



The Concept of Corporate Crime in the Indonesian Criminal Law System

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Abstract

This study aims to find answers to the problem “How is corporate criminal liability as a corporate criminal offense? “The type of research used in this study is normative juridical (legal research), which is research focused on examining the application of rules or norms in positive law in force. Corporations act and act on the interests of corporations through a systematic management structure, based on this view and supported by several theories such as Strict Liability and Vicarious Liability, corporations can be subject to criminal penalties. Corporations are liable because without corporate criminal liability, it is not impossible for a company to avoid criminal regulations and not only its employees are sued but also directors, commissioners, shareholders because they have committed a crime which is actually a mistake of business activities carried out by the company.

Keywords: *Responsibility; Corporation*

Introduction

Crime is not static but very dynamic, meaning that crime develops in accordance with the development of society. Although the nature of crime from the past until now is still the same, namely harming the various interests and the resulting losses are not the same. Conventional crimes, both the perpetrators, the modus operandi, and the results obtained are not commensurate with the risks borne by the perpetrators, as well as with the impartiality of the law.

In one adage, the poorer the nation, the higher the level of crime that seems to be no longer valid today. Now the adage is only valid for conventional crimes such as robbery, theft, fraud, embezzlement. This is since the higher the economic level of a nation, the types of crime that are increasingly diverse and increasingly sophisticated.

Unlike the case if the crime was committed by a corporation or just call it a corporate crime, seen from the aspect of law enforcement, the law is often smiling so the queen of justice, whose eyes were initially tightly closed, are no longer tight. Likewise, the sword in his hand became blunt and the scales in his left hand were biased.

Crimes committed by corporations have broader consequences and more victims, although sometimes not directly. Forest fires committed by corporations clearly have an extraordinary impact. The community is hampered by activities due to smoke which disturbs vision and breathing. Not only

experienced by one country, forest fires that occur in Indonesia smoke to neighboring countries. Not to mention the environmental damage caused by it. Flight disrupted and resulted in trillions of losses. It is not possible for the impact to be very broad if only done by one person.

This white-collar crime concept according to Gottfrdson and Travis Hirchi¹ has two desired consequences. First is the denial of the theory that crime occurs because of poverty, namely that crime can also be committed by the upper class and its immunity against the law. Furthermore, white collar crime is an important area of development for criminality research and now a lot of research and thought is devoted to the field. In subsequent developments, White collar crime tends to be organized and transnational in nature. Corporate crime is then included in this white-collar crime group.

As it is known, the Criminal Code does not recognize corporations as legal subjects. One indication used is the existence of Article 59 in Book I of the Criminal Code which states "In terms of determining the penalty for violations of the management, members of one of the management, or commissioner, then the sentence is not imposed on the management or commissioner, if it is evident that the violation has occurred in outside the burden."

So, the article does not threaten the criminal to people who have not committed a crime. This means that even if he does that for the corporation or legal entity, the corporation cannot be criminally imposed.

Besides this the Criminal Code adheres to the principle of no criminal without error. This is as intended in Article 44 of the Criminal Code which reads: "Whoever commits an act that cannot be accounted for to him, because his soul is disabled in growth or disturbed due to disease is not convicted". So, the priority in this article is his soul. While the corporation has no soul. Only humans have souls. Article 44 and Article 59 are contained in book I general provisions, it is clearly intended in this Book I that the provisions in the Criminal Code are not intended for corporations.

But corporations also commit criminal acts. For this reason, a corporation must be held accountable for its criminal liability. Some criminal acts outside the Criminal Code regulate corporations as subjects of criminal law; such as Emergency Law No.7 of 1965 concerning economic crimes, Law No.33 of 1999 concerning Eradication of Corruption Crimes as amended by Law No. 20 of 2001 and other laws.

