

Imposing Corporate Death Penalty in Indonesia: A Discourse on Penalisation, Corporate Culture, and Deferred Prosecution Agreement

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Keywords

Corporate Death Penalty;
Corporate Culture;
Deferred Prosecution
Agreement; Dissolution;
Indonesian Penal Code.

DOI

<https://doi.org/10.2484/3/UJLC.2024.v08.i02.p04>

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Abstract

The Indonesian Penal Code 2023 regulates corporate criminal liability. It covers various issues, including the actions of a corporation that amount to corporate crimes, the conditions under which a corporation can be held criminally responsible, who can be held accountable, and the types of criminal sanctions imposed on corporations. The primary criminal sanction is the imposition of fines. However, several types of additional punishments may also be imposed, including dissolution of the corporation or, in other words, the "corporate death penalty", which leads to a permanent termination of the corporation's operations, loss of jobs for employees, termination of production, and stoppage of tax payments to the government. Thus, if imposed without caution, corporate death penalty will negatively impact the state and society. This article analyses the effect of corporate death penalty on the society and highlights the need for judges to exercise caution before dissolving a corporation. The study applies normative legal research with the statutory and comparative approach. Primary and secondary legal materials were analysed. This article argues against the imposition of corporate death penalty in Indonesia for three reasons. First, Indonesia does not have sentencing guidelines for corporations. Second, Indonesia has not developed a Deferred Prosecution Agreement (DPA) mechanism yet, which is an obstacle to developing a better corporate culture. Third, corporate death penalty has harmful impacts on a country's economy and public welfare; among others, it increases the unemployment rate, which impacts social life.

1. INTRODUCTION

Corporations play important roles in people's lives. Likewise, when a corporation commits a crime, it could have a huge impact on people, since such crimes could involve numerous actors or have a transnational nature.¹ Moreover, a corporate crime tends to be highly organised, tough, extreme, and massive; also, a corporate crime involves high commitment and a

¹See Joshua M. Pearce, "Towards Quantifiable Metrics Warranting Industry-Wide Corporate Death Penalties," *Social Sciences* 8, no. 2 (2019): 5.

tremendous amount of funds.² Law enforcement in the realm of corporate crime is still, unfortunately, hindered by serious obstacles, including imperfect regulations, high costs, long duration and lack of resources.³

The concept that corporations are subject to criminal liability has had a significant impact on criminal law.⁴ Unfortunately, the regulation of corporate crime is inadequate, as there are no special regulations that consider the peculiarities of corporate crime in Indonesia. The recognition that corporations can be held criminally responsible began with the enactment of Emergency Law No. 7 of 1955 concerning the Investigation, Prosecution, and Trial of Economic Crimes. In the following decades, many laws have stipulated that corporations are subject to criminal liability.⁵ Some laws regulate corporate criminal liability partially, such as Law No. 11 of 2008 concerning Electronic Information and Transaction, in which corporate crimes are regulated only in Article 52 paragraph (4).⁶

Finally, Law No. 1 of 2023 concerning the Penal Code (the Penal Code 2023) regulates corporate criminal liability better than previous regulations. It covers, among others, the conditions under which a corporation can be said to have committed a crime,⁷ the conditions under which a corporation is criminally liable,⁸ the guidelines for judges in punishing corporations (which includes the issues that judges must consider),⁹ and the punishments that can be imposed on corporations.¹⁰ The provisions contained in Book I of the Penal Code 2023 are the *lex generalis* for the regulation of corporate criminal liability. Meanwhile, the provisions of other existing and future laws on corporate criminal liability are the *lex specialis*. Thus, the regulation of corporate criminal liability by other laws is still relevant even though the issue is regulated by the Penal Code 2023.

The Penal Code 2023 stipulates two types of punishments for corporations, including criminal sanctions (*straf*) and measures (*maatregel*). There are two types of criminal sanctions: the main sanction, in the form of fines,¹¹ and additional sanctions, which consist of payment of compensation, confiscation of goods or profits obtained from crimes, revocation of certain licences, and dissolution.¹² According to Sjahdeini (2017), the dissolution of a corporation amounts to the death penalty for the

² Achmad Ratomi, "Korporasi Sebagai Pelaku Tindak Pidana (Suatu) Pembaharuan Hukum Pidana Dalam Menghadapi Arus Globalisasi dan Industri," *Jurnal Al'Adl* 10, no. 1 (2018): 5.

³ Febby Mutiara Nelson. *Plea Bargaining & Deferred Prosecution Agreement dalam Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2020), 232.

⁴ Sutan Remy Sjahdeini. *Ajaran Pemidanaan: Tindak Pidana Korporasi & Seluk-beluknya* (Jakarta: Kencana, 2017), 15.

⁵ See Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering, Art. 1 and Law No. 9 of 2013 concerning Terrorism Financing, Art. 1.

⁶ Art. 52(4): In the event that the criminal offence as referred to in Article 27 through Article 37 committed by a corporation shall be punished with the basic punishment plus two thirds.

⁷ Law No. 1 of 2023 concerning the Penal Code, Arts. 46 and 47.

⁸ *Ibid.*, Arts. 48, 49, and 50.

⁹ *Ibid.*, Art. 56.

¹⁰ *Ibid.*, Arts. 118 to 123.

¹¹ *Ibid.*, Art. 119.

¹² *Ibid.*, Art. 120.

corporation.¹³ Accordingly, there seems to be a paradox regarding corporate criminal liability, since the primary punishment for corporations is imposition of fines, which is much less severe than dissolution (death penalty), an additional sanction.¹⁴ Although the additional punishment is secondary, it has a more severe effect on the corporation than the main punishment.

"Corporate death penalty" is a term that has long been used by other countries; it is similar to the term corporate dissolution, an alternative punishment that can be imposed on corporations that have committed serious criminal offences.¹⁵ According to Markoff (2012), "the criminal acts of large corporations have rocked the nation and brought the world economy to its knees".¹⁶ Before the coming of the Penal Code 2023, Indonesia had some regulations that could extend corporate criminal liability to senior officials of a corporation, for example in cases of money laundering¹⁷ and terrorism financing.¹⁸ The penalties for corporate crimes stated in the Penal Code 2023 have a broader impact than the direct impact of the main and additional punishments mentioned earlier, because such punishments may have an impact on "innocent people,"¹⁹ as well as exhibit economic and social impacts. Corporations have become the main actors of the world economy and are as important as the state (government).²⁰ There is an influential relationship between criminalisation and the economy, and some corporations have been negatively affected by activities within the judicial system.²¹ Corporations that have become defendants in criminal cases have experienced reduced level of trust from partners and the community.

