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Corporate Crime Liability: Beyond Rule Reform on Indonesia Criminal Policy

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Abstract

The acceptance of the corporation as the subject of a criminal act, causing problems in the accountability of corporate criminal acts, because of the existence of vague norms that cause injustice and uncertainty in its application. In this study, there are two main problems, namely regulation of corporate criminal liability in criminal law in Indonesia and the prospect of criminal law on the liability of corporate criminal acts in Indonesia from the perspective of ius constituendum. The research method used is a normative legal research method with a statutory approach, comparison study and legal concepts analysis. The results of the study are: (1) As a vague norm in the regulation of corporations as the subject of criminal acts that can be accounted for in the Criminal Code and several laws outside the Criminal Code have regulated corporations as the subject of criminal acts that can be accounted for in criminal law, (2) The prospect of regulating corporate criminal liability in the 2019 Draft Criminal Code has completely and firmly regulated corporations as the subject of criminal acts and can be accounted for in criminal law and accepts absolute criminal liability and certain substitute criminal liability.

Keywords: Corporate crime policy, Indonesia Criminal Code, Liability

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1. Introduction

In Indonesia, the policy of criminal law in criminal liability against corporations must be seen through the Criminal Code (KUHP) and laws & regulations outside the Criminal Code (Bedner, 2013). The fact is that criminal liability for corporate crimes as legal subjects is not explicitly regulated in the Criminal Code, considering that the National Criminal Law is designed to deal with individual human behavior (natuurlijk persoon). The Criminal Code is based on the principle that only humans can be prosecuted as creators or perpetrators (dader) who are held accountable for an offense, whether in the form of a crime or a violation. This can be seen through the formulation of articles in the Criminal Code, including:

1. The method of formulating the offense which always begins with the word "whoever" is generally intended for persons or non-legal entities;
2. The criminal system adopted, especially the crime of loss of independence which can only be imposed on humans and is not possible for legal entities;
3. According to the principles of Indonesian criminal law, that legal entities cannot actualize offenses because Indonesian criminal law is formed based on individual mistakes; and
4. There are no special procedures in criminal procedural law for corporations.

Several laws outside the Criminal Code already exist that regulate criminal liability for corporate criminal acts (Dewi, 2013) but they are still partial and inconsistent thus it is very difficult to implement in judicial practice in Indonesia, for example Emergency Law Number 1 of 1955 concerning economic crimes (Priyatno, 2017).

Paying attention to the policy of criminal liability against corporations in the laws and regulations above, there are previous researches that conducted with its differences than this article. First, as revealed by Campbell (2019) that in reality there are many developments in crimes that are no longer carried out by natural humans (natuurlijk persoon) but by legal entities or corporations (recht persoon) which can cause enormous losses on the part of the community towards activities. While Urbas showing that for these corporate actions, it is very reasonable if special attention is directed to increase corporate criminal liability by using criminal law

(Urbas, 2000), and also Bovens strongly inline with Urbas commented that forms of legal violations committed in corporate activities which include public welfare offenses have become quality (Bovens, 2007). While, given the progress that has occurred in the economic and trade fields, the subject of criminal law can no longer be limited to natural persons (natural persons) but also includes legal persons (juridical persons) who are commonly called corporations (Deogaonkar, 2021), because certain criminal acts can also be committed by corporations (Harris, 2016).

2. Problem Formulation

By adhering to the understanding that corporations are legal subjects, it means that corporations as a form of business entity must be responsible for all their own actions (Manirabona & Diniz, 2016). In addition, it is still possible to share responsibility for the corporation and the management or only the management. The purpose of this paper is to describe and analyze in depth the regulation of corporate responsibility in criminal law at this time, as well as the prospect of corporate criminal liability, in the perspective of ius constituendum.

3. Method

The type of research used is included in normative legal research (Wibisana, 2019), namely legal research carried out by researching library materials (Sudiarawan et.al. 2020), namely studying and reviewing legal principles and positive legal principles derived from the literature and legislation (Sithigh & Siems, 2012). The problem approach used is the statutory approach, the comparative approach, and the analytical & conceptual approach within micro-law research questions context (Siems, 2009). The technique of collecting legal materials is through literature study (Choudhury, 2017), while the technique of analyzing legal materials is using descriptive and interpretive analysis techniques.

