective and Future Challenges*, United Kingdom, Elsevier, 2017, p. 253-254.

<sup>3</sup> TII is a national chapter of the international anti-corruption civil society organisation transparency international, conducts the annual survey upon which Indonesia's assessment in the index based

<sup>4</sup> OECD, *OECD Investment Policy Reviews: Indonesia 2020*, Paris: OECD Publishing, 2020, p. 143.

<sup>5</sup> Bambang Slamet Riyadi, *Culture of Abuse of Power in Indonesia from the Perspective of Criminology and Law*, Depok: Rajawali Press, 2020, p. 35.

<sup>6</sup> Decision of District Court No. 45/Pid.Sus-TPK/2019/PN.Jkt.Pst

because the rules forbid or are against the norms, so they are considered as regulatory offences. Bribery is classified as *mala per se* crime because bribery intends to influence, so the recipient will not do or is not to do something that of his/her capacity, or has or has not done any action which is against his/her duty or law.

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

Whilst Minister of Finance of Indonesia, Sri Mulyani Indrawati asked for supports from many private sectors in order to not spoil or ruin the public sector bureaucracy by giving bribes. Bureaucrat is not such a heavenly angel. Tempted continuously with bribes would eventually result in weakness or flaw. According to the Minister of Finance, economic and national reform can only be manifested if there is commitment to fundamentally reform the attitude, mindset, and culture of all involved parties. This due to the fact that in many cases, act of bribery or offering gift is legitimated by the culture. This act therefore constitutes corporate crime.<sup>7</sup>

The involvement of corporation in judicative or law enforcement in Indonesia happens not only once or twice, but far more, corporation has become a significant role to decide either the dark or bright side of law enforcement of Indonesia. People address that conspiracy as a judicial mafia or law mafia, whilst others have opposed to that by stating that those mafias never existed in law enforcement in Indonesia. Many pros and cons on the Indonesian law enforcement system need to prove the existence of the involvement of corporation. Apart from the discussion on the existence of conspiracy in law enforcement in Indonesia by corporation, it is important to be noted, and the writer believes, that the involvement of corporate crime itself is such a power which can control the societal behaviour. The problem now is how to justify that a company has the power to commit crimes in economic behaviour?.

This piece of writing resulted from normative legal research. This is supposed to scrutinise the quality of the regulations or laws and its implementation thereafter, so the object of this writing is based on the regulations and the doctrines that exist in society.

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<sup>7</sup> Dirk Tomsa, "Local Politics and Corruption in Indonesia Outer Islands", *Bijdragen Tot de Taal, Land – En Volkenkunde*, Vol. 171, 2015, p. 201.

This writing is using secondary data. This data are meant to be information which is obtained indirectly from the society that uses document collection in educational books as reference for study.

## **B. Result And Discussion**

### **1. Legal Issues in the Case of Jiwasraya**

PT Asuransi Jiwasraya (Persero) is the first company in Indonesia which was founded in 1859 under the name *Nederlandsch Indische Levensverzekering en Lijfrente Maatschappij van 1859* (NILLMIJ). PT Asuransi Jiwasraya was born with the noble idea of educating the public to plan for the future. It is a big idea that has been recognized by the pioneers, founders, and policymakers of this republic for more than 152 years. To carry out this noble task, Jiwasraya mobilizes all its dedication and expertise in meeting the demands of the community for life insurance and financial planning which are increasingly complex and competitive.<sup>8</sup> PT. Jiwasraya is an company that overseas several companies and provides guarantees to the public or customers who are part of the company. In addition, the role of the Financial Services Authority (OJK) in the supervision of PT Jiwasraya, Jiwasraya has been recognized since 2004. This has been known since Jiwasraya reported it to the Capital Market and Financial Institution Supervisory Agency (Bapepam LK) which later changed to become part of OJK.

