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CORPORATE CRIMINAL LIABILITY

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Abstract

The evolution perspective that place person not the only one criminal law subject, but also corporations, has ignored the principle "universitas delinquere non potest" which has been used as a reason that corporations that commit crime cannot be stated as perpetrators of crime, and shift into perspective that corporations can be stated as criminal law subject. Indonesia has recognized corporations as perpetrators of crime, this can be proven by the existence of corporate arrangements as perpetrators of criminal acts in various laws and regulations in Indonesia outside the Criminal Code. However, despite the recognition that corporations are subject to criminal law, in reality we see that there are still many criminal acts involving corporations that do not direct corporations to become suspects in the judicial process. This would be a problem for law enforcement in Indonesia. With the recognition of the corporation as the subject of a criminal act, then it is important to criminalize not only the board but also to related corporations. If corporate not addressed as criminal, therefore the purpose of punishment will be different if the criminal is only addressed to administrators but not to the corporation. In general,-the charging of criminal is purpose as a deterrent effect against the corporation who committed the crime and also, also as an effort to prevent the criminal act is not performed by the other corporations. Associated with a given criminal purposes, if only the criminal responsibility on the corporate board of sentencing objectives to be achieved will be difficult to achieve. It would be important to not only penalize the corporate board, but also still penalize the corporation concerned

Keywords: Corporate, criminal liability, criminal

INTRODUCTION

The term corporate crime used is the equivalent of the English term corporat crime commonly used in international criminal law. (Amrullah, 2018; Elfina Lebrine, 2010) Corporate criminal acts are related to the burden of criminal liability against corporations. The concept of criminal liability to corporations is a new concept in criminal law. (Saputra, 2015; Sjawie, 2018) Before the emergence of this concept, only humans were subject to criminal law. After the enactment of the concept of corporate criminal liability in criminal law, then according to

criminal law, in addition to human beings and corporations are the subject of criminal acts.(Krismen, 2014; Suhariyanto, 2016)

The emergence of the concept of corporate criminal liability (corporation as a criminal offence), triggered by the increasing number of events that cause disaster for the community because of the actions of the corporation through the actions of the corporate controlling personnel.(Manullang, 2020) In fact, many disasters that occur are not only limited to the local community but also to the detriment of the international community. Concerns about the actions of corporate controlling personnel in conducting corporate activities that could cause harm to the community, have been feared since 1864 by Abraham Lincon, the 16th President of the United States.(Sjahdeini, 2017)

Corporations contribute a lot to the development of a State, especially in the economic sector, such as state income in the form of taxes and foreign exchange, so that the impact of the corporation looks very positive. On the other hand, corporations also rarely create negative impacts, such as pollution, destruction of natural resources, fraudulent competition, tax manipulation, exploitation of workers, producing products that harm the wearer, as well as fraud against consumers. Giant corporations not only have such a great wealth, but also have social and political power in such a way that the operations or activities of these companies greatly affect the lives of everyone from birth to death.

The purpose of the corporation to increase its profits resulted in frequent violations of the law. Corporations in the form of a legal entity or not a legal entity has a great power in carrying out its activities so that it often conducts activities that are contrary to the prevailing laws, even giving rise to victims who suffer losses. However, many corporations escape the pursuit of the law so that corporate actions contrary to the law are increasingly widespread and difficult to control. The corporation easily removes evidence of crimes against the community including interfering with law enforcement officers.

Losses from corporate crimes are often difficult to estimate because the consequences are multiple, while crimes in the form of imprisonment or confinement and court fines do not

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reflect their crime rate. Corporate crimes that are usually in the form of white collar crime, are generally committed by companies or legal entities engaged in business with various actions contrary to applicable criminal law. Based on the experience of developed countries, it can be argued that the identification of corporate crimes can include criminal acts such as violations of monopoly laws, computer fraud, tax and excise payments, violations of price provisions, production of goods that endanger health, corruption, administrative violations, labor, and bribery.