Money Laundering is a relatively new crime in Indonesia, although in practice forms of money laundering have long been carried out. Money laundering is a double criminal offense. An act that is preceded by another crime which is usually called a predicate offense. Simply stated, money laundering is defined as a process of making proceeds of crime or referred to as dirty money in a form that looks legitimate so that it can be used.

Money laundering is not possible immediately, careful planning is needed in doing so, money laundering crimes are also typing of crimes that are difficult to do alone. The process that must be passed in money laundering is quite complicated, the verification process in court is complicated. Especially those who do corporations. With an extensive network and organized people, it is quite difficult to prove how corporations can be said to be involved in criminal acts.

In corporate criminal offenses a more complex problem arises given that corporate criminal action is an organized act. For this reason, this research will seek answers to the problem "How is corporate criminal liability as a corporate criminal offense?"

Result

Corporate is a term commonly used by criminal law and criminologists to refer to what in other legal fields especially in the civil field as a legal entity or in Dutch is called rechtspersoon.

¹ Dalam Arief Amrullah, 2006, *Kejahatan Korporasi The hunt for mega profit and Attack on democracy*, Bayumedia Publishing, Malang, p. 21

In positive criminal law the concept of corporation has a broader meaning than the notion of a legal entity. In criminal acts, corporate money laundering is defined as a collection of people and / or assets that are organized either as a legal entity or not a legal entity. The definition means broader than the understanding of legal entities in the concept of civil law. Or it can be said that every legal entity is a corporation, but not all corporations are legal entities, because there are corporations that are not legal entities, namely organized gatherings of people and / or assets that are not legal entities, for example a firm of a firm.

Corporations as subject to criminal law are still limited in the provisions of the law outside the Criminal Code. These provisions have the concept of a corporation as an organized collection of people and / or wealth, both legal entities and non-legal entities. Inequality and imperfections in the legislation about the meaning of the corporation are not obstacles to stating the existence of the corporation, especially if the corporation has already functioned for life in society and from the standpoint of the corporation's society is indeed needed.

The emergence of the phenomenon of crime is not only committed by individuals but also by legal entities or in the form of corporations is an international concern. The world level meeting in the fourth congress of the United Nations (United Nations) in 1970 concerning the prevention of crime in Geneva also discussed changes in the form and dimensions of crime, one of which is in the form of Crime and Business which is crime aimed at obtaining material benefits through business activities (business)) or industry which is generally carried out in an organized manner and carried out by those who have a prominent position in society. Included in this crime are related to environmental pollution, consumer protection and in the banking sector, in addition to other crimes that can be known as “organized crime; white collar crime”.²

Crimes committed by corporations are so professional with such a broad organizational structure, that there is a potential room for the emergence of crime so that it is difficult to set limits on what is done by corporations as a crime or not. This was revealed by Michael B. Blankenship;

“.....to examine systematically the problem of corporate criminality, specifically addressing the evolution and limitations involved in understanding this genre of crime. The study of corporate criminality also provides us with the opportunity to explore larger issues, such as social justice. The weight of the evidence strongly suggests that the notion of the rule of law as a prevailing principle of justice as a cruel euphemism for hegemony”.³

In its development, crime is carried out in an organized manner in the form of a corporation, many terms or definitions of corporate crime often confuse the difference between the actual corporate crime from the perpetrators and the characteristics of the crime. So to clarify the problem, it can be explained with some limitations on the definition of crime in relation to corporations including;

1. *Crime for Corporation*

Is a corporate crime committed for the benefit of the corporation itself not for the benefit of individuals or perpetrators. This is done by the corporate organ (management) solely for corporate profits.

2. *Crime Against Corporation*

Crimes committed for the benefit of individuals are often committed by corporate workers (employee crime) against the corporation, for example embezzlement of company funds by officials or employees of the corporation itself.

² B.N.Arif; 1994, Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara, UNDIP Publisher Agency, Semarang. p.13.

³ Michael B. Blankenship; 1993, Understanding Corporate Criminality, Garland Publishing, New York. p. xx.