Based on the audit results on Jiwasraya in 2016 and the results of investigation in 2018, the Audit Board concluded that there have been deviations (tort) in collecting funds from JS Saving Plan products and investment placement in the form of shares and mutual funds resulting in the state loss. As for the laws and regulations deviated in the Jiwasraya case, are as follows:

1. Article 2 of Corruption Law related to Enrichment of Oneself, Others or a corporation and Article 3 of Corruption Law related to abuse of authority that can be detrimental to the state finances or economy. The two articles provide criminal threats and fines. According to the Audit Board in marketing JS Saving Plan products related parties in Jiwasraya allegedly received fees for the sale of the product. This action can be indicated as corruption due to Jiwasraya is a state-owned enterprise (SOE). As for law enforcement officers who can apply this rule are the Police, Prosecutors and Corruption Eradication Commission (KPK).

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<sup>8</sup> Fransisca Anri Widyani & Rr. Ani Wijayati, "Legal Responsibility of Jiwasraya Insurance Companies to Customers", *Proceeding from the 1<sup>st</sup> International Conference on Law and Human Rights*, Jakarta, ICLHR 2021, p. 457.

- <sup>1</sup> 2. Article 3 of Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering Criminal Act (UUT PPU) concerning prohibition from hiding or disguising the proceeds of corruption. Violation against this provision is threatened by criminal sanction of a maximum of 20 years imprisonment and fines no larger than IDR 10 billion. At present, the Prosecutors' Office is in collaboration with PPATK to trace down the flow of corruption funds in Jiwasraya. Besides the Prosecutors' Office, TPPU cases can be handled by the Police and KPK.
- <sup>1</sup> 3. Articles 11 and 21 of Law No. 40 of 2014 concerning Insurance (Insurance Law). Article 11 regulates obligations of good governance for insurance companies. Article 21 paragraph (3) regulates that investing assets insurance company customers must apply prudential principles. Violation against both of these articles are subject to administrative sanctions in the form of warning, business restriction, prohibition from product marketing, revocation of permit, cancellation of registration and approval, administrative fines and/or prohibition from occupying certain position. Based on the Audit Board findings, the board of directors and the ranks of Jiwasraya rashly made a JS Saving Plan program offering a high interest giving rise to negative spreads that erode the assets of Jiwasraya. An error also occurred in share and mutual funds investment carried out without adequate review of placement. As for law enforcement officers authorized to pass this sanction is the Financial Services Authority (FSA).
- <sup>1</sup> 4. Article 97 paragraph (3) of Law No. 40 of 2007 concerning Limited Liability Companies (Company Law) regulating personal liability of the board of directors. In the Jiwasraya case, the Audit Board smelled intentional purpose of the board directors to record pseudo profit on the financial statements, appointment of bancassurance officials not in accordance with the provisions, and submission of cost of funds (COF) without involving the relevant division. The actions of the board of directors brought legal consequences of liability up to personal assets of the board of directors (piercing the corporate veil).
- <sup>1</sup> 5. Article 32 paragraph (1) of Law No. 21 of 2011 concerning Financial Services Authority (FSA Law), regulating that if FSA officials/employees are found to be involved in a case, then the Board of Commissioners will enforce the code of ethics. Then, if indicated corruption is found, KPK may intervene (Article 11 of Law No. 30 of 2002 concerning the Corruption Crime Eradication Commission).

6. Article 90 of Law No. 8 of 1995 concerning the Capital Market (Capital Market Law, prohibits fraud acts in the capital market. Based on the Audit Board investigation, in the Jiwasraya case fraud in the form of purchasing and selling shares and mutual funds that don't reflect the actual price occurred. Against the perpetrators of the fraud, the Capital Market Law threatens a maximum imprisonment of 10 years and fines no larger than IDR 1.5 billion. Investigation of the crime under the Capital Market Law is carried out by the Capital Market Supervisory Agency (Bapepam) but since there is FSA Law, the investigation was carried out by the FSA (Article 9 of FSA Law).
7. Article 30 of Law No. 5 of 2011 concerning Public Accountants (Public Accountant Law) that prohibits public accountants from receiving conditional rewards, receiving commission and committing manipulation. If the prohibition is violated, the public accountant is threatened by administrative sanctions in the form of recommendations to perform certain obligations, written warnings, restrictions on service provision, suspension, revocation of permit and fines. The administrative sanctions are given by the Minister of Finance. The Ministry of Finance is currently checking the public accountant who audited Jiwasraya.
8. Article 17 of Financial Services Authority Regulation No. 73/POJK.05/2016 concerning Good Corporate Governance for Insurance Companies (POJK No. 73/POJK.05/2016), prohibits the board of directors from making transactions that have a conflict of interest, utilize position and/ or receive personal benefits from the company. The perpetrator of violation will be subject to administrative sanctions in the form of written warning, business activity restrictions or revocation of business permit. There are even additional sanctions in the form of prohibition from occupying certain position in an insurance company (Article 80 of POJK No. 73/POJK.05/2016). Based on the Audit Board findings, purchase and sale of shares and mutual funds of Jiwasraya were indicated **to be carried out by affiliated parties.**

