



DOI: <https://doi.org/10.38035/jlph.v4i6>
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Economic Analysis of Law in Countering Corporate Crimes

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Abstract: The existence of law in the midst of society is needed to regulate people's lives in realizing order and tranquility. The formulation of the problem in this writing is how to apply *economic analysis of law* in overcoming corporate crimes. The method used in this writing is normative juridical research, using conceptual approach techniques, legislative approach and historical approach. The nature of this research is descriptive and the data used in this writing is secondary data with data collection techniques carried out through literature studies and document studies. The data analysis in this writing will be analyzed qualitatively. The result and discussion in this writing is that the law in achieving its goals is not only based on justice, certainty and utility, but also seen from efficiency, value and benefit. Efficiency from an economic perspective determines the parameters of whether a law is effective or not. Law and economics are closely related, both complement each other and complement each other in regulating human behavior. Law enforcement policies in various countries have placed criminal law as an instrument to create social order and community welfare, so law enforcement against crimes committed by corporations should be carried out with an *economic analysis of law approach*. Law enforcement in the perspective of *economic analysis of law* does not only mean the prevention of corporate crime as a handling of legal cases, but what is more important to pay attention to is the impact of law enforcement on the economy, society and state interests. Countermeasures against criminal acts committed by corporations using criminal law means must be based on efficiency by paying attention to *costs and benefits* and carried out proportionally.

Keywords: Economic Analysis of Law, Countermeasures, Corporations

INTRODUCTION

Law always has a function and role in regulating the life of the community. The presence of law in regulating people's lives in order to realize order and tranquility is inseparable from the concept of the three purposes of law, namely justice, certainty and usefulness. The three legal objectives, namely justice, certainty and usefulness, make parameters for the effectiveness or not of a law. The three legal objectives are the directions and objectives that are to be realized by interpreting the law as a means of realizing these goals in order to regulate the governance of people's lives. Law also has an important role in supporting the success of a development. The role of law in the development process in

Indonesia has been stipulated in the outline of the state direction (GBHN). The law is expressly placed as a driver of development, especially for economic growth. Law is expected to be able to play its role as a guiding and guiding factor in creating a conducive climate in the economic field.¹

Economic development and the rapid increase in development as a result of scientific and technological advances, of course, can be understood that these advances are followed by a huge role of corporations. The progress of development itself basically has a positive impact. But on the other hand, this progress also has a negative impact on the community.² Globalization, modernization and the development of science that are constantly evolving, along with the development of the times and the development of society in all parts of the world, not only provide opportunities for the business world in economic development, but also encourage the growth of various crimes in the economic field. Crime in essence grows and develops along with the development of society followed by the advancement of science and technology. The more advanced and developed human civilization is, the more colors and forms of evil that appear in this life.³ The perpetrators of crimes in their development are not only committed by natural humans (*naturalijk persoon*) but also committed by corporations.

The attention of the United Nations (UN) to the deviation of corporate behavior that endangers the community can be seen through various United Nations (UN) congresses to give birth to strategies and policies as a joint effort of the international community in countering and preventing the actions of these very dangerous corporations. The United Nations (UN) in its seventh congress "*The Prevention of Crime and The Treatment of Ofeenders*" held in Geneva in 1995, affirmed economic crime as *a new mention of criminality is the very substantial increase in the financial volume of certain conventional economic crimes*. The congress emphasized that the increase in the volume of transactions in the economic sector is a driving factor for the emergence of new crimes such as tax violations, insurance fraud, smuggling and so on.⁴

The United Nations Congress (UN) has affirmed that crime as a social product is caused by various factors. Economic factors play a major role. Developing countries in carrying out national programs are greatly hindered by the increasing forms of economic crimes such as embezzlement, bribery, corruption and the abuse of economic power by corporations, both national and transnational.⁵ The emergence of corporate crimes is actually a logical consequence of the development of science and technology itself.⁶

In Indonesia, the forms and legal events carried out by corporations that can endanger the community can be seen from several cases such as the Teluk Buyat case and various other legal cases. These legal events show that economic progress also causes crimes that are no less dangerous and the number of victims they cause. Indonesia, currently, has been hit by crime that is quite threatening to the environment, energy sources and patterns of crime in the

¹ Krismiadi, "The Role of Law in Economic Development in Indonesia", *Jurnal Wahana*, Volume 14, Number 2, August 2011, pp. 92-93

