CORPORATE RESPONSIBILITIES ON THE ACTION OF HUMAN TRAFFICKING CRIMINALS IN INDONESIA

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Abstract

Problems related to human rights in Indonesia are criminal acts of human trafficking committed by corporations. Trafficking in persons is a modern form of human slavery and is also one of the worst forms of treatment of violations of human dignity. However, the development has difficulties with law enforcement related to corporations that commit criminal acts of trafficking. The research method used is a normative juridical research method using secondary data to be analyzed qualitatively. The results of this study show that corporations as subjects of criminal law can be equated with humans, because there are rights and obligations given by law and therefore corporate skills are also equated with human skills. Regulations regarding corporate responsibility are regulated in Law Number 21 of 2007 concerning Eradication of Criminal Act of Human Trafficking, corporations can be held liable if they commit criminal acts of trafficking by fulfilling the requirements of criminal liability in general such as the ability to be responsible, mistakes and intentions, absence of matters that are used as reasons for criminal offenses.

Keywords

Corporate Accountability; Crime; Human Trafficking

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Introduction

By nature, every human being has the same rights and is inherent in himself without exception. These rights are the right to life, rights to security, rights free from all kinds of oppression and other rights that are universally referred to as Human Rights (HAM) (Takariawan & Putri, 2018). The term HAM itself is determined in the nature of humanity and for humanity, because human rights are the basic right of all humanity as the gift of God Almighty (Takariawan & Putri, 2018).

Regarding the protection of human rights, each citizen has a constitutional right to work both at home and abroad as stipulated in Article 27 Paragraph 2 of the 1945 Constitution. Every citizen has the right to work and livelihood that is appropriate for humanity, so that no prevent Indonesian citizens from working abroad. Therefore, migrating safely is a basic right of every Indonesian citizen. Safe migration is dignified labor migration abroad, both the process of departure through government, private and independent. The state must respect, protect and fulfill its rights both before leaving, when working until returning home (Nurharsono, Counselor of the Legal Aid Division, Migrant CARE Jakarta, 2018).

One of the problems related to human rights in Indonesia is the crime of human trafficking. Human trafficking is a modern form of human slavery and is also one of the worst forms of treatment of violations of human dignity. Distribution of cases of Indonesian Citizens victims of human trafficking offenses abroad from 2015 to November 2018 totaled 1717 cases. The details of these cases are spread in the Asian region with 722 cases, the Middle East has 691 cases, Africa has 235 cases, America and the Caribbean have 11 cases, Europe has 23 cases and Oceana has 35 cases. Of the total cases above, as a major mode of criminal offenses human trafficking is un-document or misuse of visas, such as relating to Umroh visa, pilgrimage visa, visit visa and so on. Other modes of human trafficking crime are fraudulent work destinations and ordered brides (mail bride orders), forgery of victims' identities, fraud in the mode of apprenticeship or learning and sending secret routes in Sebatik-Nunukan, Entikong and Batam area (Widowati, Kasubit Kawasan III, Dit. Perlindungan WNI dan BHI, KEMENLU, 2018).

Based on the evidence above, victims are trafficked not only for prostitution or other forms of sexual exploitation, but also include other forms of exploitation, such as forced labor or forced service, slavery or slavery-like practices. The perpetrator of the crime of trafficking in persons recruits, transports, transfers, conceals or accepts people for the purpose of trapping, plunging, or utilizing the person in the practice of exploitation with all forms of threats of violence, use of violence, kidnapping, forgery, fraud, abuse of power or vulnerable positions, or give payments so as to obtain approval from the person who is in control of the victim (Nugroho, 2018).

In the era of globalization and modernism this does not rule out the possibility of human trafficking crimes committed by corporations. Very often the service providers
of Indonesian Workers (TKI), illegally use the business mode to expedite the ill will of doing human trafficking (Hanim & Prakoso, 2015). The authority to impose sanctions on corporations has been given through Law Number 21 of 2007 concerning Eradication of the Criminal Act of Human Trafficking. In an effort to overcome the crime of trafficking in persons committed by corporations, this Law has regulated human and corporation as legal subjects. Placing the corporation in the legal subject of human trafficking crimes can provide hope and optimism for efforts to investigate and eradicate criminal acts of human trafficking.