A variety of rules cause various law enforcement officers involved as well, from the Police, Prosecutors' Office, KPK, Ministry of Finance, Capital Market Supervisory Agency and FSA. There are also slices of authority between agencies that have the potential to cause mutual pull or throw of responsibility that will slow down settlement of the case



and raised loss for the community. For example, the reluctance of KPK to interfere in the Jiwasraya case.<sup>9</sup>

## 2. Corporate Crime Characteristics

Since the liberalisation system of trade has changed into global economic and free trade such WTO (*World Trade Organisation*) or APEC (*Asia Pacific Economic Committee*), it poses a great challenge for many developing countries including Indonesia. This is because the free trade zone allows the imbalance competition between industrial countries, *New Industrial Countries* (NIC's), and developing countries. In terms of capability comparison, it is surely between those parties are not similar. This issue causes a concern of which developing countries would be in a disadvantage in competition with developed countries.

Many developed countries, as known, produce many arrays to have non-tariff protection, although in this free trade era, such patent or educational or scientific privileged rights create a stumbling block to developing countries' science and technology. Moreover, with political reasons, those developed countries will surely have the ability to force developing countries to follow the scenario. This free trade scene could hence be seen as a modern colonisation or domination by the developed countries.<sup>10</sup> Doha Round emphasized that world trade would be appropriate balance if the developing countries have more accesses. If this imbalance persists, world trade liberalisation would then pose a major economic crisis to the developing countries.

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

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

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<sup>9</sup> Tribunnews.com, January 7, 2020

<sup>10</sup> Eddie Rinaldy, Denny Ikhlas dan Ardha Utama, *Perdagangan Internasional: Konsep & Aplikasi*, Jakarta: Sinat Grafika Offset, 2018, p. 249.



complex and bureaucratic regulations, which involve bribery and distortion. These new types of crimes will definitely not occur without professional or organised criminal.<sup>11</sup> Besides, as globalisation effects, most prominent corporate crimes are *price fixing* (illegal agreement to amount of price), *false advertising*, such as in medical and pharmacy ads, *environmental crime*,<sup>12</sup> and financial banking crime, such as, cybercrime, money laundering, or illegal logging.

Great effect from major increasing assets derived from selling activities by giant companies or conglomerates that are able to gather millions or billions of dollars, places companies to have immense power and influence in economic, social, and political elements. This means that giant companies would be able to influence these elements in a country. For example, *the US Campbell Soup Company* was envisioned to control 95 percent of all soup substances, and four food companies provide 90 percent of all served breakfast. In addition, Romli Atmasasmita stated that the corporation power in economy is well executed whereby affects not only investment decisions, price determination, location, research, and product design, but also social and political influences such as labour, social problems, and life quality.<sup>13</sup>

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

Multinational Corporation (MNC) existence in Indonesia has a long history since the colonisation era. In the Netherlands' colonisation period, Dutch companies lasted until the independence proclamation of 17 August 1945, even *the Previous Order* or *New Order* in 1966. In the period of 1965-1968, Richard Robinson, cited by J. Heryanto, pointed out that:<sup>14</sup>

*"there is little doubt that the Bappenas technocrats were convinced by the IMF/IBRD ideology of free-market economics, which limited the state to providing the fiscal and*

<sup>11</sup> Syahroni, Maharso dan Tommy Sujarwadi, *Korupsi, Bukan Budaya Tetapi Penyakit*, Jogjakarta: Deepublish, 2018, p. 25-27 and 103.

