

The Concept of Restorative Justice as an Alternative for Resolving Environmental Crimes Involving Corporations

M. Iwan Budiarto¹⁾ & Bambang Tri Bawono²⁾

¹⁾Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia, E-mail: m.iwanbudiarto@gmail.com

²⁾Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia, E-mail: BambangTriBawono.std@unissula.ac.id

Abstract. *The business of utilizing Natural Resources cannot be separated from the existence of corporations as executors of utilization in addition to the existence of the state or government as regulators or policy makers. It cannot be denied that corporations are the main actors in using natural resources as a gift to the Indonesian nation which will later be used for the benefit of many people. Corporations have the task of extracting natural resources into a form of income that is easy to enjoy. Damage resulting from the use of natural resources also involves corporations, giving rise to the opinion that corporations have benefits in the use of natural resources, however, corporations also play a role in environmental damage as an excess of the use of natural resources. The research method used is a normative juridical research method, namely research carried out by compiling legal materials. This research uses a legislative approach which is carried out by studying statutory regulations and statutory provisions, especially those that regulate the concept of restorative justice as an alternative resolution for environmental crimes involving corporations. The results of the research conclude that criminal liability for corporations that commit environmental crimes can be implemented based on the doctrine of corporate responsibility, namely: the doctrine of identification, vicarious liability and strict liability as well as regulating criminal liability for business entities as corporations together with their management and the concept of restorative justice and models. -The model in it offers an alternative form of law enforcement against environmental crimes that is different from the formal justice system. Restorative justice focuses more on efforts to restore victims and the detrimental impacts that arise as a result of environmental crimes through interactional efforts between parties, namely the perpetrator, victims and the community.*

Keywords: Environment; Justice; Resources; Restorative.

1. Introduction

The Unitary State of the Republic of Indonesia as a country that has a very strategic and advantageous geographical location, influences the great potential of the nature it has. It is not wrong if Indonesia is nicknamed the emerald country of the equator, because not only is its beauty charming but it also has Natural Resources (SDA) that

large, starting from forest, sea, mineral and air resources. The power of abundant natural resources is a profitable factor as well as a threatening factor for the lives of its people.

Over time, efforts to utilize Natural Resources cannot be separated from the existence of corporations as executors of utilization in addition to the existence of the state or government as regulators or policy makers. It is undeniable that corporations are the main actors in utilizing Natural Resources as a gift from the Indonesian nation which will later be used for the benefit of many people. Corporations have the task of extracting Natural Resources into the form of income so that they can be easily enjoyed.¹ In addition, corporations also have an important role in the development process in the economic sector and other life systems, through state revenues in the form of taxes and foreign exchange, as well as opening up more jobs for the wider community.

Indonesia, which has abundant natural resource potential, logically will also affect the welfare of its people, but an anomaly is happening now when a country rich in natural resources is living in the shackles of poverty. The state and corporations seem to be deadly "predators" where the practice of exploration and exploitation of natural resources when it is over, all that remains is the destruction of nature and the environment faced by the community. The damage caused by the utilization of natural resources also involves corporations, thus giving rise to the opinion that corporations have benefits in the utilization of natural resources, however, corporations also play a role in environmental damage as an excess of the utilization of natural resources.

Environmental problems in the form of environmental pollution and destruction in Indonesia in particular and the world in general at present, which include land and forest environments, water environments and air environments are problems that must be handled seriously both in terms of prevention and handling. Deforestation, critical land, thinning of the ozone layer, global warming, oil spills in the sea, fish dying in tributaries due to chemicals, and the extinction of certain species are some examples of environmental problems. In the literature, environmental problems can be grouped into three forms, namely environmental pollution, misuse of land and depletion or exhaustion of natural resources (natural resource development).