Given the previous research related to this research, an example is the research conducted by Agus Takariawan and Sherly Ayuna Putri in 2018, with the title “Perlindungan Hukum terhadap Korban Human Trafficking Dalam Perspektif Hak Asasi Manusia”, published in the Jurnal Hukum IUS QUIA IUSTUM Volume 25 Number 2, then by Lathifah Hanim and Adityo Putro Prakoso in 2015 entitled “Perlindungan Hukum Terhadap Korban Kejahatan Perdagangan Orang (Studi Tentang Implementasi Undang-Undang No. 21 Tahun 2007)”, published in the Jurnal Pembangunan Hukum Volume II Number 2, and research by Herlien C. Kamea in 2016, entitled “Penegakan Hukum Pidana Terhadap Kejahatan Perdagangan Orang Menurut Undang-Undang Nomor 21 Tahun 2007”, published in the Jurnal Lex Crimen Volume V Number 2. However, current research and previous research have a different focus. Although both are related to human trafficking crimes, the focus of the current research is corporate accountability for human trafficking crimes.

The lack of research on corporate responsibility for criminal acts of human trafficking, makes the discussion of corporate accountability for criminal acts of human trafficking an always important and actual matter for assessment.

The problems that are identified in this research are as follows: 1). How is the corporate foundation stated as a legal subject in human trafficking crime ?; and 2). How is corporate responsibility in human trafficking crime ?.

**Research Method**

The research method used is normative juridical research. The type of data used is secondary data. Secondary data in the form of data obtained from library studies in the form of legal materials such as legislation, books, journals or seminar materials using qualitative analysis (Salim & Nurbani, 2014).

**Discussion**

1. **Corporations as Legal Subjects in Crime of Human Trafficking**

The problem of corporate responsibility as a criminal offender is something that is not simple, considering that this problem stems from the principle of no crime without error. *Mens rea* or mistake is an inner attitude that naturally exists only in natural
people and therefore is considered only natural human beings who can be asked for criminal responsibility (Ratomi, 2018).

The treasures of corporate Roman law are called universities, which include countries, municipalities and associations or private associations. The principle of *societas delinquere non potest* was known at that time, where corporations were not the same as humans who had the will and soul, universities were fictions that did not have bodies and souls and therefore could not be punished (Sjawie, 2017).

The principle above, which answers why in the Criminal Code there is no place for corporations as legal subjects. The legal subject is anything that can have rights and obligations. Rights are power, the authority given by law to the subject of law, while the obligation is the burden given by law to the subject of law (Amirullah, 2012). In the beginning, what could be seen as the subject of criminal law by the makers of the Act was only humans (individuals). The subject of the criminal law known in the Criminal Code is individuals. Corporations have not been regarded as the subject of criminal law, but in its development the corporation has been considered the subject of criminal law (Ratomi, 2018). Where, in fact, sometimes humans commit criminal acts through organizations, so that the legislators in formulating offenses contribute to this fact (Suhariyanto, 2017).

In connection with the Draft Concept of the National Criminal Code, the values of the Pancasila must seep into the draft articles of the National Criminal Code. Therefore, the corporation in the Draft Law of the Criminal Code was accepted as the subject of criminal law. The subject of criminal law is not restricted to natural persons only, but also includes corporations.

The term corporation in Indonesian law or commonly referred to as a Civil Company is only known in the Civil Law and has been made as a legal subject. In Article 1654 of the Civil Law Act, it is stated that a corporation can be defined as “civil company is an agreement between two or more people, who promises to put something in the company with the intention that the profits obtained from the company are shared among them”.

Even though it is not human, the corporation (rechtperson) is a legal subject that has its own rights and obligations. Corporations form as legal entities or organizations consisting of a group of people who join for a particular purpose and have certain assets. Therefore, the legal entity is represented by the management acting for and on behalf of and for the benefit of the legal entity (representing it). Related to corporations as legal subjects, corporations that have rights and obligations are able to commit criminal acts that can be held accountable (Ratomi, 2018).

The development in criminal law has been well received among academics or practitioners regarding a specific crime involving a company called "corporate crime". Sometimes for corporate crime this is also called organizational crime (Amirullah, 2012).

