An Ideal Model For Recovering National Financial Losses From Corporate Corruption Crimes With Legal Insurance

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ABSTRACT

The APH is reluctant to prosecute companies as perpetrators of criminal activity for a variety of reasons. This means law enforcement remains reluctant to implicate companies as perpetrators in corruption cases. In fact, after the publication of Perm 13 in 2016, there were only 6 companies under suspicion as of 2020. To this condition, the authors try to provide legal ideas related to the ideal model for recovering the state's financial losses due to corruption by legally certain entrepreneurial actors related to the Afdoenings Buiten process concept (out-of-court dispute resolution) approach model.

Keywords: Model, Recovery, State Financial Losses, Corporate, *Afdoenings Buiten Process*

I. Introduction

One of the biggest points of corruption among corporate officials is the issue of corporate criminal liability. Initially, it was very difficult for companies to be held accountable. This is because there have been many obstacles in determining the form and behavior of the enterprise responsible from the point of view of criminal law or in connection with the question of physical form. The issue of subjecting companies to criminal liability is also at odds with the aggressive criminal laws in force in Indonesia. The Criminal Code recognizes only individuals as criminals, not corporations. However, extra-criminal laws and regulations recognize and regulate enterprises as subject to criminal law, one of which is Law No. 31 of 1999 on the Elimination of Corruption Crimes as amended by Law No. 20 of 2001. (hereinafter referred to as the PTPK law).

The punishment of corporations as legal subjects of criminal acts of corruption is the principal crime in the form of a fine that is aggravated by adding

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1/3 (one-third) of the maximum amount of the fine, plus additional punishment under Article 18, paragraph (1) Section (2) of the Act PTPK. If the company's legal entity is regulated as a criminal offense, Section 20 of the PTPK Act provides an opportunity to bring the company to court for crimes committed by the company together with its management.

Article 20 Section (7) of the PTPK Act has the same consequences as a single formulated sanction, as no other alternative can be chosen. In other words, if the company does not pay the fine, the alternative procedure will not be used. In addition, since the PTPK Law does not have any implementing provisions, the provisions of Article 103 of the Criminal Code should be referred to if the Special Law of the Criminal Code is not clearly stipulated. Under this condition, the Supreme Court's issuance of PERMA No. 13 of 2016 on Corporate Crime Settlement Proceedings was one of its deliberations. But the question is the validity of Perma No. 1 of 2016 after this regulation was published. In the author's view, criminal prosecution of companies involved in corruption and government financial loss before and after the 2016 Perma No. 13 issuance has been minimal.

This means that there are legal issues related to sentencing as the implementation of corporate responsibility in non-corruption cases, whether regulated in Article 20 of the PTPK Law or the regulation on handling Corruption in Perma No. 13 of 2016 which has an impact on the lack of legal proceedings against corporations. From the above explanations, the author can conclude that Perma's presence is on the one hand to overcome technical obstacles and fill legal gaps in the investigation, prosecution, and adjudication process of public companies. On the other hand, corporate liability should be more rationally used for certain crimes, but it turns out that very few companies are criminally responsible for such acts. Corruption harms state finances. Under such conditions, it is possible to question the effectiveness of Perma No. 13 of 2016 for the police in the context of handling business cases involving corrupt practices that are detrimental to state finances.

The APH is reluctant to prosecute companies as perpetrators of criminal activity for a variety of reasons. This means law enforcement remains reluctant to frame companies as perpetrators of corruption cases. In fact, after the publication

of Perm 13 in 2016, there were only 6 companies under suspicion as of 2020. In response to this situation, the author seeks to provide legal ideas on an ideal model for recovering the state's financial losses from corruption, with corporate law actors having legal certainty. Related to the research background above, the question in drafting this law, namely: "What is the ideal model for recovering state financial losses in corruption by corporations with legal certainty?" This research is legal research using a statutory and conceptual approach. The legal sources used are primary, secondary, and tertiary legal sources which are analysed using normative/prescriptive analysis**.**

II. Discussion

A. Obstacles to the practice of criminalizing corporate corruption Perpetrators in Indonesia

Based on the concept of the *Afdoenings Buiten Process* approach (out-of-court settlement of lawsuits) related to recovering the financial loss of the state by corporations as corrupt criminals, the question arises whether this concept can be used to recover state financial losses. From the authors' point of view, this approach can be an effective and efficient means of optimizing the repatriation of government financial losses. Since the essence of combating corruption is to restore a nation's financial loss or economy, it is necessary to consider the application of the concept of restorative justice in resolving national financial loss.