The topic of corporate crime is indeed important to discuss, especially in relation to the new Criminal Code that has been passed. It is undeniable that the role of corporations is currently very important. The role of corporations dominates

everyday life, especially with the increasing privatization. It is no longer the state that provides needs, but corporations. Corporations can increase state wealth and labor, but the revolution in economic and political structures has given rise to great corporate power so that the state is too dependent on corporations so that the state can be dictated according to its interests. Therefore, corporations must have responsibility. Various efforts to demand corporate responsibility continue to be made, but are full of obstacles, some of them are not touched by the law. So that the weaknesses of the legal apparatus are not repeated, it is necessary to create comprehensive corporate accountability regulations that cover all crimes.

Article 28 H of the 1945 Constitution of the Republic of Indonesia states that: "Everyone has the right to live in physical and spiritual prosperity, to have a place to live and to have a good and healthy environment and to receive health services". Based on the mandate of the Constitution, the roots of society can enjoy a good environment, Law Number 32 of 2009 concerning Environmental Protection and Management (hereinafter referred to as UUPPLH) was enacted. The presence of UUPPLH is a legal policy as a reaction to the declining quality of the environment and threatening the lives of society and other living things. A healthy and well-maintained environment is a long-term asset, especially for the sustainability of human life in the future.

Nowadays, the development of national criminal law reform has led to the idea of restorative justice as an excess of retributive justice. The idea of restorative justice changes the way the criminal justice system works, which was previously centralized on the perpetrator, to be more balanced with the involvement of victims and the community in communication patterns. Lately, it seems as if only the court is the best place to resolve legal problems (conflicts) and seek justice. Thus, every indication of a crime, without taking into account the escalation of the act, will continue to be rolled out into the legal realm which is only the jurisdiction of law enforcers. Active participation from the community seems to be no longer important, everything only leads to a court decision in the form of punishment without seeing its essence. In fact, in a criminal trial the parties involved are the public prosecutor, judge, defendant, and legal advisor and witnesses. The victim is represented by the public prosecutor and to strengthen the evidence, the person concerned is usually made a witness (victim).⁶ However, it has not yet provided a real impact or benefit for victims of crime. The implementation of Restorative Justice as an effort towards improving the treatment of the rights and interests of victims of criminal acts has been seen in various laws and regulations, although it is still inadequate in fulfilling the need for a balanced sense of justice between perpetrators of criminal acts and victims of criminal acts.

This approach that emphasizes the creation of justice and balance for the perpetrators of criminal acts and their victims is considered necessary, because basically the restorative justice approach focuses on the process of dialogue and

mediation between the perpetrators of criminal acts and their victims. This aims to create an agreement on the settlement of criminal cases that is fairer and more balanced for the victims and perpetrators and as an effort to rebuild relationships after a crime has occurred.

Based on the description above, the author is interested in further researching how corporations are criminally responsible as perpetrators of environmental crimes and how the concept of restorative justice is an alternative for resolving environmental crimes involving corporations.

2. Research methods

The method used by the author in compiling the journal uses the Normative legal method. The research specification used in this study is the descriptive analysis type. In this study, the author focuses on library research and primary materials in the form of applicable laws and secondary materials in the form of expert opinions, law books, journals and magazines. The data collection technique used in this study uses a literature study, collecting data from the results of a review of library materials and secondary data including primary legal materials, secondary legal materials and tertiary legal materials. The data analysis technique in this study is carried out with qualitative data analysis, namely data collection using laws, theories and legal principles.

3. Results and Discussion

3.1. Criminal Liability of Corporations as Perpetrators of Environmental Crimes

Criminal liability in foreign terms is also called *Teorekenbaardheid* or criminal responsibility or commonly called criminal liability, which leads to the punishment of the perpetrator with the intention of determining whether a defendant or suspect is held responsible for a crime that occurred or not. In order to be able to punish the perpetrator, it is required that the crime that he committed must meet the elements that have been determined by law. Viewed from the ability to be responsible, then a person who is able to be responsible can be held responsible for his actions.

The Indonesian criminal law system has several theories that can be used to determine the proper basis for holding a corporation criminally liable. Generally, corporate criminal liability is based on the doctrine of *respondeat superior*, a doctrine that states that a corporation itself cannot make mistakes. In this case, only agents/corporate agents who can make mistakes, namely those who act for and on behalf of the corporation.