3. *Criminal Corporation*

Corporations that are deliberately controlled to commit crimes, the position of the corporation here is only to commit crimes, the corporation is only a mask of its evil aims.⁴

The above distinction shows that it turns out that crime is not only done personally but is already very professional in an organization, crime for corporation is a crime committed by corporations with the sole purpose of seeking economic benefits, based on this economic motive the corporation often violates the law.

The development of crime today is not only done by those who have social and personal ailments, but they are also from business people organized in a corporation, E.H. Sutherland states that:

In contrast to those theories, my theory was that criminal behavior is learned just as any other behavior is learned, and that personal and social pathologies play no essential part in the causation of crime. I believed that this thesis could be substantiated by a study of the violation of law by businessmen. Businessmen are generally not poor, are not feeble-minded, do not lack organized recreational facilities, and do not suffer from the other social and personal pathologies, commit many crimes, then such pathologies cannot be used as the explanation of the crime of other classes.⁵

Such is the severity of organized crime, which has done a great deal of harm to society collectively and even to the state. In the UN congress in Caracas by taking a central theme on “crime prevention and quality of life”, looking at crime has endangered the environment, among others stated:

Considering whereas the phenomenon of crime, through its influence on society, disturbs the entire development of nations, is the welfare of the people both spiritually and materially, endangers human dignity and creates an atmosphere of fear and violence that undermines the quality of the environment.⁶

Evil becomes a historical necessity; this phenomenon seems to be an eternal problem in the order of human life. Crimes have spread globally following the times. This crime is not only a personal problem of the victim, but more broadly becomes a collective problem of the community, the state, and even includes transnational space as an international crime. The shift is not only done conventionally but more than that, many of their actions are very difficult to know whether as a crime or not. Even though there are so many victims both the community or the state that bear the burden of losses due to the crime.

The fact that corporations have committed various kinds of crimes has long occurred, in 1932 a result of research on 70 large corporations in the United States clearly shows how corporations have committed various kinds of crimes, from the results of these studies E.H. Sutherland states that:

I wish to report specially on a part of my study of white-collar crimes. I selected the 70 largest industrial and commercial corporations in the United States, not including public utilities and petroleum corporations. I have attempted to collect all the records of violations of law by each of these corporations, so far as these violations have been decided officially by courts and commissions. I have included the laws regarding restraint of trade, misrepresentation in advertising, infringement of patents, copyrights, and trademark, rebates, unfair labor practices as

⁴ H.Setiyono; 2002, *Kejahatan Korporasi-Analisa Viktimologis dan Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia*, Penerbit Averroes Press, Malang. p. 16-18.

⁵ E.H.Sutherland; 1977, *Crime of Corporation*, dalam Geis dan Meier. *White Collar Crime, offences in Bussines, Politics, and the Professions*. The Free Press, New York. p. 79.

⁶ B.N.Arif; 1994, *Op. cit*, p. 15.

prohibited by the National Labor Relations Law, financial fraud, violations of war regulations, and small miscellaneous group of the other laws.⁷

In the development of corporate crime, several forms of crime and victims of corporate crime can be inventoried, including violations against consumers, environmental pollution, administrative violations, financial, labor, manufacturing and unfair trade competition. Therefore, corporate crime in the view of Marshall B. Clinard and Peter C. Yeagar states that;

A Corporate crime is any act committed by corporation that punished by the state, regard or whether is it punished under administrative, or criminal law.⁸

Symptoms of legal violations committed by corporations such as above have a negative impact whose risks are very broad on social life, on this basis, legal entities begin to be in the spotlight of attention of legal experts so that legal entities are not only subject to civil law but can also be subject to criminal law so that it can be prosecuted and convicted of criminal sanctions.