This article aims to identify and analyse arguments that point to the importance of judges exercising caution when making pronouncements on corporate death penalty. It considers that corporate dissolution, if imposed on corporations that have an essential role in the economy and society, will have an impact on the economy and social life at large.²² With regard to sentencing, judges usually have the discretion to pursue different goals of punishment, which include, among others, retribution, deterrence and

¹³ Sjahdeini. *op.cit.*, 272.

¹⁴ Oktavianti, Djumadi, and Yulia, "Pertanggungjawaban Pidana Korporasi yang Tidak Bisa Membayar Pidana Denda dalam Tindak Pidana Korupsi," *Banua Law Review* 4, no. 2 (2022): 135.

¹⁵ Kristian, "Jenis-jenis Sanksi Pidana yang Dapat Diterapkan Terhadap Korporasi," *Jurnal Hukum dan Pembangunan* 44, no. 1 (2016): 107.

¹⁶ Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century," *University of Pennsylvania Journal of Business Law* 15 (2012): 799.

¹⁷ Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering, Art. 7.

¹⁸ Law No. 9 of 2013 concerning Terrorism Financing, Art. 8.

¹⁹ Aullia Vivi Yulianingrum and Yohana Widya Oktaviani, "Analisis Yuridis Terhadap Penerapan Sanksi Pidana Tambahan Bagi Pemulihan Lingkungan Oleh Korporasi," *Jurnal Analisis Hukum* 5, no. 2 (2022): 180.

²⁰ Hariman Satria, "Penerapan Pidana Tambahan Dalam Pertanggungjawaban Pidana Korporasi Pada Tindak Pidana Lingkungan Hidup," *Jurnal Yudisial* 10, no. 2 (2017): 15.

²¹ Bima Kumara Dwi and Mario Churairo, "Hukum Determinan Terhadap Ekonomi atau Ekonomi Determinan Terhadap Hukum," *Jurnal Simbur Cahaya* 28, no. 2 (2021): 208.

²² John F. Hulpke, "If All Else Fails, A Corporate Death Penalty?," *Journal of Management Inquiry* 26, no. 4 (2017): 3

incapacitation.²³ Therefore, judges must be very cautious when pronouncing a sentence, especially if a punishment has irreversible consequences on offenders, such as the death sentence.²⁴ This is because, once such punishment is carried out on someone who is later found to be innocent or wrongly executed,²⁵ possibly through the discovery of new evidence, no remedy can be offered at that point. The termination of employment arising from the closure of a corporation can increase the rate of unemployment, which in turn increases the rate of poverty.²⁶ Further, the dissolution of a corporation can result in other serious negative impacts,²⁷ even on other innocent parties.²⁸ Judges are obliged to consider the impact on employees before imposing corporate dissolution.²⁹ This is in line with the opinion of Richard Posner: in the implementation of criminal law, parties who do not have blameworthy conduct are still being blamed.³⁰

Some previous studies have discussed corporate death penalty. Grossman (2016) believes that the imposition of corporate death penalty on a company can be avoided. Negative impacts can be prevented through other punishment mechanisms. However, if the corporate crime is a serious crime, then the dissolution of the corporation is not a cruel punishment.³¹ Similarly, Hulpke (2017) argues that when a business fails to adhere to the norms of behaviour, thus committing corruption or damaging the environment, and other companies imitate the same, the death penalty for such corporations is appropriate.³² Furthermore, Muni (2015) conducted a research on criminal sanction for corporations, proposing the dissolution of corporations as an additional punishment for corruption. He argues that not only humans but corporations also should be sentenced to death, through corporate dissolution, and it is appropriate to impose dissolution on corporations that have been proven to be corrupt.³³

This article applies normative legal research with a statutory and comparative approach. It analyses primary and secondary legal materials. Primary legal materials include national law regulations of the Republic of

²³ Marah Stith McLeod, "Communicating Punishment," *Boston University Law Review* 100 (2020): 2266.

²⁴ Jacob Bronsther, "Nonfatal Death Sentences," *Oklahoma Law Review* 75, no. 1 (2022): 10.

²⁵ Joseph Margulies, John Blume and Sheri Johnson, "Dead Right: A Cautionary Capital Punishment Tale," *Columbia Human Rights Law Review* 53, no. 1 (2021): 109.

²⁶ Riri Ananingdyah, "Konstruksi Kesepakatan Restorative Justice terhadap Kejahatan Korporasi Sebagai Upaya Menjaga Stabilitas Ekonomi Nasional," *Journal of Community Service* 5, no. 1 (2023): 137.

²⁷ Yudha Ramelan, "Penerapan Sanksi Pidana Korporasi Pada Bank Dan Implikasinya," *Jurnal Hukum & Pembangunan* 48, no. 4 (2018): 861.

²⁸ Lilik Mulyadi, *Membangun Model Ideal Pemidanaan Korporasi Pelaku Tindak Pidana Korupsi Berbasis Keadilan Sosial* (Jakarta: Kencana, 2021), 239.

²⁹ Kristian, *op cit.*, 107.

³⁰ Richard Posner, "An Economic Theory of the Criminal Law," *Columbia Law Review* 85, no. 6 (1985): 1230-1231.

³¹ Drew Isler Grossman, "Would a Corporate Death Penalty Be Cruel and Unusual Punishment," *Cornell Journal of Law and Public Policy* 25, no. 3 (2016): 697.

³² Hulpke, *op.cit.*, 1.

³³ Abdul Muni, "Pembubaran Korporasi Sebagai Alternatif Pemidanaan dalam Tindak Pidana Korupsi", (PhD's Thesis, Faculty of Law Universitas Airlangga, 2015), 5.