METHODOLOGY

This research is descriptive-analytical, namely, research describing and outlining issues related to criminal liability to corporations that commit corruption crimes, factors inhibiting corporate crimes that commit corruption, and the perspective of accountability for corruption by co-ordination. Normative juridical and empirical juridical are used in this approach of methodology. The nThe normative juridical approach is an approach based on legislation, theories, and concepts related to research writing. It is then an empirical juridical approach to conduct field research by looking at the facts in practice and its implementation. About normative research, the approaches used are:

1. Statutory approach (statute approach), an approach taken to various legal rules related to fishery crimes such as Law No. 20 of 2001 on Amendment to Law No. 31 of 1999 concerning the Eradication of Corruption; Law No. 8 of 1981 on the Criminal Code; Law No. 48 of 2009 on the Power of Justice; Law No. 40 of 2007 on Limited Liability Companies and several implementation regulations related to research objects;
2. Conceptual approach is used to understand the concepts of Corporate Criminal Accountability Perspective as Perpetrators of Corruption Crimes such as criminal liability, corporations, and corruption crimes. With a clear concept, it is expected that the deposition in the rule of law no longer occurs a vague and ambiguous understanding.

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In this study, the population consisted of district court judges, state prosecutors, lawyers / legal advisors, and theoretical / academics. To determine the sample from the population above, the proportional purposive sampling method is used, which means that determining the sample is adjusted to the objectives to be achieved and the proportion of each sample considered to have represented the population to the problem studied/discussed. Following the method of determining samples from the population to be examined, the samples discussing this research are 1 judge of the Tangerang Class IA District Court, 1 Tangerang state prosecutor; 1 lawyer/legal advisor; and 1 theoretical person / academic. To analyze the data that has been collected by the author using qualitative analysis. Qualitative analysis is carried out to illustrate the existing facts based on the research results in the form of explanations from analysts.

RESULT AND DISCUSSION

The Criminal Code that currently applies, namely the Criminal Code which is a relic of the Dutch colonial era when Indonesia was still called the Dutch East Indies, only recognizes people who are the subject of criminal law (perpetrators of criminal acts). The Criminal Code has not recognized corporations, including legal persons, as the subject of criminal law in recent years.

The recognition of corporations as the subject of criminal law (perpetrators of criminal acts) in Indonesian criminal law is not by adding such provisions in the Criminal Code, as happens in some other civil law states. But the adoption of the concept is carried out through the indification of various laws outside the Criminal Code, namely adopted as a special criminal act.

Corporation as the subject of criminal law in Indonesia was officially adopted for the first time in 1952 with the enactment of Emergency Law No. 17 of 1951 on Hoarding goods. However, the law practically does not regulate corporate action as a criminal offence. The law does not specify in what case a corporation can be brought before the Criminal Court as a criminal offender and sentenced.

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The development of criminal law in the global community has changed the attitude of Indonesian criminal law. The attitude of the global community that has adopted the concept of corporate accountability has also been adopted by Indonesian criminal law. Although the current Article 59 of the Indonesian Penal Code has not been amended, which is still the same as the old Dutch Article 51 Sr, but the concept of criminal liability outside the Criminal Code has been adopted in various special criminal laws.

Finally, it is accepted that even if he does not have a heart, corporations according to Indonesian criminal law can also be burdened with criminal liability. Various special criminal laws in Indonesia, even since 1951 with the enactment of The Emergency Law No. 17 of 1951 on The Hoarding of Goods, which after that followed by various special criminal laws born later, has made the corporation also the subject of criminal acts other than human beings. In other words, corporations can also be burdened with criminal liability.

Other criminal laws outside the Criminal Code after the enactment of Emergency Law No. 17 of 1951 that have received the concept of criminal liability are the following laws:

1. Emergency Law No. 7 of 1965 on Economic Crimes;
2. Law No. 11 pnps year 1963 on The Crime of Subversion (this law has been repealed by law No. 26 of 1999 dated May 19, 1999);
3. Law No. 9 of 1976 on Narcotics Storage;
4. Law No. 23 of 1997 on Environmental Management;
5. Law No. 31 of 1999 on Corruption As amended by Law No. 20 of 2001;
6. Law No. 21 of 2007 on Trafficking in People
7. Law No. 11 of 2008 on Electronic Information and Transactions;
8. Law No. 32 of 2009 on Environmental Protection and Management;
9. Law No. 22 of 1997 on Narcotics as amended by Law No. 35 of 2009;
10. And Law No. 8 of 2010 on Money Laundering Crimes.