4. Corporate Criminal Liability Concept

The role of corporations in economic activity does not need to be questioned anymore. In line with the dynamics of the economy, the actions of corporations, which are now commonly known as multi-national corporations (Nur, et.al. 2021), in the early 1960s began to attract the attention of socio-economic experts (Massicotte, 2021). The phenomenon and the actions of the corporation had taken place before the second world war, but a systematic and

in-depth study only started at the beginning of that year (Fisse, 1995). Meanwhile among criminologists, a critical study of the role of corporations has been started since 1939 (Dearden, 2015), through a historic speech by Edwin H. Sutherland in front of "The American Sociological Association" (Maulidi, 2020), put forward the concept of "White Collar Crime" (WCC) which is defined as "a crime committed by a person of respectability and high social status in the course of his occupation" (Shofie, 2018).

Sutherland's research using records from regulatory agencies, courts and commissions, found that the 70 industrial and commercial corporations he studied each committed at least one violation of the law and contained policies that breaking the law (Huisman & Sliedregt, 2010). Such as misleading advertising (false advertising), patent abuse, wartime trade violation, price fitting, fraud and looting defective goods (sale of faulty goods) (Holtrefer, et.al. 2008). On the one hand, the role of corporations in driving the wheels of the economy in a country and even across national borders, while on the other hand, whether they realize it or not, cause distortions and injustice to society, but they are barely felt (Dearden, 2017).

The attention of the international community towards corporate crime is also clearly seen from the international effort to counteract the negative behavior of multi-national enterprise (Bittle & Lippel, 2013). This effort is the result of international cooperation in the form of a code of conduct of a transnational corporation (UN, ECOSOC) which among others regulates: (1) Activities of transnational corporation (TNC), (2) Treatment of TNC and (3) Intergovernmental cooperation (Jessberger, 2010).

5. Formulation in the recent Indonesia's Criminal Code and other statutory laws

The Criminal Code (KUHP) as an institutionalization of the state's formal social reaction to criminal acts or crimes cannot capture corporations as legal subjects, considering that our criminal law is designed to deal with individual human behavior (*natuurlijke persoon*). The Criminal Code is based on the principle that only humans can be prosecuted as the maker/perpetrator (*dader*) of an offense, whether in the form of a crime, or a violation. This can be seen from these following points:

1. The method of formulating the offense which always begins with the word "whoever …" which is generally intended for humans, not for legal entities;

2. The criminal system adopted, especially the crime of loss of liberty which can only be imposed on humans and cannot be imposed on legal entities;
3. According to the principles of Indonesian criminal law, a legal entity cannot realize an offense. Hoofgerechtshof van NI previously in his arres dated August 5, 1925 emphasized it on the grounds that Indonesian criminal law was formed based on the doctrins of individual guilt.
4. There are no special procedures in criminal procedural law for corporations.

In fact, in the Criminal Code there are several articles concerning corporations as legal subjects, but the criminal threats are aimed at individuals and not corporations, for example: Article 169 of the Criminal Code concerning participation in prohibited associations, and Article 398-399 of the Criminal Code concerning management or commissioners of limited liability companies, Indonesian airlines shares, or cooperative association which is declared bankrupt is detrimental to the company (Hermanto, 2021).

Thus, it is not at all implied that the administrator must be the giver of orders or leaders in the act. Therefore, the "principle of no crime without guilt" which is the basis of the existence or absence of criminal liability has been excluded.

In an effort to find out the regulation of corporate criminal liability in Indonesian laws and regulations, it turns out that corporations can commit a criminal act in its development, which is regulated in legislation outside the Criminal Code, including:

1. Law Number 12 Drt of 1951 concerning Firearms and Explosives (Article 4);
2. Law Number 7 Drt of 1955 concerning Investigation, prosecution and trial of Economic Crimes (Article 15);
3. Law Number of 1958 concerning the Placement of Foreign Workers (Article 19);
4. Law Number 32 of 1964 concerning Foreign exchange traffic regulations (Article 25);
5. Law Number 3 of 1982 concerning Compulsory Registration of Companies (Article 35);
6. Law Number 14 of 1984 concerning Outbreaks of Infectious Diseases (Article 15);
7. Law Number 23 of 1997 concerning Environmental Management (Articles 45, 46);
8. Law Number 5 of 1997 concerning Psychotrophic (Article 70);

9. Law Number 22 of 1997 concerning Narcotics (Article 80);
10. Law Number 5 of 1999 concerning Prohibition of monopolistic practices and unfair business competition (Article 1);
11. Law Number 8 of 1999 concerning Consumer Protection (Article 61);
12. Law Number 31 of 1999 in conjunction with Law no. 20 of 2001 concerning Eradication of the crime of corruption (Article 20);
13. Law Number 36 of 1999 on Telecommunications (Article 15);
14. Law Number 15 of 2002 concerning The crime of money laundering (Articles 1, 4, 5); and
15. Perpu or Emergency Law Number 1 of 2002 in conjunction with Law no. 2 of 2002 in conjunction with Law no. 15 and 16 of 2003 concerning criminal acts of terrorism (Articles 1, 18).