Indonesia and other countries. Secondary legal materials emanated from various sources, including books, journal articles, research papers, and website content that complement the primary legal sources. The comparative approach is conducted to understand the Deferred Prosecution Agreement (DPA) arrangements in the United States of America (the US) and the United Kingdom (the UK). The DPA is a special resolution mechanism for corporate crimes.

2. RESULT AND ANALYSIS

It is generally accepted that the law aims to provide a sense of justice in the community, and the purpose of criminal law is to protect the interests of society,³⁴ which is also the main purpose of punishment. One way of protecting the interests of society is to realise social justice through social welfare³⁵ and employment. In this regard, the dissolution of corporations may be contrary to efforts to realise social justice. Social justice is a perspective of justice.³⁶ Some forms of social justice amount to economic justice, whose main goal is to create a society where certain rights can be enjoyed,³⁷ including the right to achieve welfare and get a decent job. Achieving welfare means achieving social justice for all Indonesian people. Social justice is one of the precepts of Pancasila,³⁸ which should be the main foundation of law enforcement.³⁹ The concept of Pancasila requires a balance and harmony between the interests of individuals, the society, the nation and the state.⁴⁰ Thus, the dissolution of corporations as a punishment for criminal acts could very likely become an obstacle to efforts aimed at achieving social justice.

Accordingly, there are at least three reasons why imposing the death penalty on corporations must be done with caution: 1) Indonesia does not have sentencing guidelines for corporations, 2) the absence of Deferred Prosecution Agreement (DPA), which is a special mechanism of handling corporate crimes, and 3) the potential severe impact of dissolution of corporations.

³⁴ Muchlas Rastra Samara Muksin, "Tujuan Pemidanaan dalam Pembaharuan Hukum Pidana Indonesia," *Jurnal Sapientia et Virtus* 8, no. 1 (2023): 238.

³⁵ Marsudi Dedi, "Negara Kesejahteraan (*Welfare State*) dalam Perspektif Pancasila," *Jurnal Likhitaprajna* 23, no. 2 (2021): 140.

³⁶ Rizky Pratama Putra, "Pidana Uang Pengganti Terhadap Korporasi Dalam Tindak Pidana Korupsi," *Jurnal Yudisial* 13, no. 2 (2020): 155.

³⁷ Purwanto, "Perwujudan Keadilan dan Keadilan Sosial dalam Negara Hukum Indonesia: Perjuangan yang Tidak Mudah Dioperasionalkan," *Jurnal Hukum Media Bhakti* (2017): 18.

³⁸ Pancasila is the philosophical foundation of the Indonesian State, which consists of five principles that serve as the ideological and moral foundation of Indonesia. The values contained in Pancasila are the basis for developing policies, regulations and actions of the government and society, with the aim of creating a just, prosperous and civilized society. See Jagad Aditya Dewantara, Ilham Fajar Suhendar, Rum Rosyid, and Thomy Sastra Atmaja, "Pancasila as ideology and characteristics civic education in Indonesia," *International Journal for Educational and Vocational Studies* 1, no. 5 (2019): 40.

³⁹ Triwahyuningsih, "Penegakan Hukum Progresif untuk Mewujudkan Keadilan Substantif Berdasarkan Nilai-Nilai Pancasila," (Proceedings, 2017), 243.

⁴⁰ Rafly Hakim and Evan Kurnia, "Membangun Hukum Pancasila yang Berkeadilan dan Bermartabat," *Jurnal Relasi Publik* 1, no. 2 (2023): 6.

2.1. Indonesia Does not Have Sentencing Guidelines for Corporations

Sentencing guidelines for corporations are not explicitly stipulated in Indonesian law.⁴¹ Although there are existing sentencing guidelines contained in a Supreme Court Regulation (PERMA), they do not regulate corporate defendants. The mentioned Supreme Court Regulation is PERMA No. 1 of 2020 concerning Sentencing Guidelines, in relation to Article 2 and Article 3 of the Corruption Eradication Law, enacted on 8 July 2020. It is the first and only regulation containing sentencing guidelines but does not even regulate corporate defendants.

Malaysia previously had a mandatory death penalty for a number of serious crimes, such as culpable homicide or murder,⁴² drug trafficking⁴³ and firearms offences,⁴⁴ among others, "to mark the gravity of the offence, to emphasise public disapproval, to serve as a warning to others, to punish the offenders and, most of all, to protect the public".⁴⁵ However, capital punishment did not apply to corporations but only individuals under Malaysian law. Still, actions could be taken against corporations except capital punishment. Nonetheless, a debate among scholars and human rights activists on whether the death penalty should be abolished or not took centre stage in the country for many years.⁴⁶ Consequently, the Malaysian government decided to abolish capital punishment through the Abolition of Mandatory Death Penalty Act 2023,⁴⁷ which came into force on 4 July 2023 as an amendment to the Penal Code,⁴⁸ the Firearms (Increased Penalties) Act 1971,⁴⁹ the Arms Act 1960,⁵⁰ the Kidnapping Act 1961,⁵¹ the Dangerous Drugs Act 1952,⁵² the Strategic Trade Act 2010⁵³ and the

⁴¹ Noveria Devy and Barda Nawawi Arief, "Urgensi Tujuan dan Pedoman Pemidanaan dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021): 219.

⁴² Malaysian Act No. 574 concerning Penal Code (Malaysian Penal Code), Sect. 302.

⁴³ Malaysian Act No. 365 concerning Kidnapping 1961, Sect. 3.

⁴⁴ Among others, Sections 3, 3A, 7 of the Malaysian Act No. 37 concerning Firearms (Increased Penalties Act) 1971.

⁴⁵ Judgement delivered by Raja Azlan Shah, former Lord President of Malaysia (as he was then) in *Chang Liang Sang & Ors v Public Prosecutor* [1982] 2 MLJ 231 (FC): 231, paras. F to H.

⁴⁶ Rueben Ananthan Santhana Dass, "Death Penalty in Malaysia: To Abolish or Not to Abolish?" *Malayan Law Journal* 2 (2019): 3.

⁴⁷ Malaysian Act No. 846 concerning Abolition of Mandatory Death Penalty 2023, Sects. 1 and 2.