Prof. Barda Nawawi, explained that basically there are several theories and many are adopted as theories used to assess the criminal liability of corporations, especially those committing environmental crimes, including: the doctrine of identification, vicarious liability and strict liability. Corporate liability is the same as the concept of criminal liability in general. In criminal law, it is known as the concept of liability or "responsibility" and is a central concept known as the

doctrine of error. In Latin, the doctrine of error is known as *mens rea*. The doctrine of *mens rea* is based on an act not making a person guilty unless the person's mind is evil. In English, this doctrine is formulated as an act does not make a person guilty, unless the mind is legally blameworthy.

Based on this principle, there are two conditions that must be met in order to be able to criminalize someone, namely there is a prohibited external act/criminal act (*actus reus*), and there is an evil/reprehensible internal attitude (*mens rea*).⁹ Regarding corporate liability, Sutan Remy Sjahdeini emphasized that the imposition of criminal liability on corporations, there are 4 (four) systems, namely:

- a) Corporate managers are the perpetrators of criminal acts, so that it is the managers who must bear criminal responsibility;
- b) Corporations are perpetrators of criminal acts, but it is the management who must bear criminal responsibility;
- c) Corporations as perpetrators of criminal acts and corporations themselves must bear criminal responsibility;
- d) Both the management and the corporation are perpetrators of the crime and both must bear criminal responsibility.

Corporate crimes are acts committed by people based on employment relationships or other relationships carried out by themselves or together acting on behalf of the corporation inside or outside the corporate environment. The regulation of corporations specifically regarding criminal acts related to the environment in Article 116 of the UUPPLH is regulated with the intention that first if a business entity commits a fraudulent act in carrying out its business, then the party that can be held accountable is the business entity itself and a person who has the idea of carrying out the fraudulent act. Then, for the second if the environmental crime in the provisions of this Article is committed by an individual who has cooperation with the business entity, then the individual can be sued personally.

The UUPPLH has regulated criminal liability for business entities or corporations in Articles 116 to 120. In the explanation of Article 118, if a lawsuit and criminal sanctions are imposed on a corporation, then the sanctions are actually directed at the leaders/managers of the corporation. In this case, they do not act as representatives of the corporation in court, but rather as parties who carry out criminal sanctions. With this interpretation, the PPLH Law no longer adheres to corporate liability, either in the sense that the corporation is responsible for someone's actions or for its own actions, but adheres to individual vicarious liability, where the corporate leader is responsible for the actions of others or the actions of the corporation.

Overall, Articles 116 and 118 of the PPLH Law and their explanations can be interpreted as follows: (1) Law No. PPLH opens up the possibility of applying

corporate vicarious liability, namely in the case of a criminal act for or in the name of a corporation giving rise to corporate liability (Article 116 paragraph (1) letter a), (2) The PPLH Law opens up the possibility of applying individual vicarious liability, namely if Article 116 paragraph (1) letter a is translated based on the Explanation of Article 118 (3) of the PPLH Law also opens up the possibility of personal liability of the perpetrator (namely the person giving the order in the criminal act and the leader of the criminal act), as stated in Article 116 paragraph (1) letter b, and Article 116 paragraph (2).

Handling of corporate criminal liability and its punishment is still a problem in Indonesia. Mainly because the authorities still have difficulty prosecuting corporations due to lack of understanding and because there are no legal regulations.

the event. Difficulties are encountered when trying to summon or examine a corporation, especially regarding who will be summoned. One of the causes is that the procedures and methods for examining corporations as perpetrators of criminal acts are not yet clear. This reason underlies the issuance of Supreme Court Regulation (Perma) Number 13 of 2016 Concerning Procedures for Handling Criminal Acts by Corporations (hereinafter referred to as Perma).