Settlement and recovery of state financial losses in corruption cases where the perpetrator is a corporation by optimizing the Afdoenings Building Process approach (resolving cases outside of court proceedings) so that major offenders can receive fines is one of the alternative models that can be used to impose additional sanctions. Criminal sanctions are suboptimal and rarely convicted. In other words, the retributive paradigm (criminal law institutions) cannot combat corruption repressively.

As it is known that the effort to overcome crime by using criminal law institutions and physical punishment of criminals is the most classic way, even though it is said to be as old as human civilization In a philosophical context,

Crime and Punishment are sometimes even called "*older philosophy of crime control*".[4] Punishment policies using such models continue to be challenged today because sentencing or criminal sanctions in a historical context are full of descriptions of treatments that are considered cruel and transgressive by today's standards. Even Smith and Hogan called it "*a relic of barbarism*".[5]

In the context of corruption, it seems that the philosophies and theories of punishment, which are heavily influenced by the current retributive justice, no longer seem relevant to the law's main purpose of eradicating corruption in Indonesia. The legal interest to be protected is national finance. It was later revealed that many corrupt prisoners who cost the state a lot of money actually enjoyed the sentencing process. Which is giving rise to new criminal activity. Those convicted in corruption cases use the profits of their corruption to bribe prison guards while they are in prison, and may even place them in lavish institutions.

Also, the perpetrators of corruption crimes are often corporations rather than individuals. In this context, the paradigms of uncertainty and retributive justice in corporate punishment of perpetrators of corruption are clearly irrelevant. Indeed, efforts to protect government finances corrupted by corporations face many obstacles. The application of the concept of retributive justice means that the punishment of corporate corruption offenders is no longer appropriate in terms of content, structure, and legal culture. Therefore, restorative justice approach models used to avoid the failures associated with repaying government financial losses by corporations as perpetrators of corruption should be considered.

In this regard, Priyatno explains the root of the problem as follows:[6]

> An entity is subject to a criminal offense if it has committed a criminal offense and it is stated that law enforcement will not function theoretically and practically as to how the entity can be held criminally liable.

[4] Gene Kassebaum in Yusona Piadi & Rida Ista Sitepu, *Implementasi Restoratif Justice dalam Pemidanaan Pelaku Tindak Pidana Korupsi* (*Implementing Restorative Justice in Conviction of Corruption Crimes)*, (Journal Rechten: Legal Studies and Human Rights, Vol. 1 2019), p. 3.

[5] *Ibid*.

[6] Dwija Priyatno, *Kebijakan Legislasi Tentang Sistem Pertanggungjawaban Pidana Korporasi di Indonesi (Legislative policy on the corporate criminal liability system in Indonesia)*, (Bandung: Utomo, 2004), p. 152-153.

Classification is not regulated. That effort to criminally overcome them may not work. For example, legal policies on corporate criminal sanctions do not have specific provisions regarding corporate criminal sanctions for offenses punishable only by imprisonment, or regarding alternative penalties if companies do not pay fines. There are weaknesses such as These weaknesses in criminal justice reform must be overhauled.

According to Marwan, the prosecution process for criminal acts committed by companies faces two main problems:[7]

1) The issue of criminal responsibility of the institution as a group and the issue of the penal system for the institution as a group.
2) Both of these issues have not been explicitly regulated in the legislation, but because the corporate activities are physically represented by one or several corporate executives, theoretically if a corporation commits a criminal activity, it is a manifestation of its executives. Even in criminal law, it is difficult to determine the appropriate criminal penalties for corporations.