Today, the mention of corporations continues to grow and many are found in various books written. Even in Indonesia, in various provisions of the legal regulations issued by the government also include corporate words, for example, in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended into Law Number 20 of 2001 (Corruption Law), Law Number 32 Year 2009 concerning Environmental Protection and Management (Environmental Law), Law Number 31 Year 2004 concerning Fisheries (Fisheries Law), Law Number 21 Year 2007 concerning Eradication of Crime in Human Trafficking and others Laws.
Thus, corporations as subjects of criminal acts with legal entities or non-legal entities, are considered capable of committing criminal acts (corporate crime) that have a detrimental effect and can be held accountable in criminal law (Suhariyanto, 2017).

The new Criminal Code Bill has placed an understanding of corporations in Article 45 to Article 50 where corporations can be made as perpetrators of crimes and can be liable. The existence of a corporation can be used as a criminal offender can be concluded from several articles in the new Criminal Code Bill, namely: 1) In principle, in the new Criminal Code Bill, the concept of corporation has been accepted as a legal entity that can be subject to criminal law; 2) Thus corporations as legal entities can be prosecuted and sentenced to criminal penalties; 3) Crimes that can be accounted for by corporations are all acts which include criminal acts carried out by people who have functional positions in corporations that carry out such acts in the business environment of the corporation in accordance with their articles of association; and 4) Only as a rule of law can be applied to corporations, for example it is not possible to impose imprisonment or capital punishment on corporations (Ratomi, 2018).

In relation to the many special arrangements regarding corporations that commit criminal acts, the regulation is also regulated in the Act concerning criminal acts of human trafficking, namely those that have been regulated in Law Number 21 Year 2007 that recognize two legal subjects, namely individuals and corporation (recht person). We can see the formulation of the article on legal subjects in the formula of Article 1 Number 4 which states “Every person is an individual or corporation who commits a criminal act of trafficking in persons”. Thus we can understand this Law recognizing the subject of law including human beings and corporations whether legal or not incorporated.

Regarding this arrangement, the regulation must contain criminal sanctions for the corporation, because the corporation does not have an outward form of the body, the criminal sanctions that can be given to him are not generally criminal sanctions, except sanctions relating to fines or penalties.

In general, the imposition of fines on these corporations will be optimal considering that the execution is quite easy, especially if previously seized the assets of the corporation which are considered to be quite close to criminal acts that have been proven to have been done (Amirullah, 2012).

In addition to the imposition of basic penalties in the form of fines, then the corporation can be given additional penalties in various forms, such as revoking temporary permits, or prohibiting certain businesses within a certain time, or dissolving the corporation concerned.

2. Corporate Liability for Crime of Human Trafficking

The enactment of Law 21 of 2007 on April 19, 2007. The formulation of human trafficking contained in this Law is the main reference. Article 1 point 1 states that “Human Trafficking is the act of recruiting, transporting, sending, transferring, or receiving someone with the threat of violence, the use of violence, kidnapping, confinement, fraud, fraud, abuse of power or position, debt trapping or paying or benefits, so as to obtain approval from the person who holds control over the other person, whether done in the country or between countries, for the purpose of exploitation or causing the person to be exploited”.

For this definition, it means that humans are used as commodities, arbitrarily transfer them, are full of various violations and acts of arbitrary crimes based on power with the purpose of labor exploitation for various interests that harm victims and benefit
others. Therefore, human trafficking is a crime of humanity that must be stopped immediately (Sularman & Ma’ruf, 2017).

Law Number 21 of 2007 contains elements of human trafficking crimes, namely violence or threats of violence, fraud, kidnapping, confinement, abuse of power, utilization of positions of vulnerability or debt entanglement. In connection with this, that criminal events have elements that are a behavior that is contrary to the law, a behavior that is held because an offender is guilty and a behavior that can be punished, then in human trafficking criminal acts there are acts that are unlawful namely carry out recruitment, sending and receiving assignments with violence or threats of violence, deception, kidnapping, confinement, abuse of power, utilization of vulnerable or entangling positions on elements of errors in the formulation of criminal acts of human trafficking in an implicit manner for the purpose of exploiting or resulting exploited by the person which means there is an intention to exploit or result in being exploited by the person (Kamea, 2016).

Related to the regulation regarding corporate responsibility in human trafficking criminal offenses has been regulated in Article 13 of this Law: Paragraph (1). Crime of trafficking in persons is considered to be carried out by corporations if the crime is committed by people acting for and / or on behalf of the corporation or for the benefit of the corporation, both based on work relations and other relationships, acting in the corporate environment both alone and together; and Paragraph (2). In the event that a criminal act of trafficking is carried out by a corporation as referred to in paragraph (1), the investigation, prosecution and punishment shall be carried out against the corporation and / or its management.

