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### CORPORATE CRIMINAL LIABILITY IN INDONESIA ON THE PERSPECTIVE OF COMPARISON

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#### Article Information    Abstract

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*The regulation of corporate criminal liability in Indonesia's criminal justice system is basically a new and still debatable issue. It is said that because in the Criminal Code is not recognized and regulated explicitly about the corporation as a subject of criminal law. This is a natural thing since the WvS Criminal Code still adheres to the principle of "societas delinquere non potest" or "non-potest university delinquere", that is, a legal entity can not commit a crime. Thus, if in a society there is a criminal offense, then the criminal act is deemed to be done by the board of the corporation concerned. Regarding the corporate criminal responsibility system in Indonesia, in the corruption law Article 20 paragraph (1), if the corporation committed a criminal act of corruption, then those responsible for the criminal act shall be the corporation only, the management only, or the corporation and its management. Thus, it can be said that the regulation of corporate criminal liability in the legal system in Indonesia is expressly only regulated in special criminal legislation, because the Criminal Code of WvS still adheres to the principle of "societas delinquere nonpotest" so it is not possible to enforce corporate criminal liability in it.*

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## INTRODUCTIONS

Crime as a problem of social phenomena remains influenced by various aspects of life in society such as politics, economy, social, culture and matters relating to the defense and security of the state. Thus, the relativity of the crime is because of those aspects that lie behind it. Before the 21st century, the crime that existed in society was merely a conventional crime, that is simple crime related to the physical and harming the victim (done by human), for example murder, theft, rape, and fraud. But with the development of the times and technologies recently, has created crimes in a new form. Modern crime today, is not only done by people alone, but now has developed crimes committed by corporations.

Corporations as subjects of criminal law are not recognized by the Criminal Code, this is because the Criminal Code is the legacy of the Dutch colonial government that adopted the European Continental system (Civil Law). Continental European countries are lagging behind in regulating corporations as the subject of criminal law, when compared to Common Law countries, where in Common Law countries such as the UK, the United States and Canada the development of corporate responsibility has begun since the industrial revolution, in which a corporations in the United Kingdom have been sentenced to fines for their failure to fulfill a legal obligation.

In the Netherlands at the time of formulation, the compilers of the Criminal Code (1881), accepted the principle of "*university societas delinquere non potest*" which means the legal body of association can not commit a crime. Thus according to the basic concept of the Criminal Code (WvS), that a criminal offense can only be done by natural

man (*natuurlijke persoon*). In the later developments arise difficulties in practice, because in a variety of special crimes arise developments that basically assume that criminal acts can also be done by the corporation, given the quality of circumstances that are only owned by legal entities or corporations. Finally under Article 103 of the Criminal Code (WvS), permissible regulations outside the Criminal Code to deviate from the General Provisions of Book I of the Criminal Code.

Based on the mentioned provisions, various laws and regulations issued outside the Criminal Code which regulate the corporation as the subject of criminal law can be criminal and can be accounted for. UU no. 7 Drt of 1955 as the pioneer of legislation regulating that in economic crime, corporation can conduct crime and can be punished. With the acceptance of corporations as actors of criminal acts and punishable, the interesting thing to examine is the issue of corporate criminal and criminal liability imposed on the corporation.

Based on the description above of the background, it can be formulated the issues related to "Corporate Criminal liability in Indonesia on the perspective of comparison" as follows :

1. How are the regulations of criminal liability in Indonesia?
2. How are the regulations of criminal liability in other countries (UK, Germany, Netherlands, United States)?

## RESEARCH METHODS

The method used is the normative juridical method. The research specification used is descriptive. The data used is

secondary data derived from library materials. Methods of data collection conducted by literature study.