⁴⁸ Malaysian Penal Code, Amendments of Sects. 115, 118, 119, 121, 121A, 121B, 122, 124K, 124M, 125, 125A, 128, 130, 130A, 130B, 130C, 130D, 130I, 130J, 130K, 130KA, 130N, 130O, 130QA, 130ZB, 201, 212, 213, 214, 216, 221, 221, 302, 307, 364, 374A and 450.

⁴⁹ Malaysian Act No. 37 concerning Firearms (Increased Penalties) 1971, Amendments of Sects. 2, 3, 3A, 4, 5 and 7.

⁵⁰ Malaysian Act No. 206 concerning Arms 1960, Amendments of Sects. 2, 14 and 32 and Deletion of Sect. 46.

⁵¹ Malaysian Act No. 365 concerning Kidnapping 1961, Amendment of Sect. 3.

⁵² Malaysian Act No. 234 concerning Dangerous Drugs 1952, Amendment of Sect. 39B.

⁵³ Malaysian Act No. 708 concerning Strategic Trade 2010, Amendment of Sects. 9, 10, 11 and 12.

Criminal Procedure Code.⁵⁴ The act abolished the mandatory death penalty and replaced it with imprisonment for natural life and whipping, and also dealt with related matters.⁵⁵

Furthermore, "the sentencing guidelines" in Article 56 of the Indonesian Penal Code 2023 only regulates matters that the judge must consider in punishing corporations, such as the level of loss or impact caused, the frequency of crimes by the corporation, the involvement of public officials and the degree of cooperation from the corporation during the criminal proceedings. In other words, the guidelines in Article 56 are not ideal sentencing guidelines, just like PERMA No. 1 of 2020. In addition, the Penal Code 2023 does not provide guidelines for Judges regarding when to issue an order for the dissolution of a corporation.

One of the objectives of sentencing guidelines, in general, is to provide transparency and legal certainty in the imposition of punishment by judges based on relevant laws.⁵⁶ Judges do have the freedom to punish based on the applicable provisions. However, judges must not impose punishment "according to their own taste".⁵⁷ Judges might indeed exercise various methods in finding the law. However, the independence of judges is still based on legal norms, moral norms, and professional code of ethics.⁵⁸ In other words, sentencing guidelines are intended to prevent arbitrariness by judges in the form of sentencing disparity that cannot be accounted for (unwarranted disparity). The term "unwarranted disparity" refers to disparity without a clear basis/reason and disparity with an apparent reason but the reason is associated with discrimination or the reason is not enough to justify the severity of punishment.⁵⁹

Ashworth and Roberts (2013) opined that sentencing guidelines can be a tool to create consistency in sentencing decisions. "Sentencing guidelines offer a means to achieve the objectives of greater consistency and, hence, predictability".⁶⁰ The guidelines serve as an instrument that enables the court to provide an explanation of how consistency is delivered in sentencing decisions; the purposes of sentencing guidelines are to:⁶¹

- a. promote a clear, fair, and consistent approach to sentencing;
- b. produce analyses and research on sentencing;
- c. improve public confidence in sentencing;

⁵⁴ Malaysian Act No. 593 concerning Criminal Procedure Code, Amendment of Sects. 15, 172D, 388, 425A and the First Schedule.

⁵⁵ Datuk Haji Hisyam, Teh Poh Teik and Guok Ngek Seong, "Abolition of Mandatory Death Penalty Bill 2023," *Malayan Law Journal* 3 (2023): i.

⁵⁶ Nicola Padfield, "Exploring the Success of Sentencing Guideline" in *Sentencing Guidelines Exploring the English Model*, ed. Andrew Ashworth and Julian V Roberts (New York: Oxford University Press, 2013), 33.

⁵⁷ Sudarto in Lilik Mulyadi, *op.cit.*, 133.

⁵⁸ Abdurahman, Nugraha and Majestya, *op.cit.*, 74.

⁵⁹ Mahkamah Agung and MaPPI, "Buku Saku Peraturan Mahkamah Agung Nomor 1 Tahun 2020 tentang Pedoman Pemidanaan Pasal 2 dan Pasal 3 Undang-undang Pemberantasan Tindak Pidana Korupsi," <http://mappifhui.org/wp-content/uploads/2022/05/BUKU-SAKU-PERMA-1-2020-1.pdf>, 15.

⁶⁰ Andrew Ashworth and Julian V Roberts, "The Origins and Nature of the Sentencing Guidelines in England and Wales" in *Sentencing Guidelines Exploring the English Model*, ed. Andrew Ashworth and Julian V Roberts (New York: Oxford University Press, 2013), 1.

⁶¹ Padfield, *op.cit.*, 32.

- d. reduce the amount of crime or reoffending;
- e. reduce the costs of crime (or the costs of sentencing and/or the criminal justice system: the costs of appeals; the costs of the prison system); and
- f. help and support judges and magistrates to do their job: a training aid.

Given that corporations play a very huge role in people's lives, their dissolution will have a negative impact on the society and state. Therefore, the criminal justice process that leads to the dissolution of corporations should be carried out while upholding the fundamental interests of society. In cases where there is a clash between legal certainty and justice, the judge is obliged to choose justice.⁶² Regarding the imposition of corporate dissolution, the fundamental principle that must be considered is stated in the 1945 Constitution of the Republic of Indonesia, namely the right to have a job and a decent life.⁶³ In addition, the preservation of the independence of the judge and the judge's compliance with the laws and regulations in making decisions (regarding cases related to punishment for corporations) are important issues that should not be left out in sentencing guidelines. The guidelines are not a rigid guide, since judges can still deviate from them if there are strong reasons.⁶⁴

2.2. Indonesia Does not Have a Deferred Prosecution Agreement (DPA) Settlement

The DPA is one of the mechanisms to resolve corporate crimes.⁶⁵ In Indonesia, there is no DPA regulation for individual or corporate crime.⁶⁶ The DPA is a negotiation process between the prosecutor and the corporation, who is the defendant, or its legal counsel in an effort to suspend prosecution for a certain period of time.⁶⁷ The DPA can also be defined as an agreement between the prosecutor and defendant that involves the defendant agreeing to be bound by certain conditions for a certain period of time in exchange for the dropping of criminal charges.⁶⁸ There are consequences if the corporation, who is the defendant, violates the provisions in the DPA; in that case, the public prosecutor will continue the prosecution process in court.

