CORPORATE CRIMINAL RESPONSIBILITY AGAINST ENVIRONMENTAL CRIME

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ABSTRACT

This paper discusses corporate law enforcement that carries out environmental crime. Although criminal law policy recognizes corporations as legal subjects, there is no significant influence on enforcement, one of which is influenced by the formulation of the criminal norm. Using the doctrinal approach can be concluded the need to set normative standards of criteria for imposition of corporate criminal responsibility, the determination of criminal sanctions stifling the corporation and the need for guidance and prosecution of corporations.

Keyword: criminal responsibility, corporate and environmental.

A. Introduction

The criminal law policy in Indonesian criminal legislation shows corporate recognition as the subject of criminal law and criminal liability, but does not have a significant influence on law enforcement against corporate crime. The reality in judicial practice in Indonesia shows that many corporations are committing criminal acts in the environmental field, but cannot be held to criminal responsibility and sentenced to criminal. Although the various developments of criminal responsibility theory that exist today is very possible to ensnare the corporation.

Roeslan Saleh said that: "the law is part of a certain policy, it is not only a tool to carry out wisdom, but also determines, outlines or devises a policy".[1] Therefore, errors (weaknesses) at the stage of legislation policy (formulation) is a strategic error that can hamper law enforcement efforts *'in concreto'*.[2] Strategic policies are said because they provide the basis, direction, substance and limits of authority in law enforcement that will be carried out by the judicial and executive authorities. This strategic position brings the consequence that the weakness of the criminal law formulation policy will have an effect on criminal law enforcement policies and crime prevention policies.[3]

Meanwhile, Satjipto Raharjo, as quoted by Nyoman Sarikat Putra Jaya,[4] said that the law enforcement process reaches to the stage of law/law making. The formulation of the lawmakers' ideas set forth in the legislation will also determine as the law enforcement will be carried out. Furthermore, basically the criminal law policy essentially contains state policy in regulating and overcoming power, both the authority of society in general to act and behave as well as the power or authority of the ruler/law enforcer in carrying out its duty to ensure that the community is obedient and obey to the rules that have been set.

Thus, the formulation of criminal provisions (the legislation/formulation stage) is a very strategic beginning planning stage of the law enforcement process "*in abstracto*", while the second and third stages (the judicial and executive stages) are the "*in concreto*" law enforcement stages.[5] The same thing is also said by M. Cherif Bassiouni as quoted Barda Nawawi Arief, mentions the three stages with terms: the formulation stage (legislative process), the application stage (judicial process/judicial) and the execution stage (administrative process).[6] Based on the above description, there is a strong correlation between criminal law policy when formulating criminal provisions in criminal legislation. This paper will offer the draft formulation of criminal provisions in accordance with the characteristics of the corporation for effective and fair enforcement of the corporation.

B. Result and Discussion

The formulation of criminal liability to corporations especially against criminal acts in the environmental field, has consequences on how the content of environmental crimes is formulated. Especially with regard to the problem of causality (causal relationship) and the element of deliberate objection often raised. That is, this situation is used as a gap for the perpetrator to

[1] Roeslan Saleh, *Segi Lain Hukum Pidana* (Other Aspects of Criminal Law), Jakarta: Ghalia Indonesia, 1984, P. 44-45.
[2] Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan* (Law Enforcement and Criminal Law Problems in Crime Handling), cetakan ke-3, Jakarta: Kencana Prenada Group, 2010, P. 25.
[3] *Ibid*, P. 223.
[4] Nyoman Sarikat Putra Jaya, *Kapita Selekta Hukum Pidana* (The Choice Case of Criminal Law), Badan Penerbit Undip, Semarang, 2005, P. 23.
[5] Barda Nawawi Arief, *Kebijakan Formulasi Ketentuan Pidana Dalam Peraturan Perundang-undangan* (Formulation of Criminal Provisions in Regulations), Semarang: Pustaka Magister, 2012, P. 10.
[6] M. Cherif Bassiouni, *Substantive Criminal Law*, USA: Charles C. Thomas Publisher, Springfield, Illionis, 1978, P. 78.

avoid the criminal responsibility for criminal acts that have been done. This means that it is impossible to use classical legal concepts in terms of authenticity of environmental crime law "inapplicable".[7]

Determining corporate liability is difficult for law enforcement officials. In claiming the corporation's responsibility it is necessary to consider whether the corporation in conducting its business has failed to perform its duty obligations, whether the corporation is violating the public disturbance, and whether the penalty sanction imposed will reach between the criminal law objective and the socio-economic inefficiency resulting from the application of corporate criminal liability.