## FINDINGS AND DISCUSSIONS

### Corporation Comprehending

In general, the law is not only regulates the person (natural man) as the subject of law, besides regulates each individual, law is also known by the other legal subject, that is the legal entity attached to the legal rights and obligations as individual persons as the subject of law. When viewed from etymology (originally said), the definition of corporations in other terms known as *corporatie* (Dutch), corporation (UK), *korporation* (Germany), derived from the Latin "*corporation*". Related to the term "corporation" is, according to Muladi and Dwidja Priyatno<sup>1</sup>:

Such as the other words ending with "tio" then "corporation" is considered a different word (*substantivum*) derived from the verb "corporate" that many people use in medieval or later. "Corporate" itself comes from the word "corpus" which in Indonesian means "body". Thus, finally the "corporatio" means the result of comparative work or in other words obtained by human actions as opposed to the human body that occurs according to nature.

Regarding the nature of the corporation itself is fundamentally seen from the classic statement of Viscount Haldane L.C., which states<sup>2</sup>:

The corporation is an abstraction. He no longer has his own mind compared to his own body, the will and directed will have to be consistently seen in someone who for a particular purpose may be called an agent or a representative, but who actually directs the mind and spirit of the corporation consist of the ego and the central of the corporation itself.

It should be realized that some of the corporations as mentioned above are the notions conveyed by jurists, while the formulation of definitions in provisions is still governed by various terms and meanings. This has led to the emergence of legal uncertainty regarding the interpretation of the definition of corporation. So when viewed from the perspective of Indonesian criminal law, the term "corporation" has not been clearly defined.

In some special Regulation such as Acts no. 31 of 1999 jo Acts no. 20 of 2001 on the Eradication of Corruption and Acts no. 8 of 2010 on Prevention and Eradication of Money Laundering Crimes has firmly set the corporation as a legal subject. In Article 1 number 3 of Acts no. 31 of 1999 jo Acts no. 20 of 2001 and Article 1 number 10 of Acts no. 8 of 2010 stated that: "The corporation is a collection of people and/or wealth that had been organized as a legal entity (corporation) and/or not".

### Concept of Criminal Liability

The definition of criminal liability is proposed by Simons as a psychic state, so that the application of a criminal code from a public and private point of view is

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<sup>1</sup> Muladi dan Dwidja Prayatno. 2012. *Pertanggungjawaban Pidana Korporasi*. Jakarta: Kencana. P. 23

<sup>2</sup> Kristian. 2014. *Hukum Pidana Korporasi : Kebijakan Integral (Integral Policy) Formulasi Pertanggungjawaban Pidana Korporasi di Indonesia*. Bandung: Nuansa Aulia. P. 51

considered appropriate. Still according to Simons, the basis of responsibility in criminal law is a certain psychic circumstance in the person committing a criminal act and the relationship between the circumstances and the deeds that has been done in such a way that the person can be reproached for doing the deed.<sup>3</sup> So it can be deduced that the core of accountability in criminal law as proposed by Simons is:

- 1) A person's psychic or mental condition; and
- 2) The relationship between the psychological condition and the actions performed.

In the Dutch vocabulary, liability in the context of a psychic state is translated into *toerekeningsvatbaarheid* or liable or responsible, while in the context of the relationship between the psychological condition and the action performed, translates to *toerekenbaarheid* or liability.

The basic existence of a criminal offense is the principle of legality while the basic theory why the actor can be punished is the principle of error. Therefore, criminal liability is the responsibility of the person to the commits of criminal acts. Criminal liability is essentially a mechanism established by criminal law to cope with violations of 'agreement to reject' a particular act.<sup>4</sup>

Related to criminal liability, Sudarto put forward his opinion as follows<sup>5</sup>:

The criminal detention for a person can not be applied if the person has committed an act that is contrary to law or is unlawful only. Thus, even if the act meets the

formulation of the offense in the Act or is not justified, it has not met the requirement of criminal detention. For criminal detention there is still a requirement, that is the person who committing the act has an error or guilty. The person must be responsible for his actions or if viewed from the angle of his actions, his actions can only be responsible to the person. "

In more detail, Sudarto states that in order for people to have an aspect of criminal responsibility, in the sense of making the prosecutor, there are several conditions that must be fulfilled:

- 1) The existence of a crime committed by the manufacturer;
- 2) The existence of the element of error in the form of intent or negligence;
- 3) The existence of a responsible actor;
- 4) No forgiving excuses.