The DPA is one of the new developments in the criminal justice system. Based on the DPA, the public prosecutor can offer a deferral of prosecution agreement to a corporation that is alleged to have committed a crime. The DPA involves an offer of not prosecuting the corporation in court in exchange for the corporation admitting its actions and agreeing to fulfil

⁶² Indonesian Penal Code 2023, Art. 53 (2).

⁶³ The 1945 Constitution of the Republic of Indonesia, Art. 27 (2).

⁶⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (fifth edition) (New York: Cambridge University Press, 2010), 42.

⁶⁵ Mololanken LLP, "What's a Deferred Prosecution Agreement?" <https://www.mololanken.com/knowledge-Whats-a-Deferred-Prosecution-Agreement>.

⁶⁶ Febby Mutiara Nelson, "In Search of a Deferred Prosecution Agreement Model for Effective Anti-Corruption Framework in Indonesia," *Hasanuddin Law Review* 8, no. 2 (2022): 122.

⁶⁷ Nelson, *Plea Bargaining*..... *op.cit.*, 278.

⁶⁸ Legal Match, "Deferred Prosecution Agreement," <https://www.legalmatch.com/law-library/article/deferred-prosecution-agreement.htm>.

several requirements that are stipulated in the agreement.⁶⁹ The agreement contains provisions that suspend the prosecution process for a certain period of time, and it is made with the approval and under the supervision of a judge. The agreement contains some legal obligations, as follows: (a) acknowledgment of the offence committed; (b) payment of fines and compensation; (c) appointment of an independent auditor to supervise the company's activities for a certain period of time; (d) dismissal of certain employees; and (e) implementation of a compliance programme.⁷⁰

The DPA has been the mainstay of criminal procedure in the US for over 20 years and has been adopted by other countries, including the UK. The US was the first country to implement the DPA in the early 1990s. Pursuant to the Foreign Corrupt Practice Act, the legal subjects of the DPA in the US are business organisations.⁷¹ In the US, the DPA is regulated by Subsection 3161 h (2) of the Speedy Trial Act 1974. The Department of Justice (DOJ) is responsible for criminal law enforcement in the US, so DOJ prosecutors are given the authority to enter into DPA with corporations that have been accused of committing crimes. In a recent case, *US v. The Boeing Company*, Court Docket No.: 4:21-CR-005-O (N.D. Texas), the DPA was signed in January 2021, alleging that The Boeing Company had conspired to defraud the Federal Aviation Administration's Aircraft Evaluation Group (FAA AEG), in connection with the FAA AEG's evaluation of the Boeing 737 MAX aircraft. Unfortunately, The Boeing Company failed to comply with the DPA, resulting in the DOJ filing criminal charges.⁷²

The UK introduced the DPA in 2014. A year later, the British Serious Fraud Office (SFO) and Standard Bank were the first parties to adopt it.⁷³ The purpose of the UK adopting and implementing the DPA is to provide additional tools for prosecutors in dealing with corporate crimes in England and Wales, which currently, very often, proceed without payment of compensation.⁷⁴ In the UK, the DPA is set out in Schedule 17 of the Crime and Courts Act 2013.

In general, DPA has several advantages, including encouragement of self-reporting by corporations to avoid formal charges that might damage the reputation of the corporation. Self-reporting ensures, to an extent, the certainty of DPA results, so corporations can continue to run their businesses, avoiding the high costs of prosecution and preventing impacts on third parties, through unemployment, loss of investors, and damage to

⁶⁹ Nelson, *Plea Bargaining...* op.cit., 277.

⁷⁰ Polly Sprenger, *Deferred Prosecution Agreement: The Law and Practice of Negotiated Corporate Criminal Penalties* (London: Thomson Reuters, 2011), 8-11.

⁷¹ Mike Kochler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," *UC Davis Law Review* 49, no. 2 (2015): 500.

⁷² The Department of Justice, "United States v. The Boeing Company," <https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-boeing-company>.

⁷³ James R. Copland and Rafael A. Mangual, "Justice Out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order," <https://manhattaninstitute/article/justice-out-of-the-shadows-federal-deferred-prosecution-agreements-and-the-political-order>, 15.

⁷⁴ Michael Bisgrove and Mark Weekes, "Deferred Prosecution Agreements: A Practical Consideration," *Criminal Law Review*, no. 6 (2014): 416.

market structure.⁷⁵ Without the DPA mechanism in Indonesia, the potential for court pronouncements leading to the imposition of the death penalty on corporations is very high.

The use of the DPA can provide an opportunity to shape the corporate culture in terms of complying with the law;⁷⁶ the corporate culture determines the behaviour of corporate agents.⁷⁷ Prosecutors can force corporations to reform their inappropriate culture by including stringent conditions in the agreement. A poor corporate culture may lead to major disasters and massive losses, not only for the corporation but also for society. This is because "When corporations engage in criminal conduct, they generally do so in a big way".⁷⁸ This poor culture is exacerbated by the denial of the crimes committed, and corporations even try to neutralise (rationalise) their crimes before society.⁷⁹ These actions are meant to maintain the image of the corporation.⁸⁰ Change in corporate culture for the better will prevent corporations from unlawful behaviour.⁸¹ This cultural change is indeed one of the objectives of the DPA, because corporations still need to exist to support the economy and welfare of the community.

2.3. The Harmful Effects of Corporate Death Penalty

Criminal sanction will only be beneficial if it is carefully used at the right time and circumstances. If used carelessly, it will cause harm and become a threat to society.⁸² Corporate dissolution, as a criminal sanction, on the one hand, can prevent and stop harmful actions of corporations that have a significant impact on people's lives. On the other hand, corporate dissolution also causes widespread losses in people's lives. The impact of dissolution is explained as follows.

2.3.1. Loss of Jobs and Decreased Economic Stability

A corporation comprises a group of people who are organised and do business together to achieve predetermined goals, especially making profit.⁸³ The group of people referred to in the definition varies, ranging from the smallest group, as seen in a trading company, which only involves one owner and several workers,⁸⁴ who operate on the basis of power of

⁷⁵ *Ibid.*, 417.