Basically, according to Muladi and Sulistyani, in addition to being a crime committed by those in power, white-collar crime is so complex that law enforcement requires additional skills and mental strength. Obstacles identified during the investigation and prosecution process include:[8]

1) Perpetrators have both financial and political power;
2) Weak quantity and quality of law enforcement professionalism/specialization, including civil servant investigator or *penyidik pegawai negeri sipil* (PPNS), necessitates consideration of a special task force;
3) Victims are insensitive and passive (*corporate crime is an untold story or quiet act*);
4) The complexity of the certification system;
5) Weak coordination among agencies; and
6) Inadequate community involvement (e.g. *Neighborhood Watch Committee tomonitor Corporate Crime*).

It is very ironic that many of the above common obstacle-based sentencing procedures for the criminalization of corporate crime end with management alone, with no follow-up to implicate criminal proceedings against the corporation. In this way, corporations are free to escape punishment to reap the financial losses of the state caused by their efforts to foster corruption. This

[7] Marwan Effendy, *Diskresi*, *Penemuan Hukum*, *Korporasi & Tax Amnesty dalam Penegakan Hukum (Decision power*, *legal discovery*, *corporate and tax amnesty in law enforcement)*, (Jakarta: Referensi, 2012), p. 110.

[8] Muladi and Diah Sulistyani, *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Responsibility)*, (Bandung: Alumni. 2013), p. 94.

obstacle to criminal law enforcement of corporate corruption in Indonesia must be addressed immediately and solutions found.

The main aim is to strengthen the legal basis and technical penalties for corporate corruption offenders through comprehensive regulatory reform and to remove uncertainty for law enforcement when conducting investigations and prosecutions in court as well as it is useful for judges in determining the sentencing of corporate corruption offenders.

B. Afdoenings Building Process Concept (Settlement of Cases Outside the Legal Process)

Settlement of cases outside the court is now well known in the Code of Criminal Procedure. Out-of-court settlements are commonly referred to as alternative dispute resolution (ADR). Looking at its history, long before Indonesia gained independence, there were other crime-solving efforts, especially during the Dutch colonial period. The proceedings carried out are known as the Afdoening Building Process (out-of-court settlement of the case). In the Criminal Code, out-of-court settlements are regulated in Article 82 of the Criminal Code called *Afkoop*, which states: "The power to sue for violations subject to a penalty expires only if the maximum fine and costs incurred at the time the prosecution was initiated are voluntarily paid". Afkoop is also called *compositie* [9] by Jan Remmelink. In addition to the waiver of action in criminal proceedings, several terms are known that are similar to the prosecutor's waiver of action, i.e. waiver of criminal prosecution, i.e. abolition, *afkoop*, and *transactie*. Article 14 Section (2) of the 1945 Constitution states that the President authorizes abolition subject to the direction of the House of Representatives. Abolition will result in the waiver of criminal prosecution of those for whom the repeal is granted. The meaning of *afkoop* in Article 82 of the Penal Code is "the redemption of criminal proceedings for offenses for which the offense is not determined but a fine. So, by paying the maximum fine, the charges against him will be dropped".

[9] Nike K. Rumokoy, *Eksistensi Afdoenings Buiten Process dalam Hukum Acara Pidana Indonesia (The existence of the Afdoenings Buiten process in Indonesian criminal law*), Journal of Law Unsrat, Vol. 23/No. 8/January/2017, p. 48.

As described above, this extrajudicial dispute resolution is generally called alternative dispute resolution and has been widely known in the field of private law or civil law. Upon closer inspection, this alternative dispute resolution can be conducted not only in the field of civil law but also in the field of criminal law, but there are some conditions for alternative dispute resolution in criminal law. The basis for an out-of-court settlement in criminal cases is related to the nature of the criminal law itself.