² Hamzah Hatrik, 1996, *The Principle of Corporate Liability in Indonesia's Criminal Law (Strict Libality and Vicarious Liability)*, Radja Grafindo Persada, Jakarta, p. 24

³ Marulak Pardede, "Revealing Intellectual Crimes (*White Collar Crime*) in Legislation", *Journal of Business Law*, Volume 13, Number 1, 2001, p. 41

⁴ Rofinus Hotmaulana Hutahuruk, 2013, *Countering Corporate Crime Through Restorative Approaches, A Legal Breakthrough*, Sinar Grafika, Jakarta, p. 2

⁵ *Ibid.*, p. 3

⁶ Mahrus Ali, 2008, *Corporate Crime, A Study on the Relevance of Action Sanctions for the Reduction of Corporate Crime*, Makna Bumi Intaran, Yogyakarta, p. 3

economic sector such as banking crimes, computer crimes, fraud against consumers and various patterns of corporate crime carried out through penetration and disguise.⁷

Efforts to face and anticipate the widespread negative impacts caused by the corporation need to be carried out in various ways, so it is natural that law enforcement attention is directed to efforts to overcome criminal acts committed by corporations. One of the means used is the use of criminal law. Criminal law is part of the overall law that determines what acts are prohibited accompanied by criminal threats for anyone who violates the prohibition.⁸ Criminal law occupies its own position in the systemic law, this is because criminal law does not place its own norms but strengthens norms in other legal fields by establishing the threat of sanctions for violations of norms in other legal fields.⁹

Changes in society, followed by advances in science and technology that continue to develop, bring logical consequences regulated in the criminal law that need to be adjusted to the needs of the community. Legal needs in increasing national development, it is necessary to carry out a reform of the criminal law to overcome the development of crime that occurs today. The need to update the criminal law is caused by the development of criminality which is closely related to the changes and developments of Indonesia society as a whole.¹⁰ Criminal law reform, in essence, aims to make criminal law better, in accordance with the values that exist in society. Criminal law reform has the meaning of an effort to reorient and reform criminal law in accordance with the central socio-political, socio-philosophical and socio-cultural values of Indonesia society based on social *policy*, *criminal policy* and *law enforcement policy*.¹¹

Law enforcement against corporate crime is no longer based on the philosophy of retributive justice. Law enforcement policies in various countries have placed criminal law as an instrument to create social order and community welfare¹², so that law enforcement against crimes committed by corporations should be carried out with *an economic analysis of law* approach. Law enforcement in the perspective of *economic analysis of law* does not only mean the prevention of corporate crime as a handling of legal cases, but what is more important to pay attention to is the impact of law enforcement on the economy, society and state interests.¹³ Starting from the description above, the *economic analysis of law approach* in tackling corporate crime in the economic sector will be examined.

Based on the description above, the formulation of the problem in this writing concerns how to apply *economic analysis of law* in dealing with criminal acts committed by corporations.

METHOD

The method used in this writing is normative juridical research, using conceptual approach techniques, legislative approach and historical approach. The nature of this research is descriptive analytical, while the data used in this writing is secondary data with data collection techniques carried out through literature studies and document studies. The data analysis method in this writing will be analyzed qualitatively.

⁷ Soejono Dirjosisworo, 1991, *Criminal Law and Criminal Behavior of Post-Industrial Society*, Inauguration of Professors in FH_UNPAR, Bandung, p. 10

⁸ Elwi Daniel, "Application of the Ultimatum Remidium Principle to Administrative Crimes", *Journal of Criminal Law and Criminology*, Volume 1 No. 1, October 2020, p. 3

⁹ M. Ali Zaidan, 2015, *Towards Criminal Law Reform*, Sinar Grafika, Jakarta, p.3

¹⁰ Muladi and Barda Nawawi Arief, 2010, *Criminal Law Theories and Policies*, Bandung Alumni, p. 89

¹¹ Barda Nawawi Arief, 1996, *Bunga Rampai Criminal Law Policy*, Citra Aditya Bakthi, Bandung, p. 30

¹² Asep N. Mulyana, 2022, *Economic Approach in Law Enforcement Against Corporate Crime*, Grasindo, Jakarta, p. 177

¹³ *Ibid*, p. 174

RESULTS AND DISCUSSION

Application of *Economic Analysis of Law* in Countering Corporate Crimes.