<sup>12</sup> Yurizal, *Menjerat Pelaku Tindak Pidana Korporasi di Indonesia*, Malang: Media Nusa Creative, 2017, p. 86.

<sup>13</sup> Romli Atmasasmita, *Hukum Kejahatan Binis: Teori & Praktik di Era Globalisasi*, Jakarta: Prenadamedia Group, 2016, p. 32.

<sup>14</sup> J. Heryanto, "Peranan Multinational Corporations Dalam Industrialisasi Pada Era Orde Baru", *Jurnal Manajemen dan Kewirausahaan*, Vol. 5, No. 1, 2003, p. 18.

<sup>4</sup> *monetary conditions for capital accumulation, and trusted in mechanisms of the market to generate maximum growth and efficiency”.*

What the underlying reason of MNC arrival in Indonesia is that benefit expectation is far higher than its domestic investments or than in other countries. Relative advantage from this investment was depending on the economic or political factors, as stated by Robert Gilpin: *“Direct investment is intended to establish a permanent source of income or supply in the foreign economy; consequently, it creates economic and political relationships of a lasting and significant character”*.<sup>15</sup>

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

As consequence, the corporation will always set the things out from any element that can object its goals, even if it is necessary to break the law by committing corporate crimes; for instance, damaging others' reputations, natural resource undermining, illicit competition, tax evasion, labour exploitation, importing and distributing hazardous products, fraud against consumer protection, etc.<sup>16</sup>

Corporate crime is a modern crime scheme which has been epidemic to all countries and causing significant loss to society. This phenomenon is comprehended by identifying the characteristics of corporate crimes, which are different to any conventional crimes. Generally, those characters can be described as follows:<sup>17</sup>

1. Having *low visibility*, as it is always implicitly executed by normal or routine activities, associated with a professional or complex organisation.
2. *Complexity*. It is always accompanying to lies, fraud, and stealing as well as it can be correlated to science, technology, legal, organised and engaging lots of people, in years.
3. There is a *diffusion of responsibility*, widely complex organisation.
4. There is a *diffusion of victimisation*, such as pollution and fraud.
5. Obstacles in *detection and prosecution* as a result of unequal professionalism between those law enforcement authorities with the committers.

<sup>15</sup> Robert Gilpin, “The Political Economy of the Multinational Corporation: Three Contrasting Perspectives”, *American Political Science Review*, Vol. 70, Issue 1, 2014, p. 184-191

<sup>16</sup> Todung Mulya Lubis, “Corporate Responsibility”, *Harian Kompas*, 5 Januari 2019.

<sup>17</sup> John Muncie and Eugene McLaughlin, *The Problem of Crime, Second Edition*, New Delhi: SAGE Publishers: 2001, p. 251-259

6. There is an *ambiguity law* which could lead to shortcoming in law enforcement.
7. Duplication in status of crime. Must be disclosed that the offence or crime is not stipulated in the law, but it is illegal instead.

In relation with a corporate crime definition, there are also some related terms. To avoid confusions, then it shall be distinguished between 1) *crimes for corporation*, 2) *crime against corporation*, and 3) *criminal corporation*. The *Crimes for corporation* is another term of *corporate crime*. This can be determined that the corporate crime is orchestrated for company interest, not vice versa. The *Crimes against corporation*, or so called *employee crimes*, is crimes which committed by the employees or staffs of against company such as embezzlement. This type of crimes can be performed by not only staffs, but also other people in society.

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

Corporate crime must be distinguished from ordinary economic crime due to its occurrence in a larger context and is perpetrated by people of high social status (elite), not by small businesses. Crimes for corporation is able to be illustrated as *invisible hand theory*,<sup>18</sup> that should be of an action and direct impact, while the subject and the method cannot be detected. As a result, the loss will not be equal to the subject liabilities. Although, there are *lex specialist* laws which formulate that corporations can be prosecuted as subject of crime and with the issuance of regulations of the Supreme Court (Perma) of 2016 Number 13 concerning procedures for handling cases by corporations. In fact, only a few corporations have been prosecuted even though jurisprudentially there has been a decision no. 812/Pid.Sus/2010/Pn.Bjm.