Criminal law is Ultimate remedy or *Ultimum Remedium*, Van Bemmelen argues, that: [10]

> Criminal law is the Ultimate remedy or *Ultimum Remedium* (the last remedy). To the extent possible, it is limited, meaning that if other parts of the law are insufficient to assert the standards recognized by law, then criminal law applies. The threat of crime must remain the ultimate remedy or *Ultimum Remedium*. This does not mean that criminal threats are abolished, but that the pros and cons of criminal threats must always be weighed, and that the drugs administered do not make the disease worse.

The basis for the abolition of prosecution is that if an act has expired, the prosecutor continues to prosecute, or is dismissed by a judge, or if the prosecutor's request is denied, the prosecutor may no longer continue to prosecute (*niet-ontvankelijk verklaring van het O.M)*. This is stipulated in Article 78 of the Criminal Code, but the repeal of the right to sue because of *ne bis in idem* (No one is tried twice for the same crime) is stipulated in Article 76 of the Criminal Code. Purely based on unwritten penalty waivers, i.e. decisions of the B.R.V. C June 24, 1946, for "crime" not based on Coercion or *Overmacht*, but on the need to avoid "excessive crime". (*overspanning van het strafrecht*).

Based on the authority history, another crime-solving effort existed long before Indonesia became independent, especially during the Dutch colonial period. The process performed is known as the *Afdoening Buiten Process* (settlement of cases outside the court). The currently applied form of extrajudicial settlement of criminal matters is *seponeren (*waiver) i.e. diversion of proceedings in the public interest by the Attorney General. Diversion means to move the resolution of a child's problem from criminal proceedings to extra-

[10] Andi Hamzah, *Asas-Asas Hukum Pidana (Principles of Criminal Law): Ed Revision 2008*, (Jakarta: PT. Rineka Cipta, 2008), p. 10.

criminal proceedings in Juvenile Criminal Law, article 82 of the Criminal Code as well as in the provisions of the Draft of Criminal Code or *Rancangan Kitab Undang-Undang Hukum Pidana* (RKUHP) and Kitab Undang-Undang Hukum Acara Pidana Draft of Criminal Code Procedures or *Rancangan Kitab Undang-Undang Hukum Acara Pidana* (RKUHAP). The authors do not consider Article 109 Sections (2) and (3) of the Criminal Code and Article 140 Section (2) of the Criminal Code to be out-of-court settlements, due to the ad hoc nature of the termination, which can be examined at any time in a court session. Article 35 letter (c) of Law No. 16 of 2004 concerning the Republican Prosecutor General's Office, states, "The Attorney General may dismiss a case in the public interest".

Public interests are national or state interests and/or the interests of the wider community. The dismissal of a case referred to in this clause is an exercise of the principle of opportunity and can only be done by the Attorney General after considering the proposals and opinions of state officials on the matter. The Dutch equivalent of settling a case in the public interest is "*Seponering*" not "*Deponeren*" or "*Deponering*".

The right to bring an action under Article 74 Sr and so on is forfeited, in particular, if the Prosecutor/Attorney General establishes one or more demands (particularly in the form of payment of money) before the trial commences to stop or terminate the continuation of the crime criminal prosecution. Criminal offenses and offenses punishable by six years or more are not eligible for this comparability.

In addition to the public prosecutor's office, the police are also empowered to carry out/arbitrate criminal prosecutions out of court with or without conditions in the case of minor offenses (Article 74c Sr). P Article 42 Section (2) of the Indonesian Code of Criminal Procedure provides that the public prosecutor has the power to conditionally or unconditionally suspend criminal prosecution for public interest and/or specific reasons. Therefore, setting conditions is not mandatory. Also, in Section 3, the maximum statute of limitations for the principal penalty is four years or five years if the defendant is over 70 years old and/or if the damage is compensated. It also includes petty offenses and offenses with the primary threat of fines in the form of fines. In

Article 57 Section (2), A criminal suspect subject to a fine will not be subject to arrest unless the suspect has received two (2) consecutive valid subpoenas and has failed to comply with the subpoenas without valid reasons.[11]

C. The Implementation of *Afdoenings Buiten Process* (Settlement of Cases outside the Legal Process)

From the above discussion, we can conclude that the legal basis for making out-of-court settlements is the Attorney General's Hand Opportunity Doctrine. Therefore, unless the Attorney General delegates authority in that matter to the Chief Counsel or Chief District Attorney, only the Attorney General has the authority to settle cases outside the event. Under these provisions, the *Afdoenings Buiten Process* (out-of-court dispute resolution) can be conducted by paying fines as in smuggling. A mutual fine is an out-of-court settlement. H. Settle the case without going to court by paying a friendly fine agreed between the Public Prosecutor's Office (Supreme Court) and the suspect.

