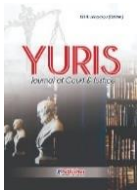

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Politics of Criminal Law Liability of Corporate Criminal in Indonesia

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ABSTRACT

This research paper examines the urgent need to reform the Indonesian Criminal Code to recognize corporations as subjects of criminal law. It delves into the concept of corporate criminal liability, highlighting the importance of establishing clear legal frameworks to hold corporations accountable for their actions. The study analyzes the politics of criminal law in Indonesia, focusing on shaping legal policies to address societal needs and ensure justice. Key findings include the necessity of incorporating various theories of corporate punishment (such as strict liability, vicarious liability, identification theory, and aggregation theory) into the legal framework to effectively address corporate criminal behavior. The research also reviews the RKUHP (Revised Criminal Code Bill), which explicitly defines corporate criminal liability and outlines the responsibilities of corporate management in crimes committed on behalf of corporations. Using normative juridical research methods, including statute and conceptual approaches, the paper examines existing legal regulations and their implications for corporate accountability in Indonesia. Concluding that a comprehensive understanding of corporate criminal liability is vital for law enforcement and judicial authorities to enforce the law effectively, the study advocates for legal reforms aligned with the values of Pancasila, reflecting Indonesia's unique socio-cultural context while addressing the complexities of corporate crime.

Keywords: *Corporation, Penal Policy, Responsibility*

INTRODUCTION

Indonesian criminal law is the constitution of biological child of Dutch criminal law. It can be seen from the history of Indonesian law that Indonesia was colonized by Dutch for 3.5 years and was full of struggles for independence. Formerly, at the era of colonialism Indonesia was called as "Hindia Belanda", the purpose of Dutch colonizing Hindia Belanda was seen from a historical approach to achieve gold, glory, and gospel. Gold is looking for trading wealth. Glory is seeking glory by expanding colonies. Gospel is to spread Christianity. During the Dutch colonial period, it turned out to leave a legal product that is still used nowadays, namely the Criminal Code (or *Weat Boek Van Strafrecht* in Dutch) which was then promulgated by Law No. 1 of 1946 concerning Criminal Law Regulations. Until now Dutch Criminal Code is still valid and has not been changed.

Indonesian Criminal Code only recognizes the subject of criminal law people who can be categorized as criminal act. Legal subjects are the holders of rights and obligations who can make legal action. Meanwhile, the current Indonesian Criminal Code does not recognize the existence of corporations as legal subjects. Utrecht stated that a corporate legal entity is an entity based on the law that has the authority to support rights, or any inanimate advocate of rights. Wirjono Projodikoro explained that a corporation is an entity which, apart from being an individual person, can also be considered as an act under the law and has rights, obligations, and legally related. against other people or institution.[1]

Even though the development of crime is now not only done by people but is also carried out by corporations and the impact of crimes committed by corporations is wider and massive than crimes that are only individualized by people.

Based on the formulation of Dutch Criminal Code based on the Doelder's view, it is in line with Jonkers that the principle of Dutch criminal law regarding legal entities which cannot commit criminal acts or offenses (delinquenre non potest principle) and the act of error that explains elements of guilt (mens rea) can only be done by people. The formulation of Criminal Code formation which recognizes people as subjects of criminal law can be seen from the most commonly found in the word "whoever" (in Dutch "Het zie", the development of modern crime in Netherlands turns out that corporations can commit crimes, therefore the Dutch Criminal Code makes a breakthrough of constitution to be responsible for the crime.

Indonesian criminal law experts, Sudarto, Andi Hamzah, Muladi, Edy Oemar Hiarij, have been trying to make Indonesia's own Criminal Code related to the value of Pancasila and Indonesia 1945 Constitution. The urgency of reforming criminal code should be oriented as an effort to review and evaluate legal norms that are not related to the conditions of society and legal reform should also be able to

[1] Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum: Dipandang Dari Sudut Hukum Perdata* (Bandung: CV Mandar Maju, 2018).

accommodate legal norms that are empty or unclear in their interpretation. Therefore, the reform of criminal law on RKUHP should be able to become a legal breakthrough against the legal issues. One of the changes in the substance of the RKUHP is the inclusion of corporations in the formulation establishment of RKUHP as legal subjects.