Based on the development of the theory of corporate criminal responsibility that exists today, there are at least five kinds of theories that can be used in requesting criminal responsibility for the corporation. Starting from the vicarious criminal liability theory which is the theory of origin in acceptance of criminal responsibility for the corporation. This theory is wide enough to be able to transfer the responsibility of a corporate administrator irrespective of its position in the corporation, to criminal liability for the corporation. However, the extent of this theory is detrimental to the corporation, so there is a need to limit it to the benefit of the corporation, or to do it in the context of the corporate purpose or contents to the task and authority intra vires and scope of employment. So that vicarious criminal liability theory with more concrete criteria still needs to be maintained in the imposition of corporate criminal responsibility in Indonesia.

Meanwhile, the theory of identification is a narrowing of Vicarious liability theory that developed in the decision in England. Based on this theory, corporations are identified through corporate directing minds called corporate alter ego of the corporation, so corporations can be held accountable for their actions and mistakes. The advantage of using the identification doctrine is that the discovery of the 'mind' of the corporation can be easily seen from the controlling board that can influence the decision of the corporation. However, this doctrine will allow corporate and corporate leaders to be free from criminal liability because they do not directly conduct *actus reus* from a crime or do not directly suggest a criminal offense. The independent actions of subordinate employees, either individually or collectively, improperly implement company policies may break the causal chain to hold the corporation accountable for a detrimental effect on society.

The doctrine of identification will only be applied perfectly to small companies. In a large company a director will rarely have direct involvement to be responsible for a crime. In addition, in large companies sometimes a controlling person does not have overall control over the activities of the company. Without personal responsibility from someone who is categorized as the 'directing mind and will' of the corporation, responsibility cannot be attributed to the corporation. So the theory of identification alone can not be the sole foundation in imposing criminal responsibility for the corporation.

Regarding criminal liability for corporations, the general principle that must be used in attributing criminal liability to the corporation is that if the action is 'reasonably attributed', it is reasonable or worthy to be attributed to the corporation concerned. In this case can use the combined teaching. This doctrine includes an essential element in the imposition of criminal liability to the corporation. However, it is necessary to add criteria regarding the possibility of a corporate culture that encourages, leads, or tolerates the occurrence of criminal acts (corporate culture doctrine) in imposing criminal liability on an organization. Adopting the corporate culture doctrine is important to encourage companies to form a work culture that is law-abiding and policies that do not lead their administrators to do things that will violate legal provisions. The corporate work culture does not only depend on one or two corporate controlling officers and does not depend on a single time, but is a big policy regarding how the behavior of the corporation from time to time. This is in line with the nature of the corporation that will not lose its fundamental identity as a different subject, even though all members in it are already different from the original formers.

All the theories described above are ways used to explain how to attach criminal responsibility to a subject of corporate law. Of course, each of these theories has advantages and disadvantages in explaining the relationship between *'actus reus*' and *'mens rea'* with the criminal liability that can be given to the corporation. Thus, it is important to be able to take advantage of each of these theories in order to obtain a better concept in maximizing the ability of criminal law to hold accountable to a corporation involved in committing a crime. Regarding the discovery of faults from the corporation, mistakes can be drawn from the mistakes of the controlling board, or from some people in the corporation regardless of their position in the corporation or from the work system or from the corporate culture. The construction of corporate errors will depend heavily on the facts of the case that the judge is facing. But the standard used to assess corporate errors is 'reasonably attributed', reasonable enough or feasible for attribution to corporations.