Peace fines or *schikking* are regulated under Article 29 of the *Rechten Ordonnantie* (Ordonansi Bea which means Implementing provisions of the Customs Law). Daily *schikking* leads to corrective penalties, peace penalties, and compensation penalties. *schikking* does not apply if the crime is considered a crime.[12] Mudzakkir suggests several classifications as benchmarks, and the range of cases that can be arranged out of court through criminal mediation are as follows:[13]

1) Criminal law violations do not fall within the category of complaint offenses, both absolute and relative complaints
2) Violation of the Criminal Code became an offense of threatening to impose a fine, and the violator paid the fine (Article 80 of the Criminal Code).
3) Criminal law violations are classified as non-criminal crimes but only threatened with fines.

[11] Tongat, *Dasar-Dasar Hukum Pidana Indonesia dalam Perspektif Pembaharuan (The Basics of Indonesian Criminal Law in an Innovative Perspective)*, (Malang: UMM Pers, 2009).

[12] Leden Marpung, *Tindak Pidana Penyelundupan Masalah Dan Pemecahannya (Crime of Smuggling and Its Solution)*, (Jakarta: PT. Gramedia Pustaka Utama, 1991), p. 21.

[13] Mudzakkir, *Alternatif Dispute Resolution (ADR) Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana Indonesia (Alternative Dispute Resolution (ADR) to settle criminal cases in Indonesia's criminal justice system)*, (Workshop Papers, Jakarta 18 January 2007).

4) Criminal law violations include criminal acts in the field of administrative law for which criminal punishment becomes the final remedy.
5) Criminal law violations are classified as mild/mild and law enforcement officers use their powers to carry out their discretion.
6) Violations of common criminal law have been terminated by the Court or not handled by the Attorney General in accordance with the legal jurisdiction they assume.
7) Criminal law violations are classified as violations of customary criminal law which are solved by customary institutions.

Peaceful fines, *schikking* as defined in article 29 of *Rechten Ordonnantie* (customs ordinance) is a form of expansion of economic crimes, namely settlements outside of court on the basis of the principle of settlement, which is different from Article 82 of Criminal Code or KHUP. The content of Article 82 of the Criminal Code means that out-of-court settlement applies only to certain offenses, those punishable only by fines, and not to offenses threatened with other penalties. An out-of-court settlement is one way to end your right to sue for infringement. That is, pay the maximum fine for the infringement.

The resolution of an offense out of court is known by various terms such as:[14]

> Andi Hamzah, wrote it with *dading*: peace, consider (*schikking*) peaceful settlement (*trausactie*), adjust (*vergelijk*) agreement to end an ongoing relationship or prevent an external relationship love arises. The peace must be in writing and have the effect of a final decision between the two parties pihak (*kracht van gewijsde*) in some disputes, there is no justification for peace, such as in disputes over rights not within the control of the parties (articles 1857-1864). Also known as BW customs, economic crime in Indonesia (especially smuggling).

Mr. H. Van Der Tas wrote: "*Schikking* (*vergelijk*), peace (*accord buiten rechte*), out-of-court settlement: Criminal law (article 82) refund of fines with ridla (reconciliation), "*vergelijk dading*".[15] ". An out-of-court settlement is also known as *afdoening buiten proces* or fines with *ridla*. In practice *schikking*, the analysis is often performed because it is difficult to find evidence according to formal rules when it is known that economic crimes have been committed. In

[14] Andi Hamzah, *Kamus Hukum (Legal Dictionary)*, (Jakarta: Ghalia Indonesia, 1988), p 134.
[15] Johana F.R. Mamengko, *Denda Damai Dalam Perkara Tindak Pidana Ekonomi (Fines for peace in economic crime cases)*, Lex Crimen Vol.I/No.1/Jan-Mrt/2012, p. 97.

addition, state damages can be quickly repaid by punitive fines and other reasons depending on this particular situation.