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

A people movement to sound a criminalisation on corporation has been envisaged to enable corporate liabilities from corporate crimes. Experts have revealed theories to enabling corporate liabilities, at least seven theories or concepts; those are *identification doctrine, aggregation doctrine, reactive corporate fault, vicarious liability, management failure model, corporate mens rea doctrine, and specific corporate offences*.<sup>19</sup> Logically, in the corporate crime, a corporation can be held responsible if it is performed by person(s) who acted as executive board or corporate representatives, and if their names are registered in a corporate establishment, that is a registration in authentic notary document, in Indonesian language, attached with the Articles of Association (AD/ART) of the corporation, and obtaining its status as a legal entity or corporation which has been granted by the related Government Minister as regulated under the Law No. 40 of 2007 in regards to Limited Company.

### 3. Corporation as the Power of Crime in the Economic Justification

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

1. Concerning that litigation process will not be efficient or time consuming, and it is costly. In terms of economic theory, this is so called *inefficiency*.
2. Open Litigation also means that minds and concentration are fully dedicated for, which results in the corporation credibility decline or plummeting to without any trust from its consumers or people. If this happens, the corporation can be determined as seated in “zero income”, therefore in the near time, there would be such business foreclosure or merger or accusation from another company.
3. *Brand Image* is the precious product that needs to be protected as trust will only stick to the *brand image company product*. If this brand image and the trust towards *brand image company* are diminishing or faded away due to an issue such as dispute arisen in litigation, therefore there is such negative perception against the *brand image*, this company hence would spend more costs to regain its trust.

Due to those above facts, the company would avoid litigation, especially public or criminal court. In another word, a company is likely to save the sum of money allocated for alternative dispute resolution besides courts. Such money or *cost* will be valued as a marketing cost.<sup>20</sup> In the event of the company released a failure product due to negligence

<sup>19</sup> C.M.V. Clarkson. *Corporate Culpability*, First Published in Web Journal of Current Legal Issues in Association with Blackstone Press Ltd. , 2019, p. 5-14

<sup>20</sup> Gollakota Kamala, Gupta Vipin, Srinivasan, R, *Business Policy And Strategic Management: Concepts And Applications*, Sri Lanka: PHI, 1990, p. 237 – 240.

causing such injury or even death, so this *cost* can be used as compensation to the victims if they will not report to Police or revoke the statement which hence will escape the company from criminal court proceedings.

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

The writer agrees to Ronny Rahman Nitibaskara's opinion that stated that corporate crime is such a deviant trap and crime, when its tension gets severe in the parallel time, to achieve its sovereignty from not only one type of crime.<sup>21</sup> When there are two phenomena arising, which are cultural transition and sovereign crime, this would be another side of *crime power*. When people become or have no guilty feeling at the time they commit such deviance and crime, it can be then ascertained that the violation is consciously conducted. There is, therefore, a view of thing said to be the crime as solution, crime as a job, crime as a choice, crime as commodity, crime as economy pivotal to raise economic crime, criminal management, etc.

Deviant trap then will contagiously set up to the law enforcement authorities, who are supposed to enforce the law, but using law as a cloak to conceal illegality. The impact of corporate crime has indeed been widespread to law enforcement sector. High technical features in modern law have made legal process, both litigation and alternative resolutions, as being identical to certain people in legal professions, which lead to collaboration between the law enforcement authorities and the criminals, therefore changing the use of law for crime (*law as a tool of crime*).<sup>22</sup>

When the crime, which is being orchestrated by a certain corporate power, grows to be sovereign as having those seven characteristics of corporate crime and far from law enforcement, the crime has gained enough criminal power to influence people (*crime against society*), and hence that social culture has changed in many ways. This transformation could then become threat to the concept of rule of law in Indonesia. This spirit shall be restored, altogether with people, to make the law and judicative as a

<sup>21</sup> Ronny Rahman Nitibaskara, *Perangkap Penyimpangan dan Kejahatan*, Jakarta: Yayasan Pengembangan Kajian Ilmu Kepolisian, 2009, p. 26 – 32.