Corporate criminal liability is based on the obligation of every corporation to distance as far as possible with the occurrence of a criminal offense, and if this obligation is neglected then the corporation may be reproached for a crime. Corporate criminal liability can only be requested if the corporation does not make the avoidance of a criminal act as part of its policy of carrying on its activities. Corporate criminal liability is deemed to meet the requirements if a corporation in reality lacks/does not/and pursues policies or levels of security in preventing acts of prohibited conduct by 'administrators', 'employees' or 'persons who can be equated with it'. Criminal liability corporations can only be done if there is a close connection with the process of making or

[7] G. Heine, “Hukum Pidana Lingkungan di Eropa Barat. Berbagai Arah Aliran Politik Hukum, Persyaratan Untuk Pemidanaan dan Berbagai Masalah Praktis yang Berkenaan dengan Penuntutan”, ("Environmental Criminal's Law in Western Europe. Various Direction of Political Law Flows, Requirements for Prosecution and Practical Issues Relating to Prosecution), dalam M.G. Faure, J.C. Oudijk dan D. Schaffmeister, *Kekhawatiran Masa Kini: Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori & Praktek* (Current Concerns: Thinking About Environmental Criminal Law In Theory & Practice), terj. Tristam P. Moeliono, Bandung: PT. Citra Aditya Bakti,1994, P. 495.

forming a decision within a corporation with a crime that occurred. Corporate criminal liability is sufficiently characterized by the fact that a crime occurs because it is sourced or related to the way business management/corporate decisions are made.

The same thing is also used by the Panel of Judges in the Netherlands in imposing (attributing) criminal liability to corporations. Although in some cases using the functional perpetration standard to impose criminal liability on corporations. On other occasions the courts in the Netherlands also use certain criteria such as corporate acceptance of criminal offenses, criminal acts committed for the benefit of corporations or for corporate gain or corporate failure to take the necessary measures to prevent crime. Other lessons learned from the United States in determining the criteria for corporate criminal responsibility. The United States uses the strict vicarious liability doctrine in which a corporation may be liable for a crime committed by an employee or another acting for a corporation, regardless of its position within the corporation. As long as it can be proven that the action was carried out for and on behalf of the corporation, carried out within the scope of its work, and acting for the interests of the corporation. A corporation may be found guilty of an offense committed by an ordinary employee who acts contrary to a corporate policy or compliance program applicable within the corporation.

Accordingly, based on lessons learned from various countries and the practice of Indonesian criminal justice as mentioned above, criteria for imposing criminal liability to corporations in the environmental field based on the following circumstances:

1. Conducted by the corporate directing mind, or if such action is not done directly by a corporate controlling person, such conduct may be committed by a person working for the corporation, either based on formal employment or other relationships:
    a. Conducted to provide benefits to the corporation; or
    b. Conducted in the framework of the intent and purpose of the corporation (contribute to the corporate goal); or
    c. Done in the framework of the duties and authority of the board (*intra vires* and scope of employment); or
2. Approved or accepted by the corporation. Approval is deemed to be granted if the corporation does not provide a failure to take reasonable care or does not prohibit the conduct of a corporate policy or does not take adequate action when the offense occurs (reactive corporate fault); or
3. Encouraged or tolerated by culture, systems, work practices that are generally accepted by corporations.

Regarding criminal sanctions such as what can be imposed on corporations must be in accordance with the characteristics of a corporation that is different from humans. Therefore, in the case that the law expressly states that the corporation is criminally accountable, it must be accompanied by a guidance of the penalty for the corporation. Under Indonesian criminal law, in addition to the basic penalty of a fine, the judge may impose additional criminal sanctions and regulatory actions. As regulated in Law No. 32 Year 2009 which has been set in accordance with the characteristics of business entities. However, according to the provisions of the law, additional crimes are not required to be handed down by a judge because they are only optional. In this case it is recommended that some additional crimes determined by law must be imposed not optional. Thus, it can have a deterrent effect on the same corporation or cause fear for other corporations. For corporations, there is the possibility of additional crime which is feared is the announcement of the judge's decision (to cause shame and terminated its business relations by its partners), the expropriation or takeover of the corporation by the state, and the revocation of business license.

