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Corporate Legal Liability as a Criminal Act of Corruption

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ABSTRACT

The aims of this study are: (1) To find out and analyze the qualifications of corporations as subjects of corruption. (2) To find out and analyze the form of criminal liability against corporations as perpetrators of corruption. The research method used in writing the results of this thesis research is normative juridical. The results of the study show (1) the existence of corporations as the subject of criminal acts should be a benchmark in handling these cases, where law enforcement officers are often found never handling cases related to corporations before. Their understanding of the corporation is still very low. All this time, they have only dealt with conventional crimes. For this reason, it is necessary to conduct intensive socialization on matters relating to corporations to all law enforcement officers. (2) The application of criminal liability for corporations as criminal acts of corruption seems discriminatory and partial due to the uncertainty of the qualifications of the actors (plegen), as regulated in the provisions of the legislation and sometime still using the term of person/legal entity and other uncertain terms, so that the enforcement encounters some ambiguity in determining the qualifications of actors (plegen, doen plegen, medeplegen). (3) The application of the concept of criminal liability to corporations is also ambiguous and seems discriminatory and partial due to the uncertainty of the subject of the perpetrators of corporate acts which are also related to the disparity in the application of the criminal system. The researcher's suggestions are: (1) the statutory provisions that using the terminology of persons/legal entities are separated into persons or legal entities or mention directors or each person. 2) In relation to the issue of criminal liability, it is better if the provisions of the legislation stipulate the concept of criminal liability based on the qualifications of acts caused by the corporation.

Keywords: *legal liability, corporation, criminal actor of corruption*

ABSTRAK

Penelitian ini bertujuan: (1) Untuk mengetahui dan menganalisis kualifikasi korporasi sebagai subyek tindak pidana korupsi. (2) Untuk mengetahui dan menganalisis wujud pertanggungjawaban pidana terhadap korporasi sebagai pelaku tindak pidana korupsi. Metode penelitian yang digunakan dalam penulisan hasil penelitian tesis ini yaitu yuridis normatif. Hasil Penelitian menunjukkan (1) Keberadaan korporasi sebagai subjek tindak pidana seharusnya menjadi tolak ukur dalam penanganan kasus tersebut, dimana masih sering ditemukan aparat penegak hukum yang belum pernah menangani kasus-kasus yang menyangkut korporasi. Pemahaman mereka terhadap korporasi masih sangat minim. Selama ini mereka hanya berhubungan dengan kejahatan konvensional. Untuk itu perlu dilakukan sosialisasi secara intensif hal-hal yang berkaitan dengan korporasi kepada segenap aparat penegak hukum. (2) Penerapan wujud pertanggungjawaban pidana bagi korporasi sebagai pelaku tindak pidana korupsi terkesan diskriminatif dan parsial karena ketidakpastian kualifikasi pelaku (plegen) sebagaimana diatur dalam ketentuan perundang-undangan dan masih menggunakan istilah orang/badan hukum dan istilah lain yang cenderung tidak pasti sehingga dalam penegakannya terdapat ambigu dalam menetapkan kualifikasi pelaku (plegen,doen plegen, medeplegen). (3) Penerapan konsep pertanggungjawaban pidana terhadap korporasi juga ambigu dan terkesan diskriminatif serta parsial karena ketidakpastian subjek pelaku tindak korporasi yang juga berkaitan dengan disparitas penerapan sistem pemidanaannya. Adapun saran peneliti adalah (1) sebaiknya ketentuan perundang-undangan yang menggunakan terminologi orang/badan hukum dipisahnya saja menjadi orang atau badan hukum atau menyebut direktur atau setiap orang. (2) Berkaitan dengan persoalan pertanggungjawaban pidana sebaiknya ketentuan perundnag-undangan menetapkan konsep pertanggungjawaban pidana berbasis kualifikasi perbuatan yang ditimbulkan oleh korporasi.

Kata Kunci : *Pertanggungjawaban Hukum, Korporasi, Pelaku Tindak Pidana Korupsi*

1. INTRODUCTION

Cases of criminals who are categorized as subjects of criminal law. The perpetrators of criminal acts (daders) according to the doctrine are those who carry out or realize all the elements of a criminal act as formulated in all applicable criminal laws and regulations. The legal basis for regulating criminal acts is regulated in Article 55 paragraph (1) of the Criminal Code which states that: Being convicted of a crime:

a. Those who do, who order to do, and who participate in doing the deed.
b. Those who by giving or promising something by abusing their power or dignity, by force, threat or misdirection, or by providing opportunities, means or information, intentionally encourage others to do something.