There are several important things related to handling criminal acts allegedly committed by corporate administrators and their corporations which are regulated in this Perma, namely:

1. The process of summoning and examining a corporation and/or its management as a suspect. This summons contains: the name of the corporation; domicile; nationality of the corporation; status of the corporation in a criminal case (witness or suspect or defendant); time and place of examination; and a summary of the alleged criminal incident.
2. Requirements for an indictment. Article 12 states that the form of an indictment contains: the name of the corporation, place, date of establishment and/or number of articles of association or deed of establishment or regulations or documents or agreements and the latest amendments, domicile, nationality of the corporation, type of corporation, form of activity/business and identity of the representative management. In addition, it contains a careful, clear, complete description of the crime being charged by stating the time and place where the crime was committed.
3. Separation of criminal liability (fault) between the corporation and its management. Whether the corporation gains profit or benefit from a particular crime or the crime is committed for the benefit of the corporation, whether the corporation allows the crime to occur, and whether the corporation does not take preventive measures or prevent greater impacts and ensure compliance with applicable legal provisions to avoid the occurrence of a crime.
4. The regulation of corporate criminal sanctions is the main criminal penalty in

the form of a fine and additional criminal penalties in accordance with applicable laws, such as replacement money, company closure, compensation and restitution. Corporations that are proven guilty are not only sentenced to a fine, but can also be sentenced to additional penalties.

5. This regulation mentions corporate statements as valid evidence in court. That the corporation must be represented by its management or attorney. The management's statements are considered "corporate statements" and are used as valid evidence.

If there is still confusion in the application of corporate criminal liability in the PPLH Law, is it the corporation that can be punished?

(corporate vicarious liability) or the corporate management who will be punished (individual vicarious liability), then in the Perma there is a clear separation between the two. Article 23 Perma paragraph (1) states that the judge can impose a criminal penalty on the Corporation, the management or the Corporation and the management. So far, there has been confusion about corporate criminalization because of the regulation of the form of punishment that is given together. For example, in Articles 98 to 115 of the UUPLH which regulate that the criminal acts imposed are imprisonment and fines. In the sense that the two types of punishment must be given together.

In relation to cases of environmental pollution and destruction, Law Number 32 of 2009 concerning Environmental Protection and Management is drafted as one of the instruments for enforcing corporate criminal acts in the environmental sector. The law stipulates that a corporation or business entity that commits an environmental crime has three models of criminal liability. This is stated in Article 116 Paragraph (1) Letters a and b which read:

(1) If an environmental crime is committed by, for, or on behalf of a business entity, criminal charges and criminal sanctions will be imposed on:

a. business entity; and/or

b. the person who gives the order to commit the crime or the person who acts as the leader of the activities in the crime.

(2) If an environmental crime as referred to in paragraph (1) committed by a person who, based on an employment relationship or other relationship, acts within the scope of the business entity's work, criminal sanctions are imposed on the person giving the order or the leader in the crime without considering whether the crime is committed alone or together..

Every person responsible for a business activity that commits an unlawful act in the form of environmental pollution or destruction, resulting in losses, is obliged to pay compensation and/or take certain actions in accordance with the affirmation in Article 87 Paragraph (1) of Law Number 32 of 2009 concerning Environmental Protection and Management. The enforcement of environmental criminal law takes into account the principle of *ultimum remedium* (last resort) if

the enforcement of administrative law is deemed unsuccessful. The application of this principle only applies to certain formal criminal acts, namely criminal penalties for violations.

wastewater quality standards, emissions and disturbances. Any act of pollution and environmental destruction carried out by corporations can be clearly and firmly sanctioned according to applicable laws and regulations.

3.2. The Concept of Restorative Justice as an Alternative for Resolving Environmental Crimes Involving Corporations

Contemporary environmental criminal law enforcement, restorative justice and the methods offered have received attention when faced with various determinant variables such as corporations, society/community, and environmental restoration. Restorative justice is considered to have the potential and is able to provide an "alternative path" in environmental criminal law enforcement that emphasizes the use of non-penal channels to maximize efforts to restore the impact of environmental crimes that occur.¹¹