Some of the provisions of the laws and regulations mentioned above, there seems to be a desire to place corporations as perpetrators of criminal acts, but the direction of development is not clear regarding its accountability (Rifai, 2021). If classified, it will appear that there are several ways in which lawmakers formulate the position of corporations as actors and their responsibilities as follows:

a. Only the administrators as actors and administrators are responsible (Articles 169, 398, 399 of the Criminal Code);
b. Corporations are recognized as being able to commit criminal acts, but criminal responsibility is charged to the management (Article 19 of Law Number 1 of 1951, Article 34 of Law Number 7 of 1981, Article 35 of Law Number 3 of 1982, and Article 15 of Law Number 4 of 1984);
c. Corporations are expressly recognized as being perpetrators of criminal acts and can be accounted for in criminal law (Article 15 of Law Number 7 Drt of 1955, Article 20 paragraph (1) of Law Number 31 of 1999 in conjunction with Law Number 20 of 2002, Law Number 36 of 1999, Law Number 15 of 2002, Perpu or Emergency Law Number 1 2002 in conjunction with Law Number 2 of 2002).

Even though laws and regulations outside the Criminal Code have accepted corporations as subjects of criminal law, there is almost no jurisprudence on this matter (Marbun, 2018).

The problem, according to the author, lies in the lack of clarity in the formulation in the legislation regarding several things including the following:

1. The unclear formulation regarding when a corporation is declared a perpetrator and when a criminal act has been committed on behalf of a corporation. This must be formulated explicitly, because if the legal subject mentioned is only a legal entity without clear specifications or identities, then the difficulty of determining who the maker is will always arise ambiguity;
2. The unclear formulation of the actions that will be accounted for through the formulation of the corporation as the subject of a criminal act. Whether it intended to control deviant behavior carried out in a corporation or whether it intended to control deviant behavior carried out for purposes on behalf of the interests of the corporation. Technically juridical such a statement can lead to different interpretations, depending on the way and how people interpret it;
3. It is unclear what criteria are used as guidelines to account for corporations, because criminal legal liability is always associated with the problem of mistakes and elements of forgiving reasons;
4. Criminal matters imposed against corporations. The type of criminal fine imposed on corporations, even though the amount is increased, remains ineffective, because there are no specific rules governing what if the fine is not paid by the corporation.
5. Specifically regarding additional penalties, namely the revocation of rights obtained by corporations, it needs to be clarified thus as not to cause differences in interpretation. What is meant by the revocation of rights obtained by the corporation is the revocation of the company's operating license. This needs to be emphasized.

Within the scope of the formation of the Indonesian National Criminal Code, special attention has emerged regarding social protection against corporate activities that are detrimental to the community thus corporations are deemed necessary to be formulated as actors and those who are responsible (Atmaja, et.al. 2022).

The concept of the corporation and corporate responsibility as the subject of criminal acts was formulated by the drafting team of the 2019 Criminal Code Draft Article 162 and Article 44 to Article 49. The formulation of these articles is as follows:

Article 162 : a corporation is an organized collection of people and or wealth, whether it is a legal entity or not.

Article 44 : corporations can be held accountable for committing criminal acts.

Article 45 : if a criminal act is committed by or for a corporation, the sentence may be imposed on the corporation and or its management.

Article 46 : a corporation cannot be criminally responsible for an act committed for and or on behalf of a corporation, if the act is not included in the scope of its business as stipulated in the articles of association or other provisions applicable to the corporation concerned.

Article 47 : criminal liability of corporate management is limited as long as the management has a functional position in the organizational structure of the corporation.