<sup>22</sup> Ronny Rahman Nitibaskara, *Ketika Kejahatan Berdaulat: Sebuah Pendekatan Kriminologi, Hukum dan Sosiologi*, Jakarta: Peradaban, 2001, p. 3.

supreme power. Therefore, however great the power is, both financial and political power of corporation do have, will never be *invisible hand* before the law. If the pressure from corporate crime gets harsher in this transition time, along with diminishing of supremacy of the law principle caused by the *betrayal of the professionals law* which has started to take part in the criminal action, it, thus in the parallel time, will achieve a prevalent position of crime. The consequence is the social culture will favorably accommodate that prevailing or sovereign felony.

The Attorney General's Office has delegated 13 suspects of alleged corruption in the management of finance and investment money by PT Jiwasraya, according to Leonard Eben Ezer Simanjuntak as a Junior Attorney General Investigators for Special Crimes (Jampidsus). The suspects were handed up to the Central Jakarta District Attorney with proof (Kejari). Of these thirteen suspects of businesses, among others PT. Millenium Capital Management, PT. Treasure Fund Investama, PT. Pool Advista Aset Manajemen, PT. GAP Capital (formerly PT. Guna Abadi Perkasa), PT. Maybank Asset Management, PT. Pinnacle Persada Investama, PT. Sinarmas Asset Management, PT. Corfina Capital, PT. Capital Asset Management Services, PT. Prospera Asset Management, PT. MNC Asset Management, PT. OSO Investment Management, and PT. PAN Arcadia Capital (formerly PT. Dhawibawa Investment Management).

According to the State Audit Board of the Republic of Indonesia (BPK RI) investigative examination reports in the framework of calculating state losses on financial management and investment funds at PT. Asuransi Jiwasraya (Persero) for the period 2008 to 2018 Number: 06/LHP/XXI/03/2020 dated March 9, 2020, state losses totalled IDR 12.157 trillion.<sup>23</sup> Since Jiwasraya is a state-owned company, the losses automatically lead to a charge of corruption under the anti-corruption law.

According Burhanuddin as an Attorney General, they violated the principle of prudence. Asuransi Jiwasraya made many investments in high-risk assets to pursue high returns. But, the question is what Jiwasraya did is economically justified? Economic justification is used to measure a return on an investment. The term is most often used in regards to material handling and how it impacts a company financially (business).<sup>24</sup> The field of Economic crime embraces fraud, bribery, corruption and financial regulation, which also includes money laundering, terrorist financing, and market abuse. The terms of financial crime and market abuse are used interchangeably, and even the international

<sup>23</sup> <https://voi.id/en/news/39709/ago-sends-13-corporate-suspects-jiwasraya-corruption-mega-case-immediately-tried>, accessed Jan 26<sup>th</sup>, 2022.

<sup>24</sup> <https://voi.id/en/news/24030/menant-tersangka-korupsi-pt-asabri-yang-rugikan-negara-rp17-miliar>, accessed Jan 26<sup>th</sup>, 2022.



monetary fund accepts the lack of international definition of financial crime, through its broad view of 'any non-violent' crime resulting in a financial loss which closely echoes theory of Sutherland.<sup>25</sup> The US Department of Justice defines white collar crime as:<sup>26</sup>

"Non-violent crime financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities: also, nonviolent crime for financial gain utilizing deceptions and committed by anyone having specialist technical and professional knowledge of business and government irrespective of the person's occupation".