Then how can the criminal provisions in the law also apply to corporations as perpetrators of criminal acts regulated in the law and does not cause any doubt for law enforcers to prosecute corporations in addition to demanding administrators, at least should include the following things:

1. Strictly determined in the law related that corporations can be prosecuted as perpetrators of crimes regulated in the law;
2. Penal sanctions and penal sanctions are specified as sanctions that must be imposed cumulatively only if the offender charged with criminal responsibility is human, whereas if the offender is a corporation, the offense determined in the penal provisions in the law it is a fine of fines.

Regarding the guidelines for prosecution of corporations suspected of being involved in a criminal act, the prosecution mechanism is generally the same as other general crimes. But there are some specificities that must be taken into account when prosecuting corporations. Given the corporation in doing his actions done by human (administrators) as the move the corporation. According to Adnan Paslyadja[8] said that in the case of a corporate case file as a suspect separated from the file of the administrator as well as a suspect each in a different case file, the public prosecutor demands individually by arranging his own indictments, but the public prosecutor can sue in an indictment and jointly prosecuted in a letter of delegation.

It further said that in the case of corporations and their respective administrators as suspects in a case file, the public prosecutor may formulate an indictment in the form of a single indictment consisting of a corporation as Defendant I and the representative representing Defendant II. That is, the public prosecutor demands the corporation jointly in an indictment as Defendant I and Defendant II. This is in accordance with the principle adopted in Attorney General's Regulation No.028/A/JA/10/2014, namely legal certainty, professional, fast/modest, and low cost, it will be more appropriate if the investigation and prosecution are conducted in one case file and in one indictment. Although in the Attorney General's Regulation No.028/A/JA/10/2014 in Chapter III number 6 mentioned, "the investigation of corporate law subjects is carried out separately with the legal subjects of individuals. [9]

[8] Results of free interview with Adnan Paslyadja (Ex Prosecutor General) at the Attorney General of the Republic of Indonesia, on January 8, 2018.

[9] *Ibid.*

Nevertheless, given the environmental law as functional law (*functioneel rechtsgebeid*), enforcement of criminal law in environmental law must apply the principle of subsidiarity by placing criminal law as the ultimate remedy (*ultimum remedium*). That is, criminal law enforcement can only be used if administrative sanctions and/or civil sanctions do not bring changes to the deviant behavior of the owner of activities or businesses that cause environmental pollution and damage.

Actually, the placement of criminal sanction as *ultimum remedium*, basically focuses on the function of the benefit of criminal law, especially in order to increase state revenue as the main purpose of administrative law (administrative penal law). In the context of criminal law as a final resort, new criminal sanctions will be used if absolutely necessary and necessary in the settlement of irregularities and violations in the administrative field, so it is the last resort after various administrative measures and actions are carried out. The placement of criminal sanctions as *ultimum remedium* does not mean that when criminal acts occur in the administrative field criminal sanctions will not be imposed. As long as the elements of the offense that have been included in the law in the field of administration have been fulfilled, law enforcement officers will conduct investigations and prosecutions and impose criminal sanctions on the perpetrators.

At this point it becomes important to understand the characteristics of criminal acts, as well as the application of criminal procedural parameters in the field of administration. In this case, the main concept lies in the presence or absence of *'actus reus*' and *'mens rea*', which precedes, follows or covers violations in the administrative field. Moreover, if the crime in the administrative field is "*mala per se*" accompanied by the character of recidivism, fraud, deceit, misdirection, forgery, manipulation, trickery, concealment, circumvention of the rules, should use the *primum remedium* principle. [10]

H. G. de Bunt in his book entitled *strafrechtelijk handhaving van milieu recht* suggests that criminal sanctions can be a *primum remedium*, if: [11]

1. Victims are very large;
2. Defendant recidivist;
3. Loss can not be recovered (irreparable).

Based on De Bunt's opinion, it can be said that the enforcement of criminal law against environmental crime does not always make criminal law as ultimum remedium. Therefore, it cannot be said specifically in environmental law enforcement, that criminal law is the last drug (*ultimum remedium*). However, in certain circumstances and in particular cases criminal law instruments should be placed as primum remedium. For example, against environmental crimes that even once just happened, but resulting in irreversible environmental damage have an impact and massive casualties. Likewise for environmental crimes which are perpetrators of recidivism, in these circumstances the application of criminal law is an option. This means that there is no need to consider administrative sanctions or criminal sanctions in law enforcement.