Corporations according to RKUHP are broader in scope, not only legal entities as in civil law but include: limited liability companies, foundations, cooperatives, state-owned enterprises, regionally-owned enterprises or the equivalent, as well as associations both legal and non-incorporated entities. law, business entities in the form of firms, limited partnerships.

The scope that stated by the corporation in the RKUHP is actually broad in scope and detailed. Because the corporation is a fictitious organ whose activities are carried out by its administrators and when the corporation commits a crime, it is necessary to define the limits of liability between the management and the corporation. According to Sudarto, implementing criminal law politics means holding elections to achieve the best results of criminal legislation, meaning holding elections to achieve the best results of criminal legislation in the sense of fulfilling the requirements of justice and efficiency.[2] Based on the statement about the politics of criminal law above, it can be concluded that legal politics is a process of drafting criminal laws and regulations to realize criminal law that is in accordance with the conditions of society. The Criminal Code which is still in force is a criminal law policy of the Dutch government which has colonialism, imperialism and individualism, so it is not suitable to be applied in Indonesia. Therefore, it is necessary to reform the Criminal Code based on Pancasila values, including the renewal of the Criminal Code which includes corporations as legal subjects in the Indonesian Criminal Code.

It turns out that outside the Criminal Code, corporate legal subjects are recognized as Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, Law No. 15 of 2002 concerning Money Laundering, Law No. 15/2003 concerning Stipulation of the Government in Lieu of Law No. 1 Year 2002 concerning the Eradication of Criminal Acts of Terrorism, Law No. 35/2009 concerning Narcotics, and other laws spread outside the Criminal Code.

Based on the described background above, the formulation of problem, this research has a purpose to know and analyze the concept of corporate responsibility and to find out and analyze the politics of corporate criminal law in Indonesia.

[2] Shafrudin Shafrudin, "Pelaksanaan Politik Hukum Pidana Dalam Penegakan Hukum Pidana Di Indonesia," *Jurnal Hukum Pro Justitia* 27, no. 2 (2009).

RESEARCH METHODOLOGY

The type of research used in this research is normative legal research. Another term for normative legal research is doctrinal research which is called library research or doctrinal study. It is called doctrinal legal research, because this research is conducted or aimed only at written regulations or other legal materials.[3] This research used library research or doctrinal studies because this research is mostly done on secondary legal materials in library. The research approach used in normative juridical research is the statute approach, the conceptual approach, and the case study approach. The following is an explanation of the normative juridical approach:

1. Statute Approach
   The approach to legislation in normative juridical research is an approach to legal regulations concerning legal issues (legal issues) being studied. In this legislative approach, it is related to legal issues faced, namely those relating to laws and regulations relating to corporate criminal liability in Indonesia. Indonesia
2. Conceptual Approach
   The conceptual approach is an approach that uses legal doctrine (legal opinion), legal theories, and legal principles. The conceptual approach used in this research is related to the teachings of corporate punishment, the doctrine of the subject of corporate law, and the principles of criminal law.
3. Cases Approach
   Case Approach is a research approach that uses court decisions at the district court, high court and cassation level. The case studies applied relate to the implementation in court decisions related to the implementation of corporate criminal liability in Indonesia.

RESULT AND DISCUSSION

Corporate Liability Penalty Concept

Sentencing is the imposition of criminal misery as a result of legal subject who has committed a crime. Criminal charges can be imposed on people and corporations. Criminalization of people is regulated in Article 10 of the Criminal Code such as capital punishment, imprisonment, confinement and fines. Etymologically, the word corporation comes from the Latin corporatio. This word comes from the older Latin word corporare. Corporare itself comes from the word corpus which means to give a body or make up. From the word corporatio translated into various languages in Europe such as *corporatie* (Dutch), *corporation* (English), *corporation* (Germany). The word *corporatie* (Dutch) was finally translated into

[3] Suratman and Philips Dillah, *Metode Penelitian Hukum* (Bandung: Penerbit Alfabeta, 2015).