Thus, various laws, namely criminal law which is a special law outside the Criminal Code, has expanded or added the subject of criminal acts from the beginning only to human beings to include corporations as the subject of criminal acts.

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There are several corporate criminalization systems in use. According to Mardjono Reksodipuro there are three criminalization systems related to corporations, namely:(Reksodiputro, 2007)

a. The management of the corporation as the creator and the manager is responsible;
b. The Corporation as the maker and responsible administrator;
c. Corporation as the maker and also as the responsible.

Mardjono Reksodipuro's opinion is adopted in the 2015 Criminal Code Bill, namely in Article 50 of the Criminal Code Bill 2015 reads: "If a criminal act is committed by a corporation, criminal liability is imposed on the corporation and/or its management". The sound of Article 50 of the 2015 Criminal Code Bill indicates that criminal liability can be charged to:

a) Corporations only;
b) Caretaker only; dan
c) Corporations and Administrators.

According to the explanation of Article 50 of the 2015 Criminal Code Bill put forward: Regarding the position as a criminal code maker and the nature of criminal liability of the corporation there are the following possibilities:

1. The management of the corporation as the maker of criminal acts and therefore the board is the one who is accountable;
2. Corporations as criminal creators and accountable administrators; Or
3. Corporations as the makers of criminal acts and also as responsible.

Therefore, if a criminal act is committed by and for a corporation then the prosecution can be made and the criminal can be dropped against the corporation itself, or the corporation and its administrators, or the management only.

According to Sutan Remy Sjahdeini, it is impossible and should not only penalize the corporation without having to criminalize corporate control personnel (corporate

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management). According to him, there are only 2 (two) criminalization systems that should be taken. The two criminalizations are:[1]

1. The management of the corporation only (which is the controlling personnel or directing mind of the corporation) is prosecuted and convicted as a criminal offender, while the corporation is not prosecuted and penalized because the corporation is not proven to have been involved in the crime, that is, because all elements as referred to in the combined teaching are not fulfilled, or
2. Both the board or the corporation are prosecuted and penalized because the corporation is proven to meet the elements as referred to in the joint teachings.

In the first system, only the management is convicted, only if the requirements to impose criminal liability to the corporation are not met. However, if the requirements to impose criminal liability on the corporation are met, then the second system, namely both the management and the corporation that must bear the criminal responsibility, must be carried out.

In the system of proving the handling of corporate crimes, the Supreme Court (MA) issued Ma (Perma) Regulation No. 13 of 2016 on Procedures for Handling Criminal Acts by Corporations. This perma was signed by Chairman of MA M. Hatta Ali on December 21, 2016 and was only promulgated on December 29, 2016. This perma is a guideline for law enforcement officers and fills legal vacancies related to the procedures for handling certain crimes committed by corporations and or their administrators.

So far, certain laws have placed corporations as legal subjects that can be punished for harming the state and or society. However, it is very minimal to be processed to the court because there is no legal procedure for investigation, prosecution to court hearings, especially in formulating indictments for corporate entities.

This Corporate Criminal Perma contains a formulation of criteria for corporate error that can be called committing a criminal act; anyone who can be held liable for corporate criminal

[1] Sutan Remy Sjahdeini, *Ajaran Pemidanaan: Tindak Pidana Korporasi dan Seluk-beluknya,* Jakarta: Kencana, 2017. Hal. 256.

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liability; procedures for examination (investigation-prosecution) of corporations and or corporate administrators; procedures of corporate proceedings; types of corporate criminalization; the verdict; and the implementation of the verdict.

In terms of error criteria there are several things to note. First, the corporation gains or benefits from a particular crime or the crime is committed for the benefit of the corporation. Second, the corporation allows criminal acts to take place. Third, the corporation does not take preventive measures or prevent greater impacts and ensure compliance with applicable legal provisions to avoid criminal acts.

"In the case that one or more Corporate Executives cease, or die does not result in the loss of corporate liability," article 5 of the Corporate Criminal Code reads.nThis Perma not only regulates criminal liability committed by one corporation on the basis of employment or other relationships, but can also ensnare corporate and corporate groups in mergers, mergers, segregation, and dissolution processes. However, corporations that have disbanded after the occurrence of criminal acts cannot be penalized.

"However, against the assets owned by the corporation (which is dissolved) is suspected to be used to commit crimes and / or is the result of a crime, then the enforcement of the law is carried out in accordance with the mechanism of legislation."