Economic analysis of law in the discussion there are two disciplines of science, namely law and economics. The two fields of science have a very close correlation, because law and economics both discuss human behavior. Law broadly regulates human behavior in carrying out its association in society, while economics studies human behavior in meeting its needs.¹⁴ The concept of *economic analysis of law* originated from a *utilitarian* thought built by Jeremy Bentham who emphasized the principle of merit as a doctrine of legal science. According to Bentham, new legal provisions can be recognized as law, if they can provide the greatest benefit to the public.¹⁵ *Economic Analysis of law*, introduced by Ronald H. Coase who wrote in his book about social costs and discusses illegal acts. The approach of *economic analysis of law* became a theory in law, after Richard Posner published his book entitled *Economic Analysis of Law*.¹⁶

Posner explained that *economic is the science of rational choice in a world – our world – in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his "self interest"*.¹⁷ (Economics is the science of rational choices that have interests in a world with limited resource availability, in relation to human desires. The task of economics is to find and explore the implications for the basis of human thought as rational beings who want improvements in their lives to get welfare/satisfaction. Satisfaction/welfare is referred to as personal interest). Posner, with the concept of *economic analysis of law*, is of the view that "human beings are basically *homo economicus*, which means that in taking actions to meet their economic needs, human beings prioritize economic values with economic reasons and considerations as well".¹⁸

Human beings in making decisions or actions to make improvements to their lives are based on rational considerations in achieving a desired result. Consideration in doing what is desired, humans are given a choice in achieving happiness. The concept of rational choice is a basic assumption as a benchmark in the framework of *economic analysis of law*. The basic concept of rational choice is emphasized on the idea that man is a being of rationality. Thus, human beings are rational beings both in terms of moneters and non-monetary to improve their standard of living (*rational maximizers*).¹⁹ Posner assumes that every individual human being is a rational maximizer in achieving their satisfaction. Posner tried to apply this assumption from the economic discipline he built into the field of law.²⁰

Posner explained that the principles of economics are very important as a tool to evaluate and analyze legal issues. The will of the law in achieving its goals is not only based solely on justice, certainty and utility. According to him, the role of the law must be seen in terms of value, utility and efficiency. The²¹ three basic elements of *economic analysis of law* (*value, utility and efficiency*) are based on the rationality inherent in humans. Talking about the basic elements of the economy, namely *value, utility and efficiency*, of course, the economy and the law have different limits, but nevertheless there are limits that are given

¹⁴ Fajar Sugianto, 2014, *Economic Analysis of Law, Series I* Introduction, Prenadamedia Group, Jakarta, p. 35

¹⁵ *Ibid*, pp.41-42

¹⁶ Maria Sutopo and Indriyanto Seno Adji, 2015, *Economic Analysis of Law, Financial Crisis and Government Policy*, Diadit Media, Jakarta, pp. 26-27.

¹⁷ Richard A Posner, 2012, *Economic Analysis of Law*, Ninth Edition, Wolters Kluwer, Law and Business, hlm. 3

¹⁸ Fajar Sugianto, *Op.cit*, hlm. 44

¹⁹ *Ibid*, p. 26

²⁰ Richard A. Posner. 1981, *The Economics of Justice*. (Cambridge: Harvard University Press. hlm. 1.

²¹ Richard A Posner, *Op.cit*, hlm. 15

with the same goal. The concept of *efficiency*, here can be seen from the theory of pareto *efficiency* and Hicks calcuring.²²

Pareto *efficiency* is divided into two, namely *pareto optimality* and *superiority pareto*. The concept of pareto optimality, if the distribution of profits can reach a level that makes people equally happy. If this condition does not occur, then pareto *superiority* can be applied which is a way where at least one person feels happy without making others suffer more. In the context of the application of the law, a legal provision is considered efficient, if the provision improves the common welfare or at least the legal provision does not make other individuals worse.²³ Kaldor-Hicks Efficiency in looking at efficiency has the same meaning as the utilitarian concept based on the benefits produced.²⁴ In the context of law, a policy or rule of law if they benefit from the policy. Theoretically, the Caldor-Hicks efficiency aims to benefit those who are harmed so that the totality of happiness continues to increase, regardless of the fact that there are citizens who are less happy.