Indonesian into corporation.[4] Initially, in Netherlands, the idea of corporate responsibility emerged. Corporations could not be subject to criminal sanctions because Dutch criminal law adheres to the principle of non-potest university delicence, meaning that corporations cannot be punished. The recognition of corporations as subjects of criminal law and their responsibilities was put forward by Schaffmesiter.

Theoretically, there are several corporate crime such as. First, crimes for corporations, crime against corporations and criminal crime corporation is the beginning of the establishment of corporate crime which is intended to commit crimes.[5] The punishment of corporations with criminal threats is one of the efforts to avoid criminal acts against the employees themselves. The development of serious crime and its widespread impact is now not carried out by people but is carried out by corporations as an organized body and is able to have a broad impact. In order to be responsible for the crime, there are several corporate punishment teachings that can be applied, namely as follows:

1. Strict Liability

   The teaching of strict liability responsibility (absolute responsibility). Strict liability theory is a form of imposing responsibility on corporations without questioning the element of error (mens rea) either intentionally or by negligence. This strict liability doctrine developed in the common law (Anglo Saxon) legal system to facilitate evidence, especially for crimes committed by corporations. This doctrine developed in England, the United States (common law) which adheres to the legal principle of "actus non facit reurn nisi mens rit rea (a harmful act wthot blameworthy mental state is not punishable) which adheres to a legal principle that to impose punishment (punishment). without questioning the element of error (schuld). The philosophy of the emergence of absolute responsibility is motivated by as stated by J. E. Krier that proof is expensive and difficult to prove the element of guilt and the loss is very large. The application of the teaching of strict liability punishment is applied in Law No. 32 of 2009 concerning Environmental Protection and Management, in Article 88 of the UUPLH which reads:

   > "Everyone whose actions and/or activities use B3, generates and/or manages B3 waste, and/or poses a serious threat to the environment, is absolutely responsible for the losses that occur without the need to prove an element of guilt."

[4] Hariman Satria, "Politik Hukum Tindak Pidana Politik Uang Dalam Pemilihan Umum Di Indonesia," *INTEGRITAS: Jurnal Antikorupsi* 5, no. 1 (2019): 1–14, https://doi.org/10.32697/integritas.v5i1.342.
[5] Satria.

To apply the criteria for legal liability using the strict liability doctrine in criminal law, there are several things that must be considered as guidelines:

a. The provisions of the law itself determine or at least the law itself tends to demand with strict liability.
b. Its application is only determined for criminal acts that are specific or certain criminal acts.

2. Vircarious Liability

Mahrus Ali and Hanafi Amrani in their book entitled "Criminal Accountability System Development and Application", explain the meaning of Vircarious Liability. By experts including: Peter Gillies gives the understanding that substitute liability is the imposition of criminal liability against a person based on a criminal act committed by another person, or based on another person's fault, or in connection with the matter. Smith & Brian Hogan explain the doctrine of vircarious liability in general, employers can be held accountable for mistakes made by their employees, except for general disturbances and slander for defamation, then the employer is held accountable for the actions of his employees even though the employer is not at all wrong.

There are two important conditions that must be considered to apply criminal liability using the vircarious liability doctrine. These conditions include:

a. There must be a relationship, such as an employment relationship between the Employer and the employee or employee.
b. The criminal act committed by the worker or employee must be related to the scope of his research.[6]

The doctrine of vircarious liability in the history of criminal law in the Netherlands, was once applied by a court known as the “milk arrest.” This arrest took place in Amsterdam, where a businessman sold milk by wearing the label “pure milk” on the packaging. In fact, it is a fact that the milk sold is not pure because it has been mixed with water, which is the act of mixing the water into the milk by the employees. In the decision of the first instance court, the judge sentenced the employer to be responsible, but the entrepreneur filed an appeal and the Dutch Supreme Court still punished the employer for the actions committed by his employee. The doctrine of vircarious liability turns out to be an extension of guilt and can lead to substitute liability. This doctrine has received much criticism for being too broad to account for its faults.