⁷⁶ John C. Coffee Jr., "Crime and the Corporation: Making the Punishment Fit the Corporation," *The Journal of Corporation Law* 47, no. 4 (2022): 981.

⁷⁷ Gregory M. Gilchrist, "The Expressive Cost of Corporate Immunity," *Hastings Law Journal* 64, no. 1 (2012): 9.

⁷⁸ W. Robert Thomas, "The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)," *New Criminal Law Review* 24, no. 3 (2021): 411.

⁷⁹ Isabel Schoultz and Janne Flyghed, "From 'we didn't do it' to 'we've learned our lesson': Development of a Typology of Neutralizations of Corporate Crime," *Critical Criminology* 28, no. 4 (2020): 747-750.

⁸⁰ *Ibid.*, 744.

⁸¹ Hasani Mohd Ali, Muhamad Helmi Said, and Siti Zakiah Binti Che Man, "Corporate Culture as Means of Proving Mens Rea in Corporate Criminal Liability Under Malaysian Anti-Corruption Law," *Malaysian Journal of Law & Society* 33 (2023): 123.

⁸² Ananingdyah, *op.cit.*, 138.

⁸³ Sjahdeini, *op.cit.*, 34.

⁸⁴ Yusuf Abdul Sukron and Karli, "Tanggung Jawab Hukum Atas Kejahatan Korporasi," *Jurnal Kewarganegaraan* 6, no. 2 (2022): 2606.

attorney,⁸⁵ to a large group, as seen in a corporate group (holding company), which not only consists of a collection of people but also a collection of companies (subsidiaries).

The group of people referred to in both the trading company and corporate group are actually working to earn income, which is then used to fulfil their needs. In a trading company, the income of the company owner and salaries of the worker come directly from the company's income. However, in a corporate group (holding company), the income of shareholders, directors, commissioners, and employees comes from different sources, and, therefore, the income received by the corporate group cannot be directly shared. This is the logical consequence of the basic form of a corporate group, which is a Limited Liability Company (LLC). Each company in a corporate group has separate assets, which can only be used on the basis of the rules in the Articles of Association or agreements in General Meeting of Shareholders (GMS) of each company. There are different sources of income for each "worker" in a corporate group, as follows:

- a. Shareholders earn income through dividend distribution;⁸⁶
- b. The Board of Directors earns income through salaries determined by the GMS or the Board of Commissioners Meeting (in the event of delegation of authority);⁸⁷
- c. Commissioners receive income through salaries determined by the GMS;⁸⁸ and
- d. Employees earn income from salaries provided by the Board of Directors based on employment agreements.

The explanation above shows that the corporation is a place where different categories of "workers" earn income. Therefore, when the corporation is dissolved, the sources of income of the "workers" cease to exist due to termination of employment. Given that corporations are generally large-scale business organisations, with thousands of employees, a large number of people will become unemployed when a corporation is dissolved. This situation often leads to massive demonstrations by the employees.⁸⁹

The layoffs in large-scale corporations (such as corporate groups) often impact a country's economic stability.⁹⁰ The determinants of economic stability involve very complex factors, ranging from monetary policy, fiscal policy, labour market conditions, to foreign trade conditions and other

⁸⁵ Tajuddin Noor, Masnun, and Novi Tala Gita Rahima Berampu, "Aspek Hukum Pendirian Perseroan Terbatas Perorangan," *Al-Hikmah* 3, no. 3 (2017): 758.

⁸⁶ See Indonesian Law No. 40 of 2007 concerning Limited Liability Companies, Art. 71 (2).

⁸⁷ *Ibid.*, Arts. 94 (1) and 96.

⁸⁸ *Ibid.*

⁸⁹ Puput Pratiwi, "Implikasi Pidana Tambahan Terhadap Korporasi dalam Tindak Pidana Pencucian Uang," *Journal of Social Science and Education* 4, no. 4 (2020): 158-160.

⁹⁰ Economic stability is a condition in which a country's economy remains balanced or relatively stable over a period of time, without significant turmoil or excessive fluctuations in key economic indicators, such as inflation rate, unemployment rate, economic growth, currency exchange rate, and interest rate. See Muhammad Ridhwan Assel, "Faktor-Faktor yang Mempengaruhi Stabilitas Ekonomi serta Imbasnya terhadap Kinerja Sektor Keuangan di Indonesia (Pendekatan Cointegration, Error Correction Model dan Financial Deepening)," *Cita Ekonomika* XIII, no. 1 (2019): 60.

external conditions. The unemployment level is one of the factors that can cause instability in a country's economy.

The inclusion of the unemployment rate as one of the determinants of economic stability is considered very rational. This is because the existence of a large number of unemployed people will have very complex effects, such as a decrease in consumer purchasing power, an increase in the amount of social spending incurred by the government, a decrease in tax revenue, and an increase in the level of economic uncertainty. A high unemployment rate can be considered as a reflection of the non-achievement of one of the national goals of the Indonesian nation: to promote general welfare.⁹¹ This means that state administrators are obliged to strive to achieve the welfare of their citizens continuously. Since dissolution of corporations causes increase in unemployment, which results in economic instability in the affected community, it should be reconsidered.⁹²

2.3.2. Bringing Harm to Innocent Stakeholders

The main goal of a corporation is to achieve significant profits through effective and efficient efforts, and one of the efforts made to achieve this goal is business expansion.⁹³ Expanding a business brings about the need for division and delegation of duties and responsibilities in determining and implementing the business steps necessary to achieve corporate goals. The larger the corporation, the greater the complexity of the delegation of duties and responsibilities, both vertically and horizontally. The division and delegation of duties and responsibilities in giant corporations tend to result in weak coordination between organs and between leaders and subordinates.⁹⁴ In some instances, corporate organs do not know the business steps taken by other corporate organs when carrying out tasks to achieve predetermined targets. This situation often creates a loophole regarding who should be held responsible for legal violations in the corporation. Such a situation occurred in the public accounting firm Arthur Andersen LLC, which the US DOJ charged with obstruction of justice in relation to the Enron scandal.