The term crime comes from a term known in criminal law theory in Dutch, *Stafbaarfeit* which consists of 3 (three) words, namely *staff* which is translated into criminal and law, *baar* which is translated as can or may, and *feit* which translates to acts, events, violations, and deeds. The Criminal Code (KUHP) does not provide an explanation of what is meant by *stafbaar feit* itself, usually a crime is synonymous with an offense, which comes from the Latin word *delictum*. The term *stafbaar feit* or

sometimes called *delict* is translated into Indonesian with various terms. (Nandang. S 2019).

Corruption never brings positive consequences, therefore corruption is classified as an *extraordinary crime*, so extra efforts are needed in terms of eradicating it. (Ibsaini., & Syahbandir 2018). One of the national issues is how the criminal liability of corporations as perpetrators of corruption crimes according to the applicable laws and regulations. As a criminal act, the corporation as a subject of criminal law is also the perpetrator of a crime in several statutory provisions and there are some statutory provisions whose status as an actor is unclear or not explicitly stated so that the criminal responsibility system is also blurred or unclear.

Corporations as perpetrators of criminal acts of corruption through the mode of corruption are a concept that still needs to be analyzed because, according to several statutory provisions, the provisions for criminal acts of corruption, in particular Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999, which regulates adheres to the corporate doctrine of the subject of criminal acts.

In criminal law there is a term accountability, which in the Dutch language is mentioned as *toerekenbaarheid*, and in English it is callaed *criminal responsibility* or *criminal liability* (Sampur Dongan 2015). The concept of criminal responsibility is based on a mono-dualistic balance that the principle of error based on the value of justice must be aligned in pairs with the principle of legality based on the value of certainty. Therefore, criminal responsibility is a mechanism to determine whether a defendant or suspect can be held accountable for a criminal act that occurred or not. In order for an act to be criminally responsible, it must contain an error. There are two types of errors, namely *intentional (opzet)* and *negligence (culpa)*.

Talking about corruption cases involving corporations as perpetrators of criminal acts, of course this is not a new thing for the Corruption Eradication Commission or Komisi Pemberantasan Korupsi (hereinafter abbreviated as KPK) considering that it has handled cases involving corporations for several years. KPK prosecutor has transferred PT Merial Esa's case file to the Corruption Crimes Court or Pengadilan Tindak Pidana Korupsi (Tipikor). At the Central Jakarta District Court (PN), PT Merial Esa is a corporate suspect related to allegations of corruption in the discussion and ratification of the Work Plan and Budget of State Ministries/Agencies (RKA-KL) in the 2016 Revised State Budget.

KPK determined PT. Merial Esa as a suspect and from the results of the development of the alleged corruption case it is indicated that the corporation has bribed someone in terms of managing the Bakamla budget for the monitoring satellite and drone procurement project in the 2016 Revised State Budget. PT. Merial Esa is a corporation that was prepared to work on a satellite monitoring project in Bakamla after it was budgeted in the 2016 Revised State Budget. PT Merial Esa is suspected of giving money to former Member of Commission I DPR Fayakhun Andriadi amounting to $911,480 in stages. The money was sent by the Director of PT. Merial Esa Fahmi Darmawansyah four times through accounts in Singapore and Guangzhou, China. "In the process of giving corruption, it was suspected that people

based on work relationships or other relationships at PT ME were acting in a corporate environment (Kompas 2022).

Based on the background description of the results of this thesis research, there are legal issues that will be the focus of the analysis which will become the subject of the legal issue, namely, (1) How is the existence of a corporation as the subject of a criminal act of corruption, and (2) What is the form of corporate criminal responsibility as perpetrators of corruption.

2. LITERATURE REVIEW

A. Theoretical Foundation

1. Criminals

Etymologically, the use of the term penal is defined as a criminal sanction. For the same meaning, other terms are often used, namely punishment, penal statement, sentencing, imposing sentences, giving criminal and criminal penalties. As for the opinions of experts regarding the term "criminal" etymologically, are:

a. According to Moelyatno, the term punishment which comes from the word "*straf*" and the term "*punished*" which comes from the words "*woedt gestraf*" are conventional terms. He did not agree with these terms and used non-conventional terms, namely "*criminal*" to replace the word "*straf*" and "*threatened with criminal*" to replace the word "*wordt gestraf*".
b. According to Sudarto that: "Punishment" comes from the word "law" so that it can be interpreted as "setting the law" or "deciding about the law" (*berechten*). Establishing the law for an event does not only concern the field of criminal law, but also civil law. (Marlina. 2012).
c. Furthermore, Jimly Asshiddiqie, stated that: He followed Sudarto's opinion and also used the term "criminal" instead of "punishment" or "criminal punishment".