### **Theory and Systems of Corporate Criminal Liability**

Basically in theory there are several doctrines that justify the corporation as a subject of criminal law that is considered to be criminal and can be sought criminally accountable. Generally, corporate criminal liability is based on the doctrine *respondet superior*, a doctrine which states that the corporation itself can not make mistakes, in this case corporate agencies acting for and on behalf of the corporation. At the level of doctrine, there are several theories and many are adopted as theories used to assess corporate criminal liability, namely<sup>6</sup>

#### **a. Identification Theory**

<sup>3</sup> Eddy O.S. Hiariej. 2016. *Prinsip-Prinsip Hukum Pidana*. Yogyakarta: Cahaya Atma Pustaka. P. 156

<sup>4</sup> Mahrus Ali. 2013. *Asas-Asas Hukum Pidana Korporasi*. Jakarta: RajaGrafindo Persada. P. 94

<sup>5</sup> *Ibid.* P. 95

<sup>6</sup> Eddy O.S. Hiariej. *Op.Cit.* P. 206-207

According to this doctrine the corporation can do a number of offenses directly through people who are closely connected with the company and viewed as the company itself. Strictly speaking, the deeds or mistakes of senior officers are identified as corporate actions or errors. This theory is also called the theory or doctrine "alter ego" or "organ theory" which can be interpreted narrowly or broadly, as proposed by Barda Nawawi Arief, as follows<sup>7</sup>:

- 1) Narrow meaning (eg English): only the actions of senior officials or corporate brains that can be accountable to the corporation.
- 2) Wide meaning (eg United States): not only senior officials or directors but also agents under it.

b. Strict Liability

Corporate liability is solely based on the sound of the law, regardless of who makes mistakes. In strict liability the element of error does not need to be proven.

c. Vicarious Liability

This doctrine puts more emphasis on accountability by corporate administrators as an 'agent' of the corporation's actions, based on the employment principle and the delegation principle. This doctrine is the exclusion of individual liability embraced in criminal law based on the *aditarian nemo punitur pro alieno delicto* (no one is convicted for the actions of others).

d. The Corporate Culture Model

This teaching focuses on the explicit and implicit legal entity policies that affect the workings of such legal entities. Legal entities may be criminally liable if a person's actions have a rational basis that the legal

entity authorizes or permits the act to take place.

e. Doctrine of Aggregation

The aggregation theory which states that criminal responsibility can be imposed on a legal entity if the act is committed by a number of people who meet the elements of offense which are interrelated and not independent.

Fisse and Jhon Braithwaiten put forward the theory of corporate error known as *Reactive Corporate Fault* theory which, according to this theory, breaks the character of the *individualistic restraktif* and the derivative character of theories in which the error model is patterned as "responsive non-process manager" arising from the intent of a firm concerned. Under a reactive error, the company or corporation makes itself accountable for observing and reporting internal discipline after an offense occurs and also completing the responsibility. If the *actus reus* of a crime is proven to be committed by or on behalf of a corporation then the court may hold the account of the corporation concerned. If a corporation is judged to have taken appropriate action to resolve the matter, then criminal liability shall not be imposed on the corporation.<sup>8</sup>

When a corporation is held criminally liable for a criminal offense, it is generally known that three corporate criminal liability systems are as follows<sup>9</sup>:

- 1) The management of the corporation as the actor, responsible management,
- 2) Corporations as actors, responsible executives, and
- 3) The corporation as the actor and the responsible

<sup>7</sup> Barda Nawawi Arief. 2013. *Kapita Selekta Hukum Pidana*. Bandung: Citra Aditya Bakti. P. 193

<sup>8</sup> Kristian. *Op.Cit.* P. 72

<sup>9</sup> Mahrus Ali. *Op.Cit.* P. 133

The first criminal responsibility system explains that criminal liability is characterized by an attempt to ensure that the nature of a corporate crime is restricted to an individual, so that if a crime takes place within the corporate environment, the criminal act is deemed done by the corporate management (*universitas delinquere non potest*).