Arthur Andersen LLC was the auditing company of Enron Corporation. The company had a consulting division as well as an auditing division. The offence for which the company was charged was committed by the auditing division, but when the company was found guilty of obstruction of justice, it led to the dissolution of the whole company. Although the United States Supreme Court later overturned the obstruction of justice verdict after some years, it was too late for the company to bounce back.⁹⁵ After the dissolution of Arthur Andersen LLC, tens of thousands of employees lost their jobs, which highlights the point made earlier that caution should be exercised before the dissolution of a corporation, as it can have a widespread impact

⁹¹ The 1945 Constitution of the Republic of Indonesia, Preamble, para 4.

⁹² Ananingdyah, *op.cit.*, 133.

⁹³ Mardianto, Natalis Christian, and Edi, "Dampak Merger dan Akuisisi terhadap Kinerja Keuangan Perusahaan," *Jurnal Benefita* 3, no. 1 (2018): 44.

⁹⁴ *Ibid.*

⁹⁵ Denis Collins, "Arthur Andersen," <https://www.britannica.com/money/Arthur-Andersen>.

on innocent people, such as labourers and corporate workers, as well as the public who are directly affected socially and psychologically.⁹⁶

A corporate crime is a criminal act that falls within the following scope: a criminal act committed by a member of management who has a functional position in the corporation and represents as well as takes decisions on behalf of the corporation; a criminal act that benefits the corporation; and a criminal act committed within the scope of the corporation's business activities,⁹⁷ either based on employment or other relationships.⁹⁸ From the above statement, a corporation is deemed to be guilty of an offence if any of these three elements are present:

- a. the offence is carried out by a corporate organ within the scope of its duties and functions (whether stated in the Articles of Association or based on appointment or delegation of power);
- b. the criminal offence committed benefits the corporation; and
- c. the offence is committed within the scope of the corporation's business, whether based on employment or other relationships.⁹⁹

The explanation above shows that if an offence is committed by only one or several functional-position holders, the corporation as a whole will be sentenced. The imposition of punishment on the corporation does not separate the guilty and innocent functional-position holders; all personnel will be affected. The personnel in question are not only functional-position holders but also employees, shareholders, and other corporations associated with the corporation concerned. If the corporation is sentenced to dissolution, all personnel will lose their positions and jobs, and in the long run, this will contribute to economic instability in a country.

This fact does not pay attention to the sense of justice for innocent functional-position holders. However, the above statement is not entirely justified because, philosophically speaking, a corporation is intended to "simulate" the human being, which involves different parts working together to achieve something that would be difficult for an individual part to achieve.¹⁰⁰ In other words, a corporation is an entity (corporate being) that is different from the humans who occupy functional positions within it. Therefore, holding only the guilty functional-position holders to account for an offence deviates from the basis and principles of the corporation's formation.

⁹⁶ Shofi Munawwir Effendi, I Gede Widhiana Suarda and Fiska Maulidian Nugroho, "Formulasi Pidana Penutupan Korporasi atas Delik Lingkungan Hidup," *Veritas et Justitia* 9, no. 1 (2023): 151.

⁹⁷ Ridwan Arifin and Shafa Amalia Choirinnisa, "Pertanggungjawaban Korporasi dalam Tindak Pidana Pencucian Uang dalam Prinsip Hukum Pidana Indonesia," *Jurnal Mercatoria* 12, no. 1 (2019): 46.

⁹⁸ Anugerah Rizki and Aulia Ali, "Interpretasi Asimetris Pertanggungjawaban Pidana Korporasi di Indonesia Kajian Putusan Nomor 862 K/ Pid.Sus/2010," *Jurnal Dictum* 12 (2017): 33.

⁹⁹ Abdurrahman Alhakim and Eko Soponyono, "Kebijakan Pertanggungjawaban Pidana Korporasi terhadap Pemberantasan Tindak Pidana Korupsi," *Jurnal Pembangunan Hukum Indonesia* 1, no. 3 (2019): 334.

¹⁰⁰ Ikka Puspitasari and Erdiana Devintawati, "Urgensi Pengaturan Kejahatan Korporasi dalam Pertanggungjawaban Tindak Pidana Korporasi Menurut RKUHP," *Jurnal Kanun* 20, no. 2 (2018): 242.

2.3.3. Disrupting the Distribution of People's Basic Needs

In manufacturing activities, especially those related to basic materials, distribution is an important process that must be carried out to ensure that products are evenly available in every region. Distribution becomes more important in a country like Indonesia, given its vast territory, since producers and consumers are far apart, especially for staples, whose production centres are concentrated in rural areas.¹⁰¹ At least, there are two main benefits of the distribution process, namely:

- a. From the consumer's point of view, the distribution process can prevent product scarcity in certain areas.
- b. From a corporate point of view, the distribution process helps corporations to run their business activities more effectively and efficiently, because with this process corporations do not need to open branch offices in various regions to meet consumer demand.¹⁰²

The distribution process is an economic process that connects the interests of producers and consumers.¹⁰³ Although its function is only to connect producers and consumers, the distribution process is a fairly complex mechanism that involves many parties. The distribution mechanism consists of purchasing, storage or warehousing, transporting, selling, standardising the quality of goods, taking risks, selecting and classifying, packing and packaging, and providing information or promotion.¹⁰⁴ Meanwhile, the parties involved in this process consist of producers, consumers, retailers, traders, and even the government, and they are present across various regions.¹⁰⁵

The complexity of the distribution process, as described above, indicates the importance of the role of each party involved in this process. Although corporations are profit-oriented, they also provide goods and services in the process of seeking profit, including distribution services. If one of the corporations involved in any aspect of the distribution process is dissolved, the distribution pattern that has been built will be damaged. This is because each corporation in the distribution channel has its own role in the process.

Furthermore, the dissolution of a corporation also brings about the end of a business contract, which is a commercially valuable agreement made by parties in written form.¹⁰⁶ The termination of a business contract, a commercially valuable agreement, can lead to substantial financial losses for both producers and consumers. This can also result in the termination of

¹⁰¹ Eyverson Ruauw, "Kajian Distribusi Pangan Pokok Beras di Kabupaten Kepulauan Talaud," *Agre-Socialeconomics* 11, no. 1 (2015): 59.