However, in relation to the use of criminal sanctions in the administrative law in the environmental field, if you want to place criminal sanctions as *primum remedium*, it must be done carefully and selectively by considering the objective conditions related to his actions. Subjective matters relating to the perpetrator, the public's impression of the criminal act and the device for the purpose of the punishment to be addressed. The use of criminal sanctions in various criminal acts in the environmental field must be linked to the objectives of the environmental criminal law itself. All of the above criteria should be included in the formulation of criminal provisions in laws and regulations that recognize the corporation as a subject of criminal offense and criminal liability. It is hoped that with the formulation of norms of criminal acts, criminal liability and corporal punishment can be applied more accurate law enforcement and fairness can be found. In particular to improve the existing arrangements in various laws and regulations today.

C. Conclusion and Recommendation

The criminal law policy has recognized the corporation as a subject of criminal offense and criminal liability, but has no significant effect on law enforcement of corporate criminal acts in the environmental field. This fact can not be separated from the issue of formulation of criminal provisions in the legislation governing it. Especially criteria for imposing criminal liability to corporations, criminal sanctions against corporations in the environment and corporate guidelines for prosecution and punishment in accordance with corporate characteristics. A clearer and stricter arrangement is needed in the formulation of criminal provisions that recognize the corporation as the subject of a criminal act. This is important to do so that law enforcement against corporations that commit criminal acts can be carried out effectively and fairness.

[10] D. Andhi Nirwanto, *Asas Kekhususan Sistematis Bersyarat Dalam Hukum Pidana Administrasi dan Tindak Pidana Korupsi* (The Basic Principle of Conditional Systematic In Criminal Law of Administration and Corruption Crime), Bandung: PT. Alumni, 2015, hlm. 256.

[11] *Ibid.*

Reference

Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan* (Law Enforcement and Criminal Law Problems in Crime Handling), cetakan ke-3, Jakarta: Kencana Prenada Group, 2010.

Barda Nawawi Arief, *Kebijakan Formulasi Ketentuan Pidana Dalam Peraturan Perundang-undangan* (Formulation of Criminal Provisions in Regulations), Semarang: Pustaka Magister, 2012.

D. Andhi Nirwanto, *Asas Kekhususan Sistematis Bersyarat Dalam Hukum Pidana Administrasi dan Tindak Pidana Korupsi* (The Basic Principle of Conditional Systematic In Criminal Law of Administration and Corruption Crime), Bandung: PT. Alumni, 2015.

G. Heine, "*Hukum Pidana Lingkungan di Eropa Barat. Berbagai Arah Aliran Politik Hukum, Persyaratan Untuk Pemidanaan dan Berbagai Masalah Praktis yang Berkenaan dengan Penuntutan*" ("Environmental Criminal's Law in Western Europe. Various Direction of Political Law Flows, Requirements for Prosecution and Practical Issues Relating to Prosecution), dalam M.G. Faure, J.C. Oudijk dan D. Schaffmeister, *Kekhawatiran Masa Kini: Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori & Praktek* (Current Concerns: Thinking About Environmental Criminal Law In Theory & Practice), terj. Tristam P. Moeliono, Bandung: PT. Citra Aditya Bakti, 1994.

M. Cherif Bassiouni, *Substantive Criminal Law*, USA: Charles C. Thomas Publisher, Springfield, Illionis, 1978.

Nyoman Sarikat Putra Jaya, *Kapita Selekta Hukum Pidana* (The Choice Case of Criminal Law), Badan Penerbit Undip, Semarang, 2005.

Roeslan Saleh, *Segi Lain Hukum Pidana* (Other Aspects of Criminal Law), Jakarta: Ghalia Indonesia, 1984.

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