Discussion

1. The Concept of Corporate Criminal Liability

a. Theory of Strict Liability

In this conception, the corporation is assumed to be responsible for acts that are physically carried out by its shareholders, management, agents, representatives or employees. In the field of criminal law, “strict liability” means that malicious intentions or “*mens rea*” do not have to be proven in relation to one or more elements that reflect unlawful behavior or “*actus reus*”, although intentions, carelessness or knowledge may be required in connection with elements another crime.

According to prof. Barda Nawawi, the theory can also be called the strict criminal liability doctrine according to the law or “Strict liability” This framework of thought is a consequence of the corporation as a legal subject, namely in the case that the corporation violates or does not fulfill certain obligations required by law, then the artificial legal subject must be criminally responsible. The important thing from this theory is that legal subjects must be responsible for the consequences that arise, without having to prove the existence of errors or omissions.

Violations of certain obligations or conditions by this corporation are known as “strict liability offences”. An example of the formulation of a Law which stipulates as an offense for a corporation is in terms of:

- a) corporation that runs its business without permission;
- b) corporation license holder that violates the conditions (conditions/situations) specified in the permit;
- c) corporation that operates vehicles that are not insured on public roads.

⁷ E.H.Sutherland, Op. cit, p. 79-80.

⁸ Clinard, Marshall B & Peter C.Yeagar; 1980, Corporate Crime, The Free Press, New York. p.16.

b. Vicarious Liability Theory

Based on this theory, it can generally be said that superiors must be responsible for what is done by their subordinates. As defined, the legal principle of “vicarious liability” is that a person is responsible for actions carried out by another person, when both are included in a form of joint or joint activity. The doctrine has traditionally been a conception that emerged from the “common law” legal system, which is referred to as “respondent superior”, namely the secondary responsibility arising from the “doctrine of agency”, where superiors are responsible for the actions carried out by their subordinates.

Among the experts who study this theory, by departing from the employment relationship in relation to “vicarious liability”, Peter Gillies makes the following thoughts:

- a) A company (as is the case with humans as perpetrators/entrepreneurs) can be held liable in exchange for actions done by their employees/agents. Such liability only arises for offenses that can be carried out vicariously.
- b) In connection with the “employment principle”, these offenses are mostly or wholly constituted as “summary offenses” relating to trade regulations.
- c) The position of the employer or agent in the scope of work is irrelevant according to this doctrine. It is not important that the employer, both as a corporation and naturally has not directed or instructed employees to violate criminal law. (In fact, in some cases, vicarious liability is imposed on the employer even though the employee commits an action contrary to instructions, based on the reason that the employee's actions are having committed the act within the scope of his work). Therefore, if the company is involved, accountability arises even if the act is carried out without referring to senior people in the company. It should be stated that this doctrine can apply based on the principle of delegation of authority or “the delegation principle”. Thus, malicious intentions or “*mens rea*” or “a guilty mind” from employees can be linked to superiors if there is a delegation of authority and obligations that are relevant according to the Act.

c. Identification Theory

Direct criminal liability (which also means non vicarious), states that senior employees of the corporation, or people who receive delegation of authority from them, are viewed with specific objectives and in a special way, as the corporation itself, with consequences that their inner actions and attitudes are seen as directly causing these actions, or constitute the inner attitude of the corporation. The scope of criminal offenses that may be committed by corporations in accordance with this principle is broader, compared to if based on the doctrine of “vicarious”. The theory states that the actions or mistakes of “senior officers” (senior officers) are identified as corporate actions or mistakes. This conception is also called the doctrine of “alter ego” or “organ theory”.

In Prof.'s view Dr. Barda Nawawi, the notions of “senior officials” of the corporation can vary. Although in general, senior officials are people who control the company, both alone and together, commonly called “directors and managers”. While in the United States, this theory is interpreted more broadly namely not only senior officials / directors, but also agents under it. This is reflected in the opinions of the following experts and legal practitioners.