¹⁰² Muhammad Amir, A. Tendean, Muh. Yogi Indrawan, and Megawati Artiany, "Pengaruh Saluran Distribusi Madu Tresno Joyo terhadap Volume Penjualan pada PT. Pensa Bina Sukses Makassar," *Jurnal Mirai Management* 8, no. 1 (2023): 487.

¹⁰³ Musthafa Syukur, "Distribusi Perspektif Etika Ekonomi Islam," *Profit* 2, no. 2 (2018): 36-37.

¹⁰⁴ *Ibid.*, 9-17.

¹⁰⁵ *Ibid.*, 19.

¹⁰⁶ Dewi Juliana, Arba and Djumardin, "Pembubaran Perseroan Terbatas (PT) Penanaman Modal Asing Menurut Hukum Positif Indonesia," *Indonesia Berdaya* 4, no. 3 (2023): 1241.

employment, not only within the dissolved corporation but also among other parties involved in the distribution process. In addition, it can lead to ineffective and inefficient distribution, posing a threat to food security, especially in areas far from the production site.¹⁰⁷

2.3.4. Reduced Tax Revenue

Taxes are mandatory contributions in the form of money or goods collected by the authorities based on legal norms, in order to cover the costs of producing collective goods and services in achieving public welfare.¹⁰⁸ Hoffer (2020) emphasises that taxes are essential for the government to function properly¹⁰⁹ and are a contribution of citizens' wealth to the state. Generally, regulations stipulate those who are obliged to pay tax. Taxes are used to finance public expenditures related to the duties of the state in administering the government.¹¹⁰ From the above explanation, at least four elements of tax can be seen, namely:

- a. obligation to surrender wealth to the state;
- b. submission is based on laws and regulations;
- c. no direct service is received from the government by the taxpayer; and
- d. used to finance public expenditure that is useful to the people.

In addition, from an economic perspective, taxation is seen as a process of transferring resources from the private sector to the public sector.¹¹¹ Based on this understanding, taxation has two consequences. First, taxes cause a reduction in an individual's ability to control resources to organise goods and services. Second, taxes lead to an increase in the state's ability to provide goods and services related to the needs of society. From these two consequences, taxation aims to prevent disparities between citizens in controlling goods and services and to carry out development. Development is a process of continuous renewal to achieve a state that is considered good; therefore, development can only be carried out with the support of significant funds. Since taxes significantly influence state revenue, the government should try to optimise the taxation sector. Taxes are regulated, and legislation is used as the basis for its collection. Also, taxes are used to promote the welfare of the people.

¹⁰⁷ M. Fuad Fauzul Mu'tamar, "Analisis Stok Pangan dalam Sistem Distribusi Ketahanan Pangan," *Agrointek: Jurnal Teknologi Industri Pertanian* 4, no. 1 (2010): 39.

¹⁰⁸ Nufaris Elisa, "Tinjauan Hukum Administrasi Negara terhadap Pembayaran Pajak," *Jurnal Institusi Politeknik Ganesha Medan* 4, no. 2 (2021): 74.

¹⁰⁹ Stephanie Hoffer, "What If Tax Law's Future Is Now?" *Ohio State Technology Law Journal* 16 no. 1 (2020): 68

¹¹⁰ Ester Vanessa Lumban Tobing, Cindi Aulia Wanda, Siti Nazla Hayati and Desi Triana Munthe, "Analysis of the Effect of Understanding Taxation and Tax Rates on the Compliance of MSME Taxpayers in Simpang Tanjung," *International Journal of Society and Law* 2, no. 1 (2024): 90

¹¹¹ Sapta Setia Darma and Euis Nessia Fitri, "Pengaruh Struktur Modal dan Manajemen Laba terhadap Pajak Penghasilan Badan," *Scientific Journal of Reflection: Economic, Accounting, Management, and Business* 4, no. 3 (2021): 598.

Additionally, the greater the income, the greater the tax payable to the state.¹¹² This is what supports the statement that the dissolution of large-scale corporations lead to a significant decrease in state revenue, which in turn leads to a decrease in the quality of public services and the provision of public infrastructure. At least six types of taxes can be imposed on a corporation, including income tax, oil and gas exploitation tax, value added tax, sales tax on luxury goods, land and building tax, and international trade tax.¹¹³

3. CONCLUSION

The Penal Code 2023 has provided legal certainty regarding the legal liability of corporations that commit crimes. The law prescribes the imposition of fines as the primary punishment for a corporation found guilty of a crime. However, the law also prescribes various forms of additional punishments for corporations, which provide the opportunity for more appropriate sanctions in each corporate crime case. One of the additional punishments is the dissolution of a corporation, or the imposition of the death penalty on a corporation. With regard to corporate dissolution, the judge needs to carefully consider all aspects of the case, especially the impact of the death penalty. Indonesian law seems to be inadequate regarding corporate criminal liability. This may be inferred from the unavailability of sentencing guidelines for corporations, especially guidelines regarding the imposition of the death penalty. These guidelines will guide judges in determining whether to impose the death penalty or not. Indonesia also still needs an arrangement related to special resolution of corporate crimes. In several countries, the DPA has been implemented, which provides an opportunity to resolve corporate crime cases before trial. Prosecutors can take advantage of the DPA to impose certain conditions that can improve the corporate culture of corporations. Moreover, the potential negative impact of corporate dissolution is a serious matter that the judge must analyse. The judge must consider the impact that the death penalty may have. Increased unemployment, disruption of primary distribution of goods, reduced tax revenue, and decreased investor confidence are the main factors for the judge's consideration.

¹¹² Moza Dela Fudika and Rosyidi Hamzah, "Dinamika Hukum Perpajakan di Indonesia Ditinjau dari Undang-undang Nomor 28 Tahun 2009 tentang Pajak Daerah dan Distribusi Daerah," *Journal of Economic Business and Accounting* 4, no. 2 (2021): 517.

¹¹³ Sutedi, *op.cit.*, 51, 61, 97, 101, 116, 118-119.

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