[6] Muhammad Isra Mahmud, “Peran Vicarious Liability Dalam Pertanggungjawaban Korporasi (Studi Terhadap Kejahatan Korupsi Yang Dilakukan Oleh Kader Partai Politik),” *Jurnal Lex Renaissance* 5, no. 4 (October 1, 2020), https://doi.org/10.20885/JLR.vol5.iss4.art1.

3. Identification Theory

This identification theory doctrine developed in Anglo Saxon countries, such as the United States, England. Identification theory or direct corporate criminal liability. The identification theory doctrine asserts that all legal actions from directors are actions for the corporation. Muladi argues that in identification theory, a company can commit offenses or criminal acts directly through people who are closely related to the company and are seen as the company itself.8 In this case, the perpetrator is the act of wrongdoing by the senior officer is identified as an act or omission of the corporation.[7]

Meanwhile, Sutan Remy S, has another view of corporate responsibility to determine the "directing mind". According to Sutan Remy S, to determine the "directing mind" responsibility, first look at the articles of association of the corporation or official letters issued from the company.[8]

Based on the opinion of legal expert above, the doctrine of identification theory is addressed to management such as directors and commissioners of companies because they act for and on behalf of corporations which are basically attached to positions and authorities.

The doctrine of identification theory can also be referred to as after ego theory. This doctrine became known when used by Judge Reid in the Tesci Supermarket Ltd v Case. Nattrass. In his judgment, Judge Reid stated that (a corporation must act through living persons... then the person who acts is acting as the mind of the company). This makes the "mens rea" element that cannot be found in corporations directly, through "mens rea" found in individuals who are the "directing mind" of the corporation.

Politics of Criminal Law Corporate Criminal Liability in Indonesia

Talking about the politics of criminal law means it involves criminal law policies. The term policy can be taken from the term "policy" (English) or *politiek* (Dutch).[9] According to Barda Nawawi Arief, "the term criminal law policy" can be referred to as criminal law politics. Or called penal policy, criminal law policy, strafrechtspolitiek. Understanding legal politics can be seen from the political side of statutory law and criminal law politics.[10] According to Sudarto, legal politics is an effort to realize good regulations according to the circumstances and situations at a time. Furthermore, implementing the politics of criminal law means holding

[7] Muladi and Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi: Edisi Ketiga* (Kencana Prenada Media Group, 2002), https://books.google.co.id/books?id=repADwAAQBAJ.
[8] Sutan Remy Sjahdeini, *Ajaran Pemidanaan: Tindak Pidana Korporasi Dan Seluk Beluknya* (Jakarta: Kencana, 2017).
[9] Sudarto, *Hukum Dan Hukum Pidana* (Bandung: PT Alumni, 2007).
[10] Sudarto.

elections to achieve good results of criminal legislation in the sense that the law must meet the requirements of justice and usability. The politics of criminal law means formulating legislation that contains criminal norms. In formulating legislation containing criminal norms, there are several things that must be considered in compiling it:

1. Did not use criminal law is used solely for the purpose of retaliation
2. Did not use criminal law to punish acts that are not harmful/harmful.
3. Did not use criminal law to achieve a goal that could be achieved more effectively with lesser means.
4. Did not use criminal law if the loss or danger arising from the crime is greater than the loss/danger from the criminal act is greater than the loss/danger from the act/criminal act itself.
5. Criminal law should not contain restrictions that do not have the support of the public.[11]

Prevention of crime using penal advice is a penal policy or penal law enforcement, according to Barda Nawawi Arief, the functionalization/operationalization can be carried out in several stages:

1. Formulation stage (legislative policy);
2. Applicative stage (judicial policy);
3. Execution stage (administrative policy).[12]

In relation to criminal liability, it is the ability of a person to accept the risk of the actions he has committed related to the law. 15 Because the corporation is a subject of criminal law, every legal subject who commits a crime must be responsible for the criminal acts committed. The implementation of criminal law politics must go through the following policies:

1. Formulation Policy

   The formulation policy has purpose to formulate criminal laws related to corporate law enforcement. This stage is called the stage of criminal legislation consisting of the following:

   a. The Neccessity to Use Clear Corporate Terminology

      This is because the term corporation in criminal law is broader than that of a legal entity. The term corporation in criminal law is not only a body whose assets are separated from the organs and management. But corporations in criminal law are also defined as organs or associations. The use of corporate terminology must be used in other and consistent laws. Such as Constitution Number 31/1999 concerning the Eradication of

[11] B. N. Arief, *Beberapa Aspek Kebijakan Dan Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1998), https://books.google.co.id/books?id=OpVkAAAACAAJ.
[12] Muladi and B. N. Arief, *Teori-Teori Dan Kebijakan Pidana* (Alumni, 1984), https://books.google.co.id/books?id=d6t1GwAACAAJ.

Corruption Crimes, Constitution number 8/2010 concerning on the Prevention and Eradication of Money Crimes.

b. Criminal Formulation

A criminal act is an act intentionally or negligently committed by a person who is against the law. The formulation of a corporate crime is different from the formulation of a criminal act committed by a person's legal subject. A corporation can be said to have committed a crime when the crime was committed by people, both within the scope of work relations and based on other relationships. The limitations of a corporate crime occur when a person in the corporate environment, either in a work relationship or in other relationships, outside the scope of that relationship, cannot be called a corporate crime.

c. Formulation of Corporate Criminal Liability

There are several penal teachings that are applied to apply corporate punishment. Such as the teachings of strict liability punishment, vircarious liability, aggregation theory, identification theory. The teachings of punishment have their respective differences and are applied in statutory regulations. To be accountable for a corporate crime, it is required that the criminal act committed must meet the elements specified in the law so that the perpetrator can be punished.

d. Formulation of Criminal Sanctions

In formulating the norms of criminal law, it should contain what criminal and criminal sanctions will be applied. Criminal application to legal subjects of persons with corporate criminal law subjects. Article 10 of the Indonesian Criminal Code describes the types of crimes such as capital punishment, imprisonment, imprisonment, and fines. The main penalties in corporate punishment include fines, announcement of judge's decisions, dissolution followed by corporate liquidation, freezing of business activities, confiscation of corporate assets by the state, and takeover of corporations by the state. Additional penalties in the form of certain social activities include, among others, cleaning the environment at their own expense or submitting it to the state at the expense of corporations, building or financing the construction of projects related to the crime committed and

carrying out other social activities with a minimum period of time by the judge.[13]

2. Application Stage

   At the application stage, it relates to the application of legal norms to be enforced by law enforcement, police, prosecutors, courts. Applicative policy (judicial policy) is the implementation of legal norms related to corporate responsibility so that corporations that commit crimes can be held accountable for their crimes. This application stage relates to court decisions on corporate cases that commit crimes.

3. Execution Stage

   The stage of concrete enforcement (implementation) of criminal law by criminal implementing officers. In this stage, the criminal implementing apparatus is tasked with enforcing criminal law regulations made by lawmakers, through the application of criminal law established by the court. Implementing officers in carrying out their duties must be guided by the laws and regulations and the values of justice in society.

In RKUHP Article 56, the punishment for corporations is explicitly explained that they should consider:

1. The level of loss or impact caused;
2. Level of involvement of administrators who have functional positions
3. Corporations and/or the role of giving orders, controlling holders, giving orders, and or beneficial owners of corporations.
4. The duration of the crime that has been committed;
5. Frequency of criminal acts by corporations;
6. Type of criminal offense;
7. Official Involvement;
8. Values of law and justice that live in society;
9. Corporate track record in doing business or crime;
10. The effect of punishment on corporations; and/or
11. Corporate cooperation in the use of criminal acts.