2. Corporate Criminal Liability in Indonesia

In the Indonesian Criminal Code (KUHP), there are no known criminal provisions that stipulate the subject of artificial law (*rechtspersoon*) or corporations, as subjects that can be subject to crime. This

can be seen in the general provisions of the Criminal Code which states the entry into force of Indonesian laws and regulations for everyone. Another term used in the Criminal Code is “citizens” as referred to in Article 5 of the Criminal Code, which in essence stipulates the enactment of Indonesian laws and regulations for Indonesian citizens who commit certain crimes, outside Indonesian territory. However, in its development, corporations later became subject to law in the formulation of criminal provisions. The following is an example where a specific law regulates corporations as subject to criminal acts, but only the management can take responsibility for:

- a) Act No. 1 of 1951 (Employment Law);
- b) Act No. 2 of 1951 (Accident Act);
- c) Act No. 3 of 1951 (Labor Surveillance Act);
- d) Act No. 12 of 1951 (Firearms Act);
- e) Act No. 3 of 1953 (Pharmacy Opening Act);
- f) Law No. 22 of 1957 (Labor Settlement Act);
- g) Law No. 3 of 1958 (Foreign Settlement Act);
- h) No. 83 of 1958 (Aviation Act);
- i) Law No. 5 of 1964 (Telecommunications Act; changed to Law No. 5 of 1989);
- j) Act No. 7 of 1981 (Employment Reporting Act);
- k) Act No. 2 of 1981 (Legal Metrology Act);
- l) Act No. 3 of 1982 (Corporate Reporting Act).
- m) Law No. 7 of 1992 (Banking; amended Law No. 10 of 1998).

The decision to hold corporations accountable in the form of their management can also be seen in the provisions of Article 46 paragraph (2) of Law Number 7 of 1992:

“In the event that the activities referred to in paragraph (1) are carried out by legal entities in the form of limited liability companies, associations, foundations or cooperatives, the prosecution of such bodies shall be carried out either against those who give orders to carry out such acts or who act as leaders in actions. that or both. “

From the formulation of the article, it is clear that the management authorized to give orders to their subordinates in the banking corporation, which can later be held criminally responsible.

Conclusion and Recommendation

Conclusion

The corporation is not fiction, it really exists and occupies an important position in society and can cause harm to other parties in society as well as humans. Treating corporations like humans (natural person) and imposing responsibility for criminal acts made by corporations is in line with the legal principle that anyone is equal before the law (principle of equality before the law). Corporations that can have a profound impact on social life should also be required to respect the fundamental values of our

society that are determined by criminal law. Corporations act and act on the interests of corporations through a systematic management structure, based on this view and supported by several theories such as Strict Liability and Vicarious Liability, corporations can be subject to criminal penalties. Corporations are liable because without corporate criminal liability, it is not impossible for a company to avoid criminal regulations and not only its employees are sued but also directors, commissioners, shareholders because they have committed a crime which is actually a mistake of business activities carried out by the company. Including if a company has made a profit from illegal business activities (money laundering), then the company (board of directors, commissioners, shareholders) should also be subject to sanctions for crimes that have been committed, not just the employees of that company.

Imposing criminal liability to a corporation for a crime committed by a person is if fulfilled all the elements or conditions as follows: a. The criminal act (both in the form of commission and omission) is carried out or ordered by corporate personnel who in the corporate organizational structure have a position as directing mind of the corporation; b. The criminal offense is committed in the context of the corporate aims and objectives; c. A criminal offense is committed by a perpetrator or by order of a giver of an order in the framework of his duties within the corporation; d. The crime was committed with the intention of providing benefits to the corporation; e. The perpetrator or the giver of the order has no justification or excuse for being forgiven of criminal liability; f. For criminal acts which require the existence of an element of action (*actus reus*) and an element of error (*mens rea*), the two elements (*actus reus and mens rea*) do not have to be present in only one person.

Recommendation

Money Laundering is a complex crime. Can be done by corporations and / or individuals. For this reason, it is necessary to think about the rules that govern how if the culprits are a combination of people and corporations, so that the penalties provided are more appropriate.

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