2. Corporations as Subjects of Crime

The definition of corporation according to the Regulation of the Supreme Court of the Republic of Indonesia Number 13 Year 2016 concerning Procedures for Handling Criminal Cases by Corporations is an organized people and/or assets, both legal entities and non-legal entities.

In Indonesia, the position of the corporation as a subject of criminal law is currently only recognized in the law that regulates criminal acts outside the Criminal Code. This is because the Indonesian Criminal Code still adheres to the view of *societas delinquere non potest* so that it has not accommodated the position of corporations as subjects of criminal law.

By accommodating the position of corporations as subjects of general criminal law, as happened in the amendment to the Dutch Criminal Code, corporations can be considered as perpetrators of criminal acts like humans as legal subjects. Unlike before, where the position of the corporation as a subject of criminal law is only accommodated by laws outside the Criminal Code which regulates certain offences.

The regulation outside the Criminal Code makes the regulation of corporations a subject of criminal law and their criminal liability differs from one

regulation to another. Of course, this will creates uncertainty about what kind of criminal arrangements apply to corporations in Indonesia. This was later identified by Mardjono Reksodiputro, into several models of criminal responsibility that apply in Indonesia. With the regulation in the R-KUHP, of course, it will also make the regulation of corporations a subject of criminal law, so that there is no difference. (Reza, A. A. 2015).

A corporation is an organized collection of people and/or assets, both legal entities and non-legal entities. There are various types of corporate understanding. The word corporation comes from the Latin *corporatus*, which was adopted into English:

> "*corporate*, *corporate is relating to alarge company or group : airlines are very keen on the corporate identity*. Lebih lanjut disebutkan kaitannya dengan status hukum, *corporate authorized to act as a single entity and recongized as such in law: local authorities, like other corporate bodies, may reduce capital spending the rule set by the corporate organization of or shared by all the members of group: the service emphasizes the corporate responsibility of the congregation* (Juni Sjafrien 2013)."

The basic idea of corporate as a subject of criminal law, cannot be separated from social modernization and the development of science and technology (IPTEK). (Muladi, & Dwidja 2012). Its placement as a subject of criminal law is still seen as a problem. As the result, currently there are pros and cons to the subject of corporate criminal law. Those who disagree/con give the following reasons:

a. Regarding the problem of crime, in fact, intentional or negligence is only found in natural persons.
b. Whereas material behavior, which is a condition for which several kinds of offences that can be punished, is only carried out by natural persons (stealing goods, molesting people and so on).
c. That criminal acts and actions which take the form of depriving people of their freedom cannot be imposed on corporations.
d. That the prosecution and punishment of corporations by themselves may befall innocent people.
e. Whereas in practice, it is not easy to determine norms on the basis of what can be decided, whether the management alone or the corporation or both must be prosecuted and punished.

3. Corporate Criminal Liability

Recognition of corporations as the subject of criminal acts in criminal law has been going on since 1635 when the English legal system recognized that corporations could be held criminally responsible for minor crimes. Meanwhile, the United States only recognized the existence of corporations in 1909 through a court decision. After that, the Netherlands, Italy, France, Canada, Australia, Switzerland and several European countries followed the trend, including Indonesia recognizing corporations as perpetrators of a crime. (Mahrus Ali 2013).

In the Indonesian Criminal Code, it is not known that there is a single provision that stipulates corporations as subject to offences in criminal law. This is

because the Dutch Criminal Code which is enforced in Indonesia does not recognize the imposition of criminal charges on corporations. *Code Napoleon*, which is the basis for the provisions of the Dutch Criminal Code, does not recognize the subject of corporate criminal law. The Criminal Code only recognizes humans naturally as subjects of criminal law. (Hasbullah F 2015). Furthermore, Indonesia states that provisions regarding criminal liability need to be regulated in the Criminal Code, which is then set forth in the Draft Criminal Code. Regarding the position as a maker and the nature of corporate criminal liability, there is a criminal liability model as follows:

a. Managers of the corporation as the maker and administrators are the one who are responsible;
b. Corporations as producers and the administrators are the one who are responsible;
c. Corporations as producers and also the one who are responsible.