The application of restorative justice to environmental crime issues is considered relevant to be used at any stage in the environmental criminal justice system, starting from before an environmental crime case enters the trial process, sentencing, to the post-sentence stage. ¹² Restorative justice approaches can be used as an alternative to imprisonment or additional obligations in cases where the central point of the restorative justice concept is the empowerment, participation, and recovery of crime victims. Therefore, determining the victim is a very vital process and influences the entire series and final results of the restorative justice concept that will be implemented. ¹³

Restorative justice must be able to identify or acknowledge victims of environmental crimes that will be the focus of future policies. This acknowledgement starts from individuals, classes/community groups, vital objects of the community/society, future generations, even components

environment other than humans. Overall, individuals/groups/parties who can or are able to be identified by the concept of restorative justice as victims are in line with the environmental victimology view in qualifying victims of environmental crimes. This ability cannot be considered as an ordinary condition, considering that victims in environmental crimes are very unique and different from other conventional crimes.

Restorative Justice means justice that is restored or restored. Each party involved in a crime is given the opportunity to deliberate, Restorative Justice emphasizes welfare and justice. Victims of a crime have the right to demand compensation from the perpetrator of the crime, namely the losses they have suffered, while the perpetrator of the crime is obliged to compensate the losses caused by him to the victim.

Restorative justice is a mechanism that is friendly to the involvement of socio-

cultural elements, various forms of intervention carried out by social communities can be placed as factors that support the fulfillment of victims' needs.¹⁴ In addition, basically restorative justice is an idea that was born from communal ideas and certainly opens up opportunities for active community roles. Therefore, restorative justice is a very relevant concept for environmental protection and preservation that strongly supports public participation.

The victims of environmental law violations are not only the environment itself, but also the community as a party that is correlated with the condition of the environment and is directly or indirectly affected by the violation.¹⁵ Likewise, restorative justice, the community is not only involved as a victim, but can also be an active party involved in the restorative justice process, especially when the environment or natural resources stand as victims. Restorative justice emphasizes providing space for participation for the community or public in conveying the needs that must be restored and playing a role.

as a supervisor of the bonds that have been agreed upon. There are four factors that are the reasons for the appropriate use of the restorative justice model in issues related to society and environmental crimes, including: 16

- 1) Involves a wider range of participants than perpetrator and victim mediation;
- 2) Able to direct the orientation of settlement in the form of compensation and restoration of environmental sustainability;
- 3) Easy to apply at every stage of the criminal justice process; and
- 4) This model has been widely developed in many countries for various crimes.

Considering the explanation above, the case resolution model outside the court for environmental law violations has advantages compared to if the case is resolved through a formal legal approach (in court). In general, the advantages of this concept include:

- 1) Faster and more precise in terms of time and cost. Not using formal procedures that are time-bound will automatically reduce the time and costs of the parties.
- 2) Restoring the impact of violations. As previously mentioned, that recovery in this case can be intended for two parties, namely corporate actors and community victims. Recovery of community victims, in this case both as factual victims and as potential victims due to the impact of environmental violations in the form of environmental damage or pollution or disruption of the ecosystem. While recovery for corporate actors is to restore the good name of the corporation and public trust in it.
- 3) Reducing criminal sanctions given to legal subjects, as administrators or organs in a corporation. One of the problems of criminal law (criminal and criminal penalties) and the Indonesian criminal justice system today is regarding over capacity in correctional institutions. The impact of over capacity raises questions Will the purpose of punishment be achieved ? Of

course, this question is still debatable, but several studies show that such conditions are not conducive to achieving the purpose of punishment. So that the restorative approach here can minimize the imposition of criminal penalties, both against people as corporate organs and against the corporation itself. Even though the imposition of sanctions (criminal or administrative) cannot be avoided, the results of efforts to resolve cases through the restorative justice approach can reduce the punishment for perpetrators of violations.

- 4) Involving indigenous communities. The existence and activities of corporations in processing and exploring natural resources are very likely to intersect with the systems and interests of indigenous communities. So that the restorative justice approach that will be taken later does not rule out the possibility of involving the functions and legal systems of indigenous communities as part of the area affected by environmental law violations committed by corporations.
- 5) Approaching the values of justice. The highest justice is justice obtained from agreement. Communication built in mediation allows the parties to submit their desires, followed by bargaining until an agreement is reached. The achievement of an agreement as a result of the communication process is the justice desired by the parties.