Utility and efficiency have a relationship, *utility* in the economic approach is defined as benefits or benefits or profits obtained. According to Posner, the use of the two words between *value* and *utility* is cost or benefit.²⁵ Human beings as rational beings in making decisions to achieve their desires are based on the three economic elements in question, namely *value*, *utility* and *efficiency*. The economic *analysis of law* thought developed by Posner gave birth to a concept of justice known as *the economic conception of justice*.²⁶ The concept of justice is the underlying economic standard of the three elements mentioned above. In essence, the justice intended by Posner is based on efficiency.²⁷

The concept of economic justice can essentially be concluded that laws are created and applied for the main purpose of maximizing the broadest public interest (*maximizing overall social utility*). The concept of economic justice is a reference for assessing the extent of the impact of the enforcement of laws or regulations on society. This principle can be known from the reaction of the community and the benefits of the law or the law or regulation in question.²⁸ With such rapid economic development and growth, the law is always faced with a challenge. As is known, crime is always developing along with the development of society followed by the advancement of science and technology. The more advanced and developed human civilization is, the more colors and forms of evil that appear in this life. Sudarto once reminded that it is something that should not be forgotten about the disturbances to the welfare of the community. Progress achieved in the economic field will not eliminate crime, but will give birth to a new dimension of crime, such as criminal acts committed by corporations.²⁹

Today's crime prevention policy using criminal law means is not only aimed at humans as legal subjects, but also on other legal subjects such as corporations. Perpetrators of crimes in their development can not only be committed by humans, but can also be committed by corporations. A corporation can commit a criminal act, through the management or members of the corporation contained in it who act for and on behalf of the corporation or the controller of the corporation that has the authority to control the corporation and the decision

²² Romli Atmasasmita and Kodrat Wibowo, 2016, *Microeconomic Analysis of Indonesia's Criminal Law*, Prenadamedia Group, Jakarta, p. 40

²³ Irma Reisallinda Ayuningsih, Getting to Know *the Economic Analysis of Law*, <https://www.djkn.kemenkeu.go.id>, accessed on September 4, 2024, at 19.00 WIB.

²⁴ From Romli Atmasasmita to Kodrat Wibowo, *Op.cit*, hlm. 59

²⁵ Richard A. Posner, *Loc.cit*, hlm. 11

²⁶ Fajar Sugianto, 2013, *Economic Approach to Law*, Series II, Kencana, Jakarta, p. 51

²⁷ Maria Sutopo and Indriyanto Seno Adji, *Op.cit*, p. 28

²⁸ Fajar Sugianto, *Op.cit*, hlm.45

²⁹ Sudarto, 1986, *Reform of Indonesia's Criminal Law*, BPHN Symposium on National Criminal Law Reform, Bina Cipta, Bandung, p. 94

is a decision accepted as a corporate decision. Corporation, etymologically in Latin comes from the word *corporatio*, as a word that ends in *tio* (as a noun) which comes from the verb *corporare* which comes from the word *corpous* which means to give or corporate.³⁰ Corporations are quite broad entities. Corporations in Nani Mulyati's dissertation refer to legal subjects that are not human or human legal, such as the state, city government, associations or organizations, legal entities, associations, associations and business entities that are different from the individual members contained in them. This group is also called *rechtspersoon*, *judicial persoon* or *juristic persoon*.³¹ Corporations are a commonly referred to term in criminal law and criminology.

In Indonesia, corporations as formulated in the new Criminal Code include legal entities or those that are equated with it and associations that are not incorporated or that are equated with it. Corporations as legal subjects that can be held criminally liable have long been formulated in laws and regulations. Corporate crimes must be understood as criminal acts committed in an organizational manner involving many interested parties.³² The application of *economic analysis of law* in tackling corporate crimes requires legal policies that are designed and used to create incentives to prevent corporations from committing crimes in an efficient way and maximize social welfare. The goal is to assess the efficiency of the legal rules applied in maximizing social welfare. This approach involves economic principles in evaluating whether the regulations applied are effective enough in preventing violations of the law and changing corporate behavior.

The economic analysis of law developed by Posner emphasizes that people will obey the law, if they get more benefits than they violate it.³³ Business people who are members of corporations, in Jhon Braithwaith's view, are rational *actors* who understand very well and always weigh the risks they will face from their actions, so that their enforcement against corporations also needs to be seen how far the corporation is aware and aware of the violations it has committed, including the legal consequences received. The level of violations of the law committed by corporations as business people in carrying out their economic activities, according to Thomas Ullen and Robert Cooter, actually also needs to be measured in a scale of *culpability* that can determine the degree of corporate error and determine the type of sanctions that should be imposed on the corporation.³⁴ Countermeasures against corporate crimes, as it is known, not only include aspects that must be overcome by criminals, corporate actions in carrying out their business activities involve administrative and civil aspects, so it is necessary to solve them in an economic approach.

