THE ACCOUNTABILITY OF THE DIRECTORS OF LLC (LIMITED LIABILITY COMPANY) FOR ENVIRONMENTAL CRIME IN INDONESIA

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ABSTRACT

The accountability of the Directors of a Limited Liability Company (LLC) has been regulated in Article 116 UUPPLH. The criminal responsibility of the LLC directors as individuals for criminal act of environmental damage as long as the directors have authority but do not make any effort to prevent violation or to improve the situation. While the director's criminal responsibility represents the organ of a limited liability company for criminal act of environmental destruction that can be identified based on Responsible Corporate Officer Doctrine (RCO) and Strict Liability. In accordance with its position in the company, the directors of a LLC have an obligation to take action to ensure that the violation will not occur. Accountability of corporate directors or managers is deemed necessary if the corporation is only used as a tool for individual leader / administrator to commit criminal act. On the other hand, the accountability of the directors / management of the corporation is also needed because of the possibility of the sanction or punishment imposed on the corporation will not affect the life of the leader / manager of the corporation.

Key words: Criminal Accountability, LLC Directors and Crime

INTRODUCTION

Talking about law enforcement is an action system. There are various activities that can be carried out by state equipment in carrying out law enforcement. What is meant by law enforcement equipment in general is not just the police but also the institution that has the authority such as the police and the prosecutor's office. However, law enforcement can be interpreted broadly including the duties of lawmakers, judges, government agencies (bestuur), officer of criminal execution.(Sudarto, 1981)

Regarding the enforcement of environmental law, mentioned in the International Conference on Enforcement of Environmental Law in Oaxaca, Mexico on 25-28 April 1994, enforcement of environmental law is the utilization of various legal tools to encourage and compel regulated communities to comply environmental protection requirement which is usually reflected in environmental legislation and licensing. From this limitation, the enforcement of environmental law is a combination of various legal instruments, whether for encourage the regulated communities to comply voluntary with environmental protection requirement or device that have command and control, such as the utilization of environmental criminal law (Santosa, 1995)

Therefore, general law enforcement can be interpreted as an act of implementing legal means with the aim of imposing legal sanction to ensure compliance with the stipulated provision. The ultimate goal of enforcing environmental law is compliance with applicable environmental law. Compliance is a condition that is achieved and maintenance of the provision of environmental law, both those that apply individually. Therefore, the enforcement of environmental law includes compliance measures, the administrative sanction and judicial action which include civil claims (compensation and cost of environmental recovery) and criminal sanction (Panggabean, 2017)

In order to carry out law enforcement, the Indonesian government has carried out its duties related to environmental preservation, among others by the issuance of Law Number 32 of 2009 concerning Environmental Protection and Management (referred to as UUPPLH). In the UUPPLH, there are 2 types of environmental crimes, namely environmental pollution and environmental destruction. The definition of environmental pollution in Article 1 paragraph 14 of UUPPLH states that "environmental pollution is the inclusion of living things, substances, energy, and / or other components into the environment by human activities so as to exceed the prescribed environmental quality standard". While what is meant by environmental destruction in Article 1 paragraph 16 of the UUPPLH states that environmental destruction is "the action of people that cause direct or indirect changes to the physical, chemical and / or biological characteristics of the environment so that they exceed the standard criteria for environmental damage". According to the Ministry of Environment and Forestry (KLHK) data that Indonesia's forest cover in 2017 was 93.6 million ha, while the deforestation rate in forest areas in 2017 was 64.3%, while the amount of waste produced by Indonesia in 2016 amounted to 65 million tons, and increased to 67 tons for 2017. While according to the data from the Oceanography Center of Indonesian Institute of Science (LIPI) show that about 35.15% of coral reefs in Indonesia were in poor condition and only 6.39% were in a condition which is very good. Global warming is triggered by coal burning which reaches an annual emission amount of 9 billion tons of Co2.

Corporate placement as the subject of criminal law cannot be separated from social modernization. Satjipto Rahardjo, the socialization of its impact must be recognized, that the more modern the society is, the more complex the social, economic and political systems that are found, thus the greater the need for a formal life control system. Social life can no longer be left to be a relaxed rule, but it is desired to have a more tidy and organized, clear, detailed arrangement, even though such methods might meet the growing needs of the community, but the problems occur are plentiful (Rahardjo, 1980)

Determining corporate accountability is difficult for law enforcement officer. Law enforcement officer in asking for corporate accountability need to pay attention to whether the corporation in carrying out its business has failed its duty, whether the
Corporation is violating public disturbance, and whether the criminal sanction imposed will reach between the objective of criminal law and socio-economic efficiency resulting from the application of criminal liability corporation (Syahrin, 2014)

The fact is that not only corporation can be held accountable for crime, but administrator and / or employee can also be held accountable for their crime. Alvi Syahrin (2014) believes that Directors and / or Managers in a company can be held accountable in these conditions:

1. Criminal accountability for corporate officers who are in the position of responsible (corporate management) and based on Responsible corporate Officer Doctrine and Strict Liability, affirmed that company officers can be responsible for criminal act of the corporation, even though he is not aware of the crime, because his position in the company has obligation to take action to ensure that the violation will not occur. Corporate officers are personally responsible for corporate criminal acts as long as the officers have the authority to prevent violation or to improve the situation. The criminal responsibility for these officers does not need to pay attention to (proven) the existence of mens rea, because the mens rea has been proven that the officer has violated his obligations.

2. An employee is responsible for personal request involved if he is a person who is directly involved, help, provide, encourage, or cooperate with other employees or subordinates to commit a crime. The officers responsible for the RCO Doctrine if he is in a position obliged to prevent criminal act and based on this doctrine there is no need to prove its existence anymore. Thus, the imposition of accountability of private court on companies (corporate officers) for corporate error must be limited to a campaign: a. there is reason for interesting public policy to be carried out, in the case of significant political hazard that may be caused by corporate activities; b. There should be nothing suitable for the agreement and c. It is natural in all situations for companies (corporate officers) to be responsible by paying attention to some factors: first, approval of the company; second, official employees, have the capacity to influence corporate relation and.; the steps taken to install the company in accordance with the requirements set out in the law. Furthermore, employees (corporate officers): a. Have been successful or canceled; b. Have been negligent or careless in his agreement to run the corporation (Syahrin, 2014)

The magnitude of the position and authority of the board of directors make them having great responsibilities as well. The responsibility that can be borne by the board of directors is that the directors are fully responsible personally for the loss suffered by the company, and in the case of the board of directors consisting of 2 (two) or more members, then the principle of applying responsibility is tanggungrengteng (joint and several liability) (