In this case of Jiwasraya, *mens rea* is an element that is difficult to prove from a corporation that is considered to have committed a crime, considering that the corporation can only take actions through the organs of the Board of Directors. One of the defendants in this case was Heru Hidayat, the President Commissioner of PT Trada Alam Minera. He was initiated by a malicious agreement between Heru Hidayat and Board of Directors (Director of Jiwasraya) before the implementation of PT. AJS investment began in 2008. The malicious agreement was marked by an agreement to appoint Heru Hidayat and Benny Tjokroaputro to control and regulate Jiwasraya investment in both Jiwasraya shares and mutual funds. The initial regulation and control of Jiwasraya investment were to improve the finances of Jiwasraya, which in 2008 experienced an RBC (risk based capital) of -580% (minus 580 per hundred), which is far from the health level of an insurance company, namely should be 120%. With an RBC value of -580% and a liability level (the obligation of Jiwasraya to policyholders) of Rp. 6.7 trillion, Jiwasraya financial improvement is needed by investing in Jiwasraya on a large scale, which is expected to improve Jiwasraya finances.<sup>27</sup>

Why is economic activity for profit can be blamed by law? Isn't what Jiwasraya did reasonable in the context of economic justification? To better understand the concept of economic justification as a power corporate crime, we know first about the economic crime. Economic crime is a concept that emerged 'slowly' at the turn of the century. It was 'strengthened' by the middle of the century, and by the end of the century, and especially at the turn of the millennium, it had become a fact that was very present (twenty-first century). On his way, in issued 1940, the phrase 'white collar criminality' as economic and financial crime was acknowledged by Sutherland. During his investigations into the

<sup>25</sup> Edwin H. Sutherland, *White Collar Crime: The Uncut Version*, Bringhamton: Vall-Ballou Press, 1983, p. 45.

<sup>26</sup> Axel Palmer, *Countering Economic Crime: A Comparative Analysis*, Oxon: Routledge, 2018, p. 2-3.

<sup>27</sup> Decision Court Number 30/Pid.Sus/Tpk/2020/PN.Jkt.Pst



criminal actions of 70 corporations from the United States' Top 200, he discovered that they were all part of the largest 200 companies in the country.

According to a study conducted by KPMG in 69 countries, therefore, which investigated more than 348 economic crime files, the profile of a business criminal is represented by a man aged 36 to 45 years old who works in the financial sector, commits fraud against his own employer, holds a high management position, has worked for the same company for more than 10 years, commits crimes to satisfy his greed rather than to achieve professional goals, and takes advantage of the weak functions of the company.<sup>28</sup>

As a result, there are at least two approaches to economic and financial crime:

1. Criminality is defined as "the ensemble of human behavior classified as crimes, punished and convicted as such, under specified circumstances, inside a criminal law system (sub-system) explicitly determined from a geo-historical viewpoint" from a legal standpoint'.<sup>29</sup>
2. From a sociological standpoint, criminality is a common occurrence that has existed and will continue to exist. According to experts, the only thing that can be done is to take steps to lessen it. And it's a dream to believe that criminality will be eradicated totally'.<sup>30</sup>

Economic or financial crimes are closely related to legal reasoning. The origin, interpretation, implementation, and extinction of legal norms are all discussed in the context of legal reasoning (rules, standards, or principles). Lawmakers debate the enactment and abrogation of norms by competent legal authorities, or the development and extinction of norms. Judges and other officials primarily debate the application of standards based on evidence of relevant facts and interpretations of relevant legal texts. Legal arguments are frequently combined with political, economic, and moral arguments in favor of or against a measure in these situations. However, judicial judgments must be backed by legal reasons from the standpoint of legal justification. For example, in order to be accepted, economic reasons must be legally relevant.

The core concept is to defend (or condemn) an action based on its real or anticipated economic effects. In legal practice, however, analogous arguments are frequently offered under alternative categories, such as economic purpose argument or economic intention argument. This is hardly surprising, given that such consequences

<sup>28</sup> Monica Violeta Achim and Sorin Nicolae Borlea, *Economic and Financial Crime: Corruption, Shadow Economy, and Money Laundering*, Springer: University of Cluj-Napoca, Romania, 2020, p.1-2

<sup>29</sup> Moldoveanu, N., *Criminalitatea Economico-Financiaro in Europa*, L'Harmatt Publishing House: 1999, p. 13.