In addition, it can also identifying the qualifications of the corporation as the perpetrator of a crime related to the placement of the corporation based on *the doctrine of vicarious liability*, namely the transfer of criminal responsibility to other people. The corporation is responsible for the actions taken by the employees/management, on behalf of their attorney or mandate as well as those who represent and/or have a working relationship with the corporation on behalf of the corporation. (Surya Jaya 2014).

B. Theoretical Framework

1. Corporate Criminal Liability Theory

The concept of criminal liability for corporations is also determined based on the fault of the maker and not only by the fulfillment of all elements of the corruption crime that has been committed. However, because the corporation is a legal entity, the assumption of criminal liability still refers to the concept of guilt (mens rea) which these elements serve as the main basis or elements of the criminal act of corruption that are inherent as elements of a criminal act of corruption. (Admaja Priyatno 2014).

2. Identification Theory

The implementation of identification theory on corporate responsibility as perpetrators of corruption in corruption cases, the basic assumption is that corporations as a subject of criminal law also apply the concept of criminal responsibility related to the terms of punishment that apply in general, namely the existence of an act (*actus reus*), the existence of an error (*mens rea*), and the absence of excuses and excuses.

3. Aggregation Theory

According to the aggregation theory, if there is a group of people who commit a criminal act or crime, but that person acts for and on behalf of a legal entity or

corporation or for the benefit of a corporation, the corporation can be criminally liable. The proposition in this theory contains the basic assumption that criminal acts of corruption committed by corporations are criminally responsible for people acting on behalf of the corporation.

4. Corruption Theory

In general, the theory of corruption that researchers use as an analytical knife is very much in sync with the corporate responsibility of the subject of corruption. As the understanding related to corruption is the result of a lack of transparency and accountability, both prerequisites are good governance (Nasution, P. 2018).

3. METHODS

The type of research used in this research is normative legal research. Normative legal research essentially examines laws that are conceptualized as norms or rules that apply in society, and become a reference for everyone's behavior. (Ishaq, 2017). According to Soerjono Soekanto and Sri Mamudji, normative legal research is legal research conducted by examining library materials or secondary data. The selection of this type of research will focus on the articles in the legislation relating to the regulation of criminal acts of corruption that are applied to corporations as perpetrators of corruption. (Soerjono Soekanto & Sri Mamudji 2012).

The research approach chosen in this thesis is consistent with the type of research so that the approaches used are, first, a statutory approach, second, a theoretical approach and a comparative approach. Consequences as normative research, the characteristics of the object of research are also considered, namely the qualification of corporate criminal responsibility as perpetrators of corruption in relation to corporate crimes. This characteristic is more relevant to use the three approaches to be an approach that is in accordance with the characteristics of corporations as perpetrators of corruption. The legal material analysis technique used in this study is a deductive-inductive technique which is narrated qualitatively. The analysis stage is carried out through a process of reviewing all legal materials by reading, and studying the collected legal materials, then looking for and finding the relationship between legal materials by assembling them with the concepts and theories used. All results of identification and analysis of legal materials are narrated through reasoning and legal arguments to answer legal issues and formulate a number of new ideas and ideas (novelty) about the concept of corporate responsibility as a perpetrator of a criminal act of corruption in a corruption crime.

4. RESULTS AND DISCUSSION

1. The Existence of Corporations as Subjects of Corruption Crimes

In the following, theoretical concepts from theories and doctrines as well as laws and regulations will be proposed as a reference for determining corporations as perpetrators of criminal acts, in addition to being a reference for theoretical concepts that are presented. A description is needed so there are no multiple interpretations

of the determination of corporations as the subject of criminal acts as shown in Table 1 below:

Table 1
Identification and Theoretical Qualification of Corporations as Subjects of Crime

No.	Corporations as Subjects of Crime	Theorists/legal basis	Qualifications
1	Statutory Provisions	UU No.31 tahun 1999 juncto UU No.20 tahun 2021 UU Tindak Pidana Khusus	Every person and legal entity is treated as a criminal act
2	Doctrine	Subekti dan Tjitrosudibio, Rudi Prasetyo	Can be done by Corporation
3	Theory	Peter Giller	Corporations as subjects of criminal law

Source: primary legal materials, processed, 2022

Based on Table 1, it is known that from the doctrines, theories, laws and regulations regulating corruption crimes, corporations are determined as the subject of criminal acts. The determination of the qualifications of the corporation as a subject of criminal law becomes a reference in determining the position of the corporation as a perpetrator of a criminal act of corruption. In this regard, from the table of legal materials it can be concluded that corporations are currently qualified as criminal law subjects and therefore corporations are perpetrators of corruption. Following are some of the special statutory provisions that qualify corporations as the subject of a criminal act as shown in Table 2 below:

Table 2
Some Special Legislation Qualifying Corporations as the Subject of a Crime

No.	Statutory Name	Legal Basis	Legal Subject Designation
1	Constitution No. 31th 1999 juncto Constitution No. 20th 2021 about corporate crime	Article 20 section (1) Article 20 section (2) Article 20 section (3)	- Corporation and or its management - people who have a working relationship - claims against corporations represented by management

2	Constitution No. 5th 1999 about prohibition of antitrust and business competition	No regulating the subject	- legal entity and non-legal entity
3	Constitution for consumer protection	Article 61	Business actors and or administrators
4	Constitution No. 8th 1995 about capital market	No article provisions	Does not mention legal subjects
5	Constitution No.8th 2010 about money laundering	Article 1 number 9 juncto Article 1 number 10	Every person/individual/corporate/ group of people/wealth
6	Constitution No.5th 1997	Article 59 section (3) juncto Article 70	-Corporations -no management confirmation
7	UU No. 7 , 2014 about trading Constitution No.7th 2014 about trade	Article 1 section (14)	Business actor / every individual
8	Constitution No. 14th Constitution No. 4th 1997 about people with disabilities	Article 14	BUMN & BUMS
9	Constitution No. 22nd 1997 about narcotics	There are no general rules	Not seen as the subject of a crime
10	Constitution No.23rd 1997 about Environment	Article 46 section (1)	Business actors

Source: Barda Nawawi Arief, 2010

Based on Table 2, the information shows that the position of corporations as perpetrators of criminal acts has been embraced in Indonesian criminal law and therefore, in relation to criminal acts of corruption, corporations have become subjects of criminal law or perpetrators of criminal acts that raise corporations and

people act on behalf of corporations, even though the term corporation is interpreted by various laws and regulations.

2. Corporate Criminal Liability as Perpetrators of Corruption Crimes

The discussion on the form of criminal liability for corporations will refer to several assumptions and concepts and prepositions from the theoretical framework that has been formulated previously. Based on several theoretical and doctrinal assumptions in relation to criminal liability for corporations, there are legal issues related to the qualifications of criminal liability to whom criminal responsibility is placed on individuals, business actors or the main director (officer) or other people or legal entities. Corporate criminal liability is not a universal feature of today's modern legal system. Some countries such as Brazil, Bulgaria, Luxembourg and the Slovak Republic do not recognize any form of criminal liability for corporations. Other countries such as Germany, Greece, Hungary, Mexico and Sweden, although they do not provide criminal liability to corporations, they still have a system of administrative sanctions that can be imposed on corporations for the criminal acts of some of their employees (Allens Arthur Robinson 2018).

At first, the legislators stated that only humans (individual or individuals) could commit criminal acts. Referring to the formulation of the provisions of Article 59 of the Criminal Code, especially relating to offences, it is formulated by the phrase "*hij die*" which means whoever. In the development of criminal law in Indonesia, the legislators formulating offences also considering the fact that humans also sometimes take actions within or through organizations in civil law or outside of it, so that regulations emerge against corporations as perpetrators of criminal acts. (Eddy O.S. Hiariej, 2014).

4. CONCLUSION

Based on the results of research and discussion in previous chapters, the authors draw the following conclusions:

1. The existence of corporations as the subject of criminal acts in the criminal act of corruption has been accepted as a legal subject of criminal acts, only in determining who the subject of corporate criminal law. It becomes unclear because there are several terms of criminal law subject for corporations which are regulated in special laws and regulations, including in corruption crime. The variety of terms and designations of criminal law subjects for corporations will result in ambiguity in law enforcement.
2. The problem of implementing the form of criminal responsibility for corporations as perpetrators of criminal acts is not patterned and seems inconsistent between one decision and another court decision so that it will also threaten the consistency of the type and quality of criminal liability and the system of sanctions that will be applied by law enforcement officials.

Based on the conclusion of the study, the researcher recommends the following:

1. It is better if the term criminal act for corporations is uniformed into "everyone" and or "legal entity" so that in its application it does not cause ambiguity to the perpetrators of criminal acts committed by corporations.
2. It is better if the concept of accountability for corporations as perpetrators of corruption is applied consistently by law enforcement officers (prosecutors and judges) and not too varied so that in its application it does not cause discrimination for everyone and does not seem inconsistent in law enforcement.

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