Criminal acts, as stated by Posner, are inefficiencies³⁵ (inefficient acts), therefore in determining the inefficient acts (acts that can be punished), do not incur costs greater than the profits obtained from law enforcement. What acts are determined as criminal acts that should be punished are based on efficiency considerations. Efficiency means that the determination of a criminal act must consider *cost and benefit*. *Economic analysis of law* in assessing the designation of an act as a criminal act is an effort to achieve legal efficiency. This approach involves an economic evaluation of legal policies, including the effects of criminal acts on economic behavior. The goal is to strike a balance between prevention and overall economic efficiency.

³⁰ Soetan K Malikoel Adil, 1995, *Reform of Our Criminal Law*, Development, Jakarta, p. 83

³¹ Nani Mulyati, 2018, *Corporations as Legal Subjects and Their Criminal Liability in Indonesia Criminal Law*, Dissertation, University of Indonesia, p. 3

³² Irfan Ardiansyah, "Solutions in Law Enforcement Against Corporate Crimes Reviewed from the Aspects of Criminal Criteria and Patterns", *UIR Law Review Journal*, Volume 03, No. 1, 2019, p. 63

³³ Richard A. Posner, *Op.cit*, hlm. 3

³⁴ Asep N Mulyana, *Op.cit*, hlm. 184-186

³⁵ Choky Ramadhan, 2016, *Introduction to Economic Analysis in Criminal Policy in Indonesia*, editor Supriyadi Widodo Eddyono, Institute for Criminal Justice Reform, Jakarta, p.29

Corporations in committing criminal acts, judging from the *economic analysis of law* approach, can be considered as acts that are detrimental to economic efficiency, so that in determining criminal acts committed by corporations can be understood in the context of the economic impact they cause. The economic efficiency in question is an economic approach to the law in formulating the profits generated by the law.³⁶ Law, in this case, as an incentive in changing and maintaining corporate behavior in accordance with legal purposes. The theory of *economic analysis of law* encourages the principle of corporations to have responsibility in preventing corporations from committing violations that can be detrimental to economic efficiency. Corporations are incentivized to adopt ethical business practices in complying with the law as part of their business strategy.

The *economic analysis of law* approach to legal policy emphasizes the importance of analyzing the costs and benefits of the establishment of criminal acts, so that the application of criminal law in overcoming criminal acts committed by corporations is one of the elements that plays an important role in preventing economically detrimental behavior. Thus, the use of criminal law through its criminal sanctions must serve as an incentive to prevent behavior that is detrimental to the economy or suppress behavior that is contrary to the law.

Corporate crimes, in essence, are violations of the law committed in carrying out their business activities for the purpose of obtaining profits or profits, for this reason, law enforcement against criminal acts committed by corporations using criminal law means must be used carefully and carefully, so that the application of criminal law means does not cause *overcriminalization*. *Overcriminalization*, in Douglas Husak's view, resulted in disproportionate crimes.³⁷ The policy of countering corporate crime through criminal law means in an economic approach is in line with Jeremy Bentham's view that criminal law should not be used groundless, useless, unprofitable and *ineffective*.

CONCLUSION

Discussing problems can indeed be done with various approaches, one of the methods that can increase the role of law in people's lives is by using the economic analysis of law approach. The economic approach to law is intended to think about how economic principles can be applied in law. *Economic analysis of law* provides an understanding of law in a new way and is very useful for public policy. The *economic analysis of law* approach explains legal issues as objects that are colonized with basic economic concepts, economic reasons and considerations. The goal is to occupy the legal essence of legal issues, so that the flexibility of analysis becomes more elaborated. Economic analysis of law is a method in answering legal problems in the formation of laws, the process and the impact of the law enacted. *Economic analysis of law*, in assessing the work of law in the midst of society in achieving the three goals of law, is based on three basic elements of the economy, namely *value*, *utility* and *efficiency*. An economic analysis of the law that emphasizes the three main basic elements of the economy can create a law in accordance with its function, especially in tackling criminal acts committed by corporations.

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³⁶ Fajar Sugianto, "Economic Efficiency as a Legal Remedy", *Journal of Law*, Volume 9, Number 9, 2013, p. 85

³⁷ Elwi Daniel, *Op.cit.*, hlm. Sec. 5.

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