In order to further complement the advantages of the restorative justice approach in resolving environmental cases, citing the opinions of Eman Rajagukguk and Gatot Soemartono. According to him, the business community prefers to resolve cases outside of court procedures because: first, environmental cases can be resolved privately, without the public knowing; second, there are limitations to the judge's ability to resolve environmental cases. Third, procedural resolution is aimed at finding the wrong/right party, while dispute resolution

through a non-procedural approach can open up opportunities for a compromise resolution.

Regarding the synergy between resolving environmental cases/violations through three legal mechanisms (administrative, civil and criminal), the following concept is obtained:

- a) The process of resolving civil and criminal cases outside the court (non-litigation in civil cases, and ADR in criminal cases) can be carried out simultaneously, and can also be carried out simultaneously with the process of resolving cases through administrative legal channels.
- b) The settlement of the two legal channels outside the court is aimed at agreeing on the issue of compensation (material and immaterial) for community victims, efforts to restore the environmental and social conditions of the community due to the violations in the present and in the future, and efforts to forgive the perpetrators from the community.

- c) The results of the settlement of the case outside the court will be the basis for reducing or easing the imposition of administrative sanctions on the corporation or criminal sanctions on people who are part of the corporation; and the results of the agreement will be the basis for not continuing the case through formal channels, either civilly or criminally, against the corporation.
- d) The results of out-of-court settlements in the form of agreements will be determined by a court ruling so that it has coercive power over the parties, especially the perpetrator/violator;
- e) If the settlement of the case outside the court fails to reach an agreement, then the formal legal path is used, either civil, criminal or administrative; where the settlement of the criminal case remains the *ultimum remedium* after a decision has been made on the civil or administrative case.

The above idea does not immediately disregard the principle of *preimum remidium* in the existing environmental criminal law. The restorative justice approach in resolving environmental cases/violations, which is in fact contrary to the principle of *preimum remidium*, clearly cannot be used/applied in one case resolution procedure. That the principle of *preimum remidium* must be specifically for certain environmental crimes (not the principle of *ultimum remidium* which is specifically as contained in the current UUPPLH), or in other words, the principle of *preimum remidium* needs to be given limitations on its application, namely if the provisions of the synergy of the three legal mechanisms above are not achieved and there is a repetition of criminal acts by corporations.

The synergy of several legal mechanisms has been in line with the restorative justice paradigm which is realized through mediation. Mediation itself is built on the principle of material losses suffered by factual victims and immaterial losses suffered by potential victims. Thus, seeing two victim variables, each of which has different losses but occurs simultaneously, mediation that can be applied as an alternative dispute resolution in environmental violation cases is by combining mediation in civil law as a solution to dispute resolution from the side of material losses and penal mediation from the side of immaterial losses. The restoration of the loss aspect from two different victim variables through the restorative justice approach is in line and in tune with *Pancasila* which has been agreed upon as the source of all sources of law.

4. Conclusion

Criminal liability for corporations that commit environmental crimes can be implemented based on the corporate liability doctrine, namely: the identification doctrine, vicarious liability and strict liability and regulates criminal liability for business entities as corporations together with their managers. Every person responsible for a business activity that commits an unlawful act in the form of environmental pollution or destruction, resulting in losses, is obliged to pay compensation and/or take certain actions in accordance with the affirmation in

Article 87 Paragraph (1) of Law No. 32 of 2009 concerning Environmental Protection and Management. Enforcement of environmental criminal law takes into account the principle

ultimate remedy(last resort) if administrative law enforcement is considered unsuccessful. Then the concept of restorative justice and the models within it offer an alternative form of law enforcement against environmental crimes that are different from the formal justice system. Restorative justice focuses more on efforts to restore victims and the detrimental impacts that arise from environmental crimes through interactive efforts between the parties involved, namely the perpetrators, victims, and the community.

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