Seeing the characteristics of corporate crime that are different from the crimes committed by individuals. So there are several theories about corporate criminal liability. This is not only because corporations are organizations, but also because the purpose of corporations is to do business and not commit crimes, so the issue of mens rea or mental attitude is not as easy as compared to crimes committed by individuals (Azizurrahman, 2014).

There are 2 theories that are used as a basis for justifying the criminal responsibility imposed on corporations, because in these two theories it still places errors as a requirement that a criminal subject can be accounted for:

First, Identification Theory. This theory is used to justify the imposition of criminal liability on corporations, even though in reality the corporation is not something that can do its own actions and may not have mens rea, because it does not have an inner attitude (Azizurrahman, 2014). This theory teaches that to be able to impose criminal liability on a corporation, whoever commits the crime must be able to be identified by the public prosecutor. If the crime of human trafficking is carried out by those who are the directing minds of the corporation, then the accountability of the crime can only be borne by the corporation. That is, behavior and mens rea from someone associated with a corporation can be attributed to the corporation so that criminal liability can be borne by the corporation. In other words, the behavior and mens rea of the person is considered to be the behavior and heart attitude of the corporation. Determination of being able to apply this theory must be able to be aimed at: 1). The performance of the personnel who become the corporate directing mind is included in the field of activity assigned to it; 2). The criminal act is not a fraud against the corporation concerned; 3). Criminal action is intended to obtain or generate benefits for the corporation; and 4).
Legal subjects can be found guilty of committing criminal acts (Hanim & Prakoso, 2015).

Second, the Vicarious Liability Theory. This theory reinforces the existence of justification for imposing speech responsibility on corporations. This theory is the imposition of criminal liability from criminal acts committed by other people or more, or better known as substitute liability. In vicarious liability, mens rea is the main requirement that must be fulfilled to punish legal subjects who commit crimes. In other words, it must be proven in advance that someone made a mistake, so he should be convicted of his mistake. In addition, there must be a working relationship between the perpetrator and other people who must be accountable for criminal acts committed (Azizurrahman, 2014). If this theory is applied to corporations, it means that corporations may be responsible for actions carried out by their employees, their power, or their mandate or whoever is responsible for the corporation. There are two important requirements that must be met in order to be able to apply a criminal act based on this theory: 1). There must be a relationship, such as the employment relationship between the employer and the worker; and 2). Criminal acts committed by these workers must be related or still within the scope of their work (Girsang, 2014).

If this theory is related to corporate crime, this is part of an effort to entrap the corporation for the crime committed by its employees. The imposition of criminal liability is imposed on superiors or corporate leaders for criminal acts committed by subordinates in an organizational structure, because the actions of employees are part of the interests of the corporation itself. So that the responsibility is automatically borne by the boss or director in this case acting for and on behalf of the corporation (Kamea, 2016).

In the era of globalization where crime has transformed from a conventional model to a modern model, it would be wise if we had started to look at corporations as legal subjects and could be criminally accountable. Especially in terms of human trafficking crimes, it is very possible for corporations to get economic benefits from the occurrence of human trafficking crimes (Girsang, 2014).

Based on the 2 theories above and in accordance with the sound of the formulation of article 13 of Act Number 21 of 2007, the Vicarious Liability theory is more appropriate if used in asking for criminal responsibility against corporations in human trafficking criminal acts.

Talking about corporate criminal liability that commits criminal acts of human trafficking in analyzing it also uses the theory of criminal liability in general, as follows: 1). Having the ability to be accountable; 2). There are errors either intentionally or negligently; and 3). There are no matters which constitute the reasons for criminal offenses.