<sup>30</sup> Nita, N., *Descoperirea si Combaterea Infractionalitatii Economico-Financiare*, eMAG: Rumania, 2008, p. 23.

must be legally significant in order to have justificational authority in law. Relevant to the goal or intent of a legislator or a judge, as well as the implementation of a policy or the promotion of a concept. Of course, economic concerns have a larger role in the legislative process such as judgement.<sup>31</sup> *Normative analysis asks how the law can be improved to better achieve the goal of efficiency.*<sup>32</sup>

In the Jiwasraya case together with 13 companies have formed a crime of power. One of the suspects, Heru Didayat, who committed corruption in Jiwasraya and Asabri, has been charged with death penalty. The arrest was carried out based on the results of the investigation of the Audit Board (BPK) of the Republic of Indonesia who found alleged corporate crime in the company management involving the Board of Directors, managers, and other parties outside the company. According to the Audit Board in marketing JS Saving Plan products, related parties in Jiwasraya allegedly received fees for the sale of the products. This action can be indicated as corruption due to Jiwasraya is a state-owned enterprise (SOE).

The power of the corporation to touch the authority of the court is with indications of bribery against a corruption court judge who has handed down a nil sentence.<sup>33</sup> Business and corporate crimes pose a serious challenge for the classical law economic model of enforcement. Are corporate and business crimes any different from other crimes? Are these crimes best deterred by punishing individuals, punishing corporations, or both?

A rational individual determines whether or not to commit a crime depending on the likelihood and severity of punishment in the classical paradigm. In the case of businesses or organizations, however, the crimes as the result of various actors committing or preventing violations. There are three aspects to our understanding of business crime.<sup>34</sup> To begin, we must think of corporate crime in the classic sense, which is crime committed primarily by legal businesses. Naturally, the literature on both the pro and con sides of corporate criminal liability is not excited about putting harsh punishments on businesses. The second approach is to look at businesses as victims of crime, with a focus on cybercrime. We propose that the basic argument concerning potential victims' ineffective preventive actions may simply be applied to cybercrime

<sup>31</sup> Damiano Canale and Giovanni Tuzet, *Chapter 2: What is Legal Reasoning About: A Jurisprudential Account*, "Economics in Legal Reasoning", UK: Springer, 2020, p. 16-17.

<sup>32</sup> Thomas J. Miceli, *The Economic Approach to Law Second Edition*, California: Stanford University Press, 2009, p. 2.

<sup>33</sup> <https://nasional.sindonews.com/read/660627/13/hakim-tolak-hukum-mati-heru-hidayat-divonis-nihil-di-kasus-korupsi-asabri-1642510870>, accessed Jan 26<sup>th</sup>, 2022.

<sup>34</sup> Hans Sjogren, Goran Skogh (Edited), *New Perspective on Economic Crime*, UK: Edward Elgar Publishing, 2004, p. 6 - 7

deterrence. Our last perspective is to be to regard a business as a target for sort of activities of crimes. The harm or social loss produced by commercial crime is debatable in some circumstances, with other researchers claiming that the social loss is nothing. Insider trading, or more broadly, financial market crimes, is one illustration of this debate.

### C. Conclusion

Corporate crime from time to time will continue to expand and pose jeopardy to the rule of law concept in Indonesia, and the supremacy of law is at stake. A corporation with strong capital support from its company, with its core business seeking as much profit as possible, is very vulnerable to carrying out activities that violate the law. The business expansion activities carried out by PT Jiwasraya are business activities that are justified by the economy or finance. The Audit Board (BPK) of the Republic of Indonesia found alleged corporate crime in the company management involving the Board of Directors, managers, and other parties outside the company. One of them, in marketing JS Saving Plan products related parties in Jiwasraya allegedly received fees for the sale of the products. This action can be indicated as corruption due to Jiwasraya is a state-owned enterprise (SOE) even though it is an economic habit, which is normal. Activities that are justified in business are still getting attention by law because the nature of the crime is corporate crime, namely corporate crime which is carried out solely for the benefit of the corporation. Corporate crime will have the power to suppress society, so that the culture of the community will in some ways change and will indirectly threaten the concept of the rule of law in Indonesia.

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