Article 48 paragraph (1): in considering a criminal charge, it must be considered whether other parts of the law have provided more useful protection than imposing a sentence on a corporation;

Paragraph (2) : the considerations as referred to in paragraph (1) must be stated in the judge's decision; and

Article 49 : excuses for excuses or justifications that can be put forward by the maker acting for and on behalf of the corporation, can be submitted by the corporation as long as the reason is directly related to the act that is being charged against the corporation.

Regarding the position as an actor and the nature of corporate responsibility, it is stated in the explamination of Article 46 of the 2019 Draft Criminal Code is as follows:

a. the cooperative management is the actor and therefore the management is responsible;
b. corporation as a responsible maker and manager;
c. Therefore, if a criminal act is committed by and for a corporation, the prosecution can be carried out and the punishment can be imposed on the corporation, the cooperative and its management, or only its management.

The main punishment that can be imposed on corporations according to the 2019 Draft Criminal Code is only a fine with a maximum threat of a heavier fine than the threat of a fine against people, which is the next higher category. The maximum fines for corporations are those who commit criminal acts that are punishable by a maximum imprisonment of 7 years to 15 years is a category V fine and a death penalty, life imprisonment, or maximum imprisonment of 20 years is a category VI fine. Meanwhile, the minimum fine for corporations is category IV fines (Article 75 paragraph (4), (5), (6)). An additional penalty that can be imposed on a corporation is in the form of revocation of rights obtained by the corporation (Article 84 paragraph (2)).

From the description above, it can be seen that three circumstances make corporations accountable in criminal proceedings, namely:

1. The basis of liability that arises as a result of the actions of cooperative agents acting on behalf of cooperatives within the scope of their work;
2. Corporate liability arises if the criminal act contains an element of negligence to carry out certain obligations; and
3. The form of the crime is legalized, desired, ordered, implemented, or tolerated by the board of directors acting on behalf of the company within the scope of work.

The provisions for absolute liability are assumed to apply to corporations unless otherwise specified, there are also provisions regarding the defense of "due diligence" for corporations based on stronger evidence so that high-level managerial agents who have supervisory responsibilities over the main issues of criminal acts committed by businesses to prevent crime (de Bunt & Huisman, 2007).

In addition, it is also regulated that a person is individually responsible for actions he or she does on behalf of the corporation to a certain extent which seems to be carried out in his name. Likewise, for corporate agents who have primary responsibility in carrying out corporate obligations and then in carrying out these obligations, they are individually responsible (Tomasic, 1994).

In the context of corporate criminal liability, corporations as legal personalities can have assets like humans and can sue and be prosecuted in civil cases (Husak, 2014). At first, there was a refusal of people to be responsible for corporations in criminal cases, the reason being

that corporations did not have feelings like humans so that they could not make mistakes. In addition, imprisonment may not be applied to corporations (Wibisana, et.al. 2018). However, considering the negative impact caused by corporate activities, the idea arose to hold corporations accountable in criminal cases (Bittle, 2013). It is said that the corporation is responsible for the actions of its members within the scope of its work. Of course, the penalties that can be imposed on corporations are usually in the form of fines or other actions such as disciplinary actions or administrative actions.

To overcome the increasingly complex development of crime, it seems that classical criminal law which adheres to the principle of error is no longer capable. Therefore, it is necessary to reform the field of criminal law by acknowledging that the principle of guilt is no longer the only principle that can be used. In modern criminal law criminal liability can also be imposed on a person, even though that person does not at fault at all (Semrad, Scott-Parker & Nagel, 2021).

Observing the prospect of future norm structure in the frame of the ius constituendum, there is a clear tendency to renew the criminal responsibility system adopted by the current criminal law. This development is motivated by the rapid development of society in the fields of science and technology, as well as in the fields of economy and trade. This development is characterized by a tendency to accept deviations or exceptions to the principle of error. In this regard, its relevance to criminal law reform in Indonesia is examined from the theoretical justification, sociological justification, and philosophical justification.

The basis for theoretical justification, this theoretical relevance needs to be stated with the consideration that the validity of a rule of law does not conflict with the trend of global thought development. This theoretical relevance must also be related to the scientific way of thinking that the newly introduced legal rules can be accepted or opposed by various arguments. Reasons and arguments based on abstract thinking are also based on the reality that occurs in society, both the reality in legislation and the reality in law enforcement through court decisions/jurisprudence. Introduction of a deviant accountability system and the principle of error are the influence of the common law system (Cavanagh, 2011), the accountability system is recognized considering the very fast development of society, both in the fields of industry, economy, and trade (Bittle & Frauley, 2018). This fact proves that law develops by following

the stages of development of its society. The stages of development from primitive kinship ties to a modern territorial state. Here it is shown how the law needed by the community to regulate the life of the community itself should be adapted to the developments that exist in society. Deviations from this error principle are given limitations that must be considered in applying the principle of absence of guilt and criminal responsibility, the limits are 1) the extent to which the consequences caused by the development of new offenses threaten the very broad public interest and the existence of social life as a totality and 2) the extent to which the values of justice based on Pancasila justify the principle of no faults at all.