Applying the theory above is still guided by the rules regarding corporate responsibility as a legal subject, so that it is relevant and relevant. To understand in full, the above accountability criteria will be described one by one, as below:

First, Having Accountability. In simple terms, the term “responsible ability” can be interpreted as a healthy condition and has a person's reason in distinguishing things that are good and bad. In principle, in the matter of the ability to be responsible, criminal law adheres to a system called “fictional system” meaning, according to Indonesian law each perpetrator of a criminal act is basically always considered a person who is capable of being responsible for his actions (Takariawan & Putri, 2018).
Therefore, every criminal act carried out by corporate organs such as employees, directors, commissioners, shareholders, or anyone who controls the corporation, they are considered as people who are capable of being responsible for their actions, unless it can be proven otherwise there is a reason, as stated in Article 44 of the Criminal Code: 1). The soul of the offender has a mental disability since his growth to his mind becomes less than perfect to distinguish between good and bad; and 2). If the offender experiences a normal disorder caused by an illness, his mind becomes not functioning perfectly / optimally to distinguish between good and bad things. The above formula is associated with corporate responsibility as a legal subject in Law No. 21 of 2007, using the vicarious liability theory, the ability to be responsible for corporate organs (employees, directors, commissioners, shareholders, or anyone who controls the corporation) during the assignment, orders or objectives of the corporation are delegated to corporate responsibility capabilities. Indirectly, the corporation as the employer of the organ.

Second, the existence of errors, whether intentional or negligent. In criminal law intentionally (dolus) or negligence (culpa) are two forms of inner attitudes from an offender who acts as an important basis for determining whether he is guilty or not for his actions. The essence of this theory is that someone's criminal acts can be said intentionally if the perpetrator knows / realizes that the act is prohibited by law and this theory teaches that a person's criminal actions can only be deliberately done if the perpetrator not only knows / aware of the prohibition of deeds, but also indeed requires that action be done (Takariawan & Putri, 2018).

Third, there is no reason for forgiving and justifying as an eraser of errors. The requirement for a legal subject, including a corporation, can be criminally responsible for the latter, which is about the absence of forgiving reasons. The reason for forgiveness is the reason that eliminates the mistakes of a legal subject including the corporation. Acts carried out by the subject of law (corporation) remain against the law, so it remains a criminal act, but is not convicted, because there is no mistake (Azizurrahman, 2014).

In accordance with the nature of independence (persoonlijk) the reasons for criminal offenses must be sought in the corporation itself. It is possible to happen to someone there is a criminal offense, but it is not the case with a corporation, even if the act of the person is considered as a corporate act.

Thus, how corporate liability in criminal acts of human trafficking is the fulfillment of all the requirements of criminal liability that are interpreted from the mistakes of the management described above, the existence of criminal acts, the ability to be responsible, errors and no criminal offense. Then it is adjusted to the corporate accountability theory as described and explained above (Azizurrahman, 2014).

As a follow up to the fulfillment of the requirements of the corporation, criminal liability can be imposed, then Law Number 21 of 2007 has regulated criminal sanctions in the form of criminal penalties and additional criminal sanctions. The formulation of sanctions is mentioned in Article 13 Paragraphs 1 and 2: “Paragraph (1). Crime of trafficking in persons is considered to be carried out by corporations if the crime is carried out by people acting for and / or on behalf of the corporation or in the interests of the corporation, either based on work relations or other relationships, acting in the corporate environment both alone and together”; and “Paragraph (2). In the case of a criminal act of trafficking carried out by a corporation as referred to in paragraph (1), then investigation, prosecution, and punishment is carried out on the corporation and / or its management”.

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Conclusion

Corporations as subjects of criminal law can be equated with humans. Because in it there are rights and obligations given by law, and therefore corporate skills are also equated with the human skills seen in them. Corporations have been determined as legal subjects of criminal acts by the new Criminal Code Bill, which will later apply to the entire criminal law system. As a result, every law outside the Criminal Code does not need to regulate specifically, except legislation outside the Criminal Code wants to determine otherwise or deviate.

In criminal law, both seen in Law Number 21 of 2007 concerning the Eradication of Crime in Human Trafficking, as well as theories of corporate accountability, corporations as one of the legal subjects in criminal acts of human trafficking can be held liable if they commit human trafficking crimes. In determining corporate responsibility which commits a criminal act of trafficking, it is determined from the fulfillment of the requirements of general aseca criminal liability (subjective conditions) such as the ability to be responsible, any mistake either intentional or negligent, the absence of matters that are used as reasons for criminal offenses. Of course, in determining how the accountability is adjusted based on the theory of corporate criminal liability in terms of human trafficking criminal acts, it is more appropriate to use the vicarious liability theory in determining corporate responsibility in human trafficking criminal acts.

References


Law Number 21 Year 2007 concerning Eradication of Crime in Human Trafficking.