This Perma determines the examination of the corporation and or its management as suspects in the process of investigation and prosecution either alone or together after the process (letter) summons. This summons letter contains: the name of the Corporation; place of residence; corporate nationality; corporate status in criminal cases (witnesses / suspects / defendants); time and place of inspection; and a summary of alleged criminal events.

Article 12 perma regulates the form of an indictment partially referring to Article 143 paragraph (2) of the Criminal Code with the adjustment of the contents of the indictment containing: the name of the Corporation, place, date of establishment and/or number of the articles of association/deed of establishment/regulation/document/agreement as well as the last amendment, place of residence, nationality of the corporation, type of corporation, form of activity/business and identity of the representative administrator. In addition, it contains a

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careful, clear, complete description of the alleged crime by mentioning the time and place where the crime was committed.

The evidentiary system for handling corporate crimes is still referring to kuhap and the provisions of event law that are regulated specifically in other laws. As with the defendant's testimony, the corporate statement is a valid evidence in the trial. While the criminal prosecution of corporations, namely the main criminal in the form of fines and additional criminal in accordance with the applicable law, such as replacement money, compensation and restitution.

If unable to be paid, the corporation's property is confiscated and auctioned by the Prosecutor to cover the amount of criminal fines, raking money, compensation and or restitution (civil lawsuit by the victim) that is decided by the court. This fine can be converted into a proportional imprisonment after the management has finished serving the basic crime (prison).

For the record, there are about 70 laws that ensnare corporate criminal liability, but are minimally processed and decided to go to court. Such as crimes of fish theft, illegal logging, forest burning, corruption, environmental destruction, money laundering committed by corporations. Because, KUHAP itself has not determined the technical guidelines for the preparation of an indictment when the legal subject of the perpetrator is a corporation.

In practice, investigators and prosecutors are reluctant or not to bring corporate crimes to court because of the difficulty of drafting and formulating indictments in corporate crime cases. The court also when prosecuting corporate crimes relies heavily on the indictment filed by the public prosecutor.

KPK itself as one of the institutions of interest has never made the corporation as the subject or suspect / accused of corruption. In fact, Law No. 31 of 1999 on the Eradication of Corruption Act jo Law No. 20 of 2001 (Tipikor Law) has provided instruments to ensnare corporations as perpetrators of corruption crimes. Although many of the company's directors have been convicted, KPK has been constrained to formulate how corporate responsibility as the perpetrators of corruption.

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The KPK and the Prosecutor's Office have tried to prosecute corporations for paying state damages, but often failed because the judge deemed the corporation not to be a defendant in the indictment. There was only one case of corporate corruption that was successfully dragged to trial, namely the corruption case of PT Giri Jaladhi Wana in the construction project of Pasar Sentra Antasari which was investigated by banjarmasin state prosecutor. PT Giri was sentenced to pay Rp1.3 billion and an additional penalty of temporary closure for six months.

CONCLUSION

The position of the corporation as the subject of criminal law is only accommodated by laws outside the Criminal Code governing certain deliberations. The regulation outside the Criminal Code makes the regulation of the corporation as the subject of criminal law and its legal liability differs from one regulation to another. Surely this will cause uncertainty about what kind of criminal arrangements apply to corporations in Indonesia. This was later identified by Mardjono Reksodiputro as several models of criminal accountability prevailing in Indonesia. With the regulation in the R-Criminal Code, of course, it will also make the uniformity of regulation regarding corporations as the subject of criminal law.

Corporation as the subject of law in criminal law is an inevitability considering the reality of corporate development that trying to get maximum profit brings the consequences of the fall of such a large victim, not only individuals, but society, nation and country. Aspects of the victim should get attention given the sense of justice measured also from the perspective of the victim. In response, the principles of law that have been applied to individuals do not need to be rigidly applied in corporate accountability. Various other special criminal law laws also regulate corporate liability such as laws on banking, psychotropics, narcotics, corruption, consumer protection, fisheries and so on. However, in various laws there has not been a uniform formulation of what, how and when corporations can be accounted for or the types of criminal sanctions that can be imposed.

Such legislation policy can be an obstacle in its application that will ultimately reduce the effectiveness of the application of corporate accountability.

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