It means that RKUHP recognizes the subject of corporate criminal law to be accountable for the crime. In contrast to the Indonesian Criminal Code, the legacy of the Dutch, which does not recognize corporate legal subjects. Thus, the RKUHP

[13] Alfikri, Erdianto, and Erdiansyah, "Politik Hukum Pidana Pertanggungjawabanpidana Korporasi Dikaitkan Sebagai Subjek Hukum Pidana," *Jurnal Online Mahasiswa* 5, no. 2 (2018), https://jnse.ejournal.unri.ac.id/index.php/JOMFHUKUM/article/view/22364.

explicitly and completely explains corporate punishment. It can be seen from the formulation of Article 45 of the RKUHP:

1. Corporations are the subject of criminal acts
2. The corporation as referred to in Paragraph (1) includes a legal entity in the form of a limited liability company, foundation, corporation. state-owned enterprises, regional-owned enterprises, or equivalent thereto, as well as associations, both legal and non-legal entities or business entities in the form of a firm, limited partnership, or equivalent in accordance with the laws and regulations.

The formulation of Article 45 RKUHP details that included in the type of corporation. it is clear for law enforcers, especially investigators, public prosecutors, and judges to apply corporate criminal subjects from abstracto to in concreto. The reform of the Indonesian criminal law is very important considering that the Indonesian Criminal Code is a legacy from the Netherlands and does not reflect Pancasila values. Then the RKUHP also explains explicitly about corporate criminal liability. Articles 46, 47 and 48 of the RKUHP as following below:

1. Article 46 RKUHP: criminal act of corporation is a crime committed by a management who has a functional position in the corporate organizational structure or based on a work relationship or based on other relationships acting for and on behalf of the corporation or acting in the interests of the corporation, within the scope of business or activities of the corporation, either individually or together
2. Article 47 RKUHP: Beside the provisions as referred in Article 46, criminal acts by corporations can be carried out by giving orders, controlling holders, or corporate beneficial owners who are outside the organizational structure, but can control the corporation.
3. Article 48 RKUHP: Criminal acts by corporations as referred in Article 46 47 can be accounted within the following term below:
    a. Included in the scope of business or corporation as specified in the articles of association or other provisions applicable to corporations;
    b. Benefiting corporation against the law;
    c. Accepted as corporate policy
4. Article 49 RKUHP: criminal acts liability by corporations as referred in Article 48 is imposed on corporations, management with functional positions, givers of orders, control holders and/or beneficial owners of corporations.
5. Article 50 RKUHP: Justifying the reasons that can be submitted by management who have functional positions, give orders, control holders, or corporate beneficial owners can also be submitted by corporations insofar as these reasons. The politics of the criminal law

of the RKUHP are explained on the basis of consideration which includes the philosophical basis, the sociological basis, and the juridical basis of the RKUHP. That in order to realize the national criminal law of the Unitary State of the Republic of Indonesia which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia as well as general legal principles recognized by civilized society, it is necessary to draft a national criminal law to replace the Criminal Code inherited from the Dutch colonial government. That the national criminal law must be adapted to legal politics, circumstances, and the development of social, national and state life with the aim of respecting and upholding human rights, based on the One Godhead, just and civilized humanity, the unity of Indonesia, democracy led by wisdom. wisdom in deliberation/representation, and social justice for all Indonesian people. That the material of national criminal law must also regulate the balance between public or state interests and individual interests, between protection of perpetrators of criminal acts and victims of criminal acts, between elements of actions and mental attitudes, between legal certainty and justice, between written law and the law that lives in society, between national values and universal values, and between human rights and human obligations.

CONCLUSION

There are several teachings of punishment for corporate crimes, namely strict liability, vircarious liability, identification theory, and aggregation theory. The doctrine of vircarious liability, namely if in an act a person's superior is responsible for the mistakes made by his subordinates is an order from his superior, then it is not a strange thing if the existing criminal liability is released to his superiors. The doctrine = identification theory, that is, a corporation is considered responsible for criminal acts committed by the company's leadership (board or high-rank employee). The politics of criminal law on corporate criminal liability in Indonesia. The politics of criminal law or criminal law policy is an attempt to create a criminal law product (penal policy) that is in accordance with the needs of society in the future. The criminal liability policy of corporations in the RKUHP is explained explicitly and clearly that corporations are the subject of corporate criminal law and provide punishment to corporations.

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