Thus, the core of the problem revolves around the extent to which the meaning of guilt or criminal responsibility must be expanded while still considering the balance between individual interests and the interests of the wider community. This problem is not an easy one. Careful consideration must be given to making a drastic leap from the concept of error which has been extended in such a way to the concept of zero error. The latter is the deepest root in the values of justice based on Pancasila. The justification for the deviation of the principle of error in corporate criminal liability can be observed from the basic objectives of criminal law and punishment which are integrative in the context of social protection, namely 1) general and special prevention, community protection, 3) maintaining community solidarity, and 4) compensation or balancing. The reason for the need for the formulation of strict liability and vicarious liability in corporate punishment is a reflection of protecting social interests.

Sociological justification is needed to assess the extent to which deviations from the principle of error in criminal responsibility are acceptable to society (Suartha, et.al., 2020). In connection with this, there are two known theories, namely the theory of recognition and the theory of power. Both theories are used in assessing the applicability of the error principle deviation whether it can be applied or not in Indonesian society (Suartha, et.al. 2021). According to the recognition theory, whether or not a legal norm applies is determined by the extent to which society accepts and recognizes it as a norm that is obeyed. A new legal provision may be considered law if it is legally recognized by the community. Meanwhile, according to the theory of power, whether or not a norm applies is seen as far as the norm is enforced by a certain power. At the extreme, it states that in the view of the theory of power, a legal norm is valid because of power which is commanding, separate from the consideration of

whether or not there is recognition from the society it governs. Recognition of legal subjects other than people, such as legal entities, partnerships, or community associations can be announced to be an advanced thought, considering that it is not only humans who can become legal subjects (natural humans). With this recognition, it states that the development of thinking on the subject of offenses in criminal law currently has sociological relevance to Indonesian society. That is, the extent to which the deviation from the principle of error is supported by his morality to act and the extent to which the deviation from the principle of error is given the power to apply in Indonesian society. This also means whether or not the deviation of the principle of error is enforced in Indonesia regarding legal politics and criminal politics applied in Indonesia (Lasmadi, 2021). Deviations from the principle of error (Arofa, et.al., 2015), with strict restrictions, may or may not be enforced in Indonesia, depending on the attitude of the legislators to determine them, by emphasizing efforts to maintain a balance of social interests in social life.

The basic philosophical justification is related to its compatibility with the legal mind and the philosophy of national law in Pancasila (Yusa, et.al., 2021), which is the state ideology, basic principles, and guidelines for the Indonesian people and their state life (Hermanto & Aryani, 2021). The introduction of deviations from the principle of guilt is contrary to the principle of men's area because according to the principle of men's area, someone who is accused is proven guilty. However, with the socio-economic development of the community, which is also followed by the development of increasingly complex crimes (Peno, 2019), namely the emergence of acts that are light but very dangerous to the community, proving the element of guilt in corporate responsibility is very difficult in law enforcement practice.

6. Conclusion

The conclusion in this article including first, is that the Criminal Code cannot capture corporations as legal subjects who can be punished, because they still adhere to the principle that legal subjects are only natural humans. Several laws and regulations outside the Criminal Code have begun to deviate from this general principle, by trying to place the corporation as a subject of criminal law and the issue of criminal liability. Second, in the perspective of the ius constituendum, the subject of corporate criminal acts and their criminal liability has been

formulated in a firm and detailed manner in the draft of the 2014-2015 Criminal Code, Article 162, Article 44 to Article 49.

There are two suggestions including first, the legislators should be more assertive in the Criminal Law regarding the acceptance of corporations as legal subjects in criminal law, so that corporations can be prosecuted and sentenced. Second, legislators should accept the principle that deviates from the principle of error is not contrary to the philosophy of Pancasila. In other words, an in-depth study is needed for Indonesia that the deviation from the principle of error has juridical, sociological, and philosophical relevance.

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