The second criminal liability system is characterized by the recognition that arises in the formulation of a law that a crime can be committed by a union or a corporation, but the responsibility for it becomes the burden of a legal entity (corporation).

The third criminal responsibility system is the beginning of a direct responsibility of the corporation. In this system it opens the possibility of prosecuting the corporation and holding it liability under criminal law. It is used as a justification and the reason that *corporatio* as actor and at the same time is responsible because in the various economic and fiscal offense the profit earned by the corporation or the losses suffered by society is very big. According to Muladi, that corporations can be responsible for as an actor, in addition to nature of a humans.

### **Corporate Criminal Liability in Indonesia**

The regulation of corporate criminal liability in the Indonesian criminal justice system is basically a new and still debatable issue. It is said that because in the Criminal Code is not recognized and regulated explicitly about the corporation as a subject of criminal law. This is a natural thing since the WvS Criminal Code still adheres to the principle of "*societas delinquere non potest*" or "*non-potest universitas delinquere*", is legal entities can not commit a crime. Thus, if in a society there is a criminal offense, then the criminal act is deemed to be done by the

board of the corporation concerned. This is clearly seen in the provisions of Article 59 of the Criminal Code which reads:

In cases where pride is liable to a criminal offense against a board member, commissioner or commissioner, the board, member of the governing body or commissioner who does not interfere with the offense, shall not be subject to criminal sanction. "

The regulation of corporations as legal subjects in the legal system in Indonesia is basically explicitly regulated in various Act of special criminal law such as Act No. 31 of 1999 as amended by Act No. 20 of 2001 regarding the Eradication of Corruption , Act No. 15 of 2003 on Criminal Acts of Terrorism, Act No. 32 of 2009 on the Protection and Management of the Environment, and so forth.

The theoretical determination of corporate crime is placed in Act No. 31 of 1999 jo with Act No. 20 of 2001, Article 20 Verse (2) stating that:

Corruption is committed by the corporation if the offense is committed by people, whether conscious of the employment relationship or other relationship, acting in the corporate environment both alone and together.

The provision of Article 20 Verse (2) is basically a concretization of the theory of identification and the teaching of functional actors as the theoretical basis of corruption by corporations. The theory of identification is reflected in the phrase "when the offense is committed by good people on the basis of employment and other relationships", whereas the functionalist's doctrine is reflected in the phrase "acting in the corporate environment both alone and together."

In identification theory, corporations can

commit criminal acts directly through people who are closely related to the corporation and are seen as the corporation itself. Actions committed by certain members of the corporation as long as the act relates to the corporation, are deemed to be acts of the corporation itself, so that when such conduct leads to a loss or if a particular member commits a crime, in fact the offense is a criminal act committed by the corporation so that corporations can be held accountable for crimes committed. The theory also says that corporations are considered committing a crime if those identified with the corporation act within the scope of their position. If the person commits a criminal offense in his capacity as a person, the act itself is not a corporation act.

According to the doctrine of functional performers, in the socio-economic environment the actor (corporation) does not necessarily always perform the act physically but it could be done by the employee originally it is still within the scope of function and corporate authority. But since the corporation does not commit the act itself, the act is transferred to a corporate employee under the terms expressly set forth in the Articles of Association and Bylaws. If the employee commits an act that is prohibited by law (criminal act) it is actually a criminal act that is essentially committed by the corporation.

Regarding the corporate criminal responsibility system in Indonesia, in the corruption Act Article 20 Verse (1), if the corporation committed a criminal act of corruption, then those responsible for the criminal act shall be the corporation only, the management only, or the corporation and its management. Such provisions provide a great opportunity for judges to elect those responsible for non-criminal conduct by the

corporation. A judge may impose a punishment on a corporate administrator alone without involving his own corporation, although in fact the corporation corrupts and benefits or benefits from it. If so, the chances of a judge to impose a criminal sanction on the corporation directly are very thin because generally, based on criminal cases where the perpetrator is a corporation, the judge does not impose a penalty on the corporation but on the board.

Thus, it can be said that the regulation of corporate criminal responsibility in the legal system in Indonesia is expressly only regulated in special criminal legislation, because the Criminal Code of WvS still using the principle of "*societas delinquere nonpotest*" so it is not possible to enforce corporate criminal liability in it.

### **Corporate Criminal Liability in Other Countries**

#### **1) England**

In 1944 it has been firmly established that corporations may be responsible for criminal law either as a maker or a participant, for each offense, although it is implied that there is a mensrea on the basis of identification. So unlike in Indonesia, corporate liability in the UK is not limited to certain areas of the law, although not all delays can be done by corporations.

Corporations in principle can be accounted for as individuals by identification principles. For example, a company accused of a common law offense such as agreeing to embezzle or deceive, a offense that requires the existence of mensrea and no vicarious liability is possible. In the case of the court view, that the actions and attitudes of certain core officials regarded as the embodiment of the organization are the actions and attitudes of the corporation. In this case the

corporation is not held to be held responsible on the basis of liability of the actions of its officials, but the corporation as well as in violation of its legal obligations is deemed to have done the offense in private.

Although essentially the corporation's principle can be accounted for equally with individuals, but there are some exceptions that is :

- a) In cases that nature can not by corporation, for example: bigamy, rape, perjury.
- b) In cases where the only applicable criminal may not be imposed on corporations, for example: imprisonment or dead sentence.

The corporation may also be held responsible in criminal law for the act of a person in the case of possible vicarious liability, so in the corporation's position as an employer. This vicarious responsibility must be differentiated from liability based on the principle of identification. In addition, corporations can also be responsible for by the actions of corporate leadership people who make a decision in the company's business.

## **2) Germany**

There is no corporate criminal liability in Germany. Like the countries in Europe, Germany rejects a legal fiction that says corporations can commit criminal acts. By adopting the principle of *societas delinquere non potest*, instead the German legal system punishes individuals as corporate officials. Until now Germany has rejected corporate criminal responsibility, although some European countries have changed direction in response to corporate scandals.

From a theoretical point of view, Germany asserts the principle of limits of criminal liability. As quoted in The Yale Law

Journal stating "Germany, like virtually every country, is willing to adopt the fiction of a corporation as a separate" person "for purposes of corporate law, bankruptcy law and even administrative law." Germany continues to deny accountability corporate crime but reforms and sanctions on civil law and administrative systems for action to corporations in a case.

Germany extends criminal offenses aimed at individual corporate directors or corporation agents and punishes them for crimes committed by persons, including all forms of theft and fraud. It then relies on administrative and civil law to govern and punish the corporation itself. Germany controls and punishes corporations through an administrative legal system that is more inclined to civil liability. The German administrative legal system is technically monitored by a criminal court and sanctions are granted in the form of fines that reach millions of euros.

The imposition of administrative sanctions by the courts may be in the form of a penalty for the expropriation of corporate assets and the forced repayment of legitimate corporate property, but the "privacy" principle of corporations remains upheld in German law so that all cases of corporations will have no effect on reputation and the corporation itself.

## **3) Netherland**

During the 20th century, the Dutch developed several criteria or factors for establishing corporate criminal liability. Some cases indicate that previously developed 'criteria' to establish sole proprietor liability can also determine to establish corporate criminal liability. The concept of corporate criminal liability does not reap the controversy in the Netherlands,



the flexible problem approach used by the Dutch Supreme Court in the 2003 case is in line with the substance of criminal law until today.

Corporations are included as "legal personality" in the form of *besloten vennootschap* (limited liability company) and or *naamloze vennootschap* (Limited Liability Company (PT Tbk) mentioned in Dutch Civil Code Article 2. The Dutch Supreme Court then clearly mentions four situations in which the behavior, in principle, can be said to be within the scope of the corporation<sup>10</sup>:

- a. Where the case concerns the act or omission of a person who works for the enterprise, within or outside the formal employment contract;
- b. Behavior in accordance with the company's 'normal business' day-to-day;
- c. Corporations benefit from the behavior;
- d. The course of action is the 'gift' of the corporation, and the corporation has approved it.

The Dutch criminal law does not recognize a theory like the 'doctrine of identification', in which only the top-level director can cause the corporation to take responsibility. In Dutch criminal law, any employee who may cause the company to commit an offense, as long as it may be construed that the company has committed the offense may be criminally liable. In addition, as has been pointed out, other factors may also lead to corporate criminal liability.

Sanctions for corporations are not specified in the Dutch Penal Code, only

sanctions for natural persons are mentioned, but in practice the imposition of sanctions for corporations or legal persons shall be subject to the provision of sanctions for natural persons which are adjusted to the portion of legal persons so that sanctions shall become effective if imposed and fixed in accordance with the maximum terms of any violation provided for in the Dutch Penal Code regulating the six categories of maximum sanctions for violations or crimes in the form of fines.

#### 4) United States of America

The United States address to the theory of superior respect (one of the doctrines in Civil Law) or the relationship between master and servant or principal with agents that apply the principle of "*maxim qui facit per alia facit per se*", where an agent commits a crime reaching out to employees, its employees and profits are directed to corporations then corporations can be punished for a crime. Corporations as legal subjects in the U.S Code as a whole (embodied in the Criminal Code so that the corporation is one of the legal subjects for all pre-committed individual crimes) so that corporate criminal liability can be imposed on its own corporation as well as its board.

The United States continues to expand the scope of corporate crime by included many types of corporate crimes such as murder, IET crimes, money laundry, extortion and many white collar crime. The subject matter of punishment in the United States includes individuals of any person and corporations to set forth in the U.S Code. The courts in the United States of America

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<sup>10</sup> B.F. Keulen dan E. Gritter. 2010. *Corporate Criminal Liability in the Netherlands*. Vol.14.3. Electronic Journal of Comparative Law. P. 5

adopt a *respodeat superior* that declare a corporation constitutionally punishable when one of its agents commits a criminal offense if:

- 1) within the scope of his work; and
- 2) For corporate profits.

Criminal penalties imposed on corporations of up to hundreds of millions of dollars for each offense or crime, for cases of major corporate crime are subject to criminal prohibition of doing business or cooperation with government or not participating in government activities or programs, and American legal openness about corporations making "privacy" becomes non-existent so that when a corporation becomes entangled by a case, the US government will announce it resulting in the fall of the corporate reputation and the drop in the stock of the corporation on the international stock exchange.

## CONCLUTIONS

Corporate criminal liability in Indonesia is strictly regulated only in special criminal legislation which recognizes corporations as subject to criminal law, for example in Act no. 31 of 1999 in conjunction with Act No. 20 of 2001 on the Eradication of Criminal Acts of Corruption because the existing Criminal Code in Indonesia still adheres to the principle of "*societas delinquere non potest*" ie legal entities can not commit a crime. Indonesia adheres to the theory of identification in the corporate criminal responsibility formulation system so that its liability may be imposed on its board only, the corporation alone or both (the board and corporation simultaneously). The corporation's legal subjects should also be included in the Penal Code so that there is

uniformity regarding the subject of corporate law.

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