The purpose of this principle is the out-of-court settlement of violations of crimes, which may only result in fines. That the criminal process must be done before a judge, namely by voluntarily paying some of the fines that the law threatens. This principle means that by paying the amount of a penalty determined by law, the respondent does not need to re-impose the judge's judgment.

Decree Men/J.ANo.Ie/DKT/A/1962/148 regulates the powers of the Public Prosecutor's Office or the Public Prosecutor's Office in relation to the prosecution of dangerous smuggling cases. Eligible violations or special considerations must be clarified out of court. The Decree of the Attorney General, of October 13, 1967, No. Kep. 089/D.A/10/1967 provides for the decentralization of *schikking* delegation to the Minister of Finance for administrative violations not exceeding Rp 500,000, - based on the decision of the Attorney General, dated 31 January 1977 No. JA/TP4/1/1977, the *schikking* limit is set by the Minister of Finance at Rp 5,000,000, - by prior discussion with the local prosecutor's office.

The Minister of Finance with a letter dated October 16, 1967, No. Kep. 249/Men Keu/1967 also assigns this right to Customs and Taxes. However, it must be emphasized that delegated powers are contained only in Article 29 of *rechten ordonnantie* (Ordinary Rights) and are not related to crimes. As the controlling agency, Customs and Tax Authorities are required to report any case resolved outside of the event to the prosecutor's office, this is to prevent abuse of *schikking* powers to Article 25 of the provision is too broad to include violations of article 26b Jo. Article 3 stipulates that the *rechten ordonnantie* or offense is a crime.

Andi Hamzah, wrote: “In the past, the Attorney General has also dealt with out-of-fact cases for offenses that were criminal and were not limited to breaking the *rechten ordonnantie* but also *devisen ordonnantie* or breaking the law (which has been revoked or withdrawn). Indeed, this is consistent with the grounds of punishment, not limited to offenses but to all crimes. The only thing

to keep in mind is that the reason for using the principle of opportunity to resolve a case is in the public interest. Therefore, public interest arguments must be unambiguous and objectively acceptable".[16]

III. Conclusion And Recommendation

A. Conclusion

The APH is reluctant to prosecute companies as perpetrators of criminal activity for a variety of reasons. This means law enforcement remains reluctant to implicate companies as perpetrators in corruption cases. In fact, after the publication of Perm 13 in 2016, there were only 6 companies under suspicion as of 2020. Considering these conditions, the authors develop legal ideas in relation to an ideal model for recovering state financial losses from corrupt and criminal acts involving entrepreneurial actors with legal certainty; namely, the conceptual approach of the *Afdoenings Buiten Process* (settlement of cases outside the legal process), which can be accomplished by paying a friendly fine as is applied in the crime of trafficking. The Afdoenings Buiten Process, when applied to criminal acts of corruption involving corporations, may be limited by the Attorney General by considering the value and impact of government financial losses.

B. Recommendation

In practice, there are content, structural, and legal-cultural obstacles that hinder attempts to compensate for damage to state property by criminalizing corporations as perpetrators of corruption. According to the author's recommendation, the solution to consider its application in terms of overcoming obstacles in order to optimize the reimbursement of damages by the State is the approach to the concept of Afdoenings Buiten-Process (out-of-court process) can be accomplished by peaceful fines as is applied to the crime of smuggling. Afdoenings Buiten-Process must be conducted before a judge by voluntarily paying a series of fines threatened by the law. This principle means that by

[16] Andi Hamzah, *Loc.Cit*.

paying the amount of a penalty determined by law, the respondent does not need to re-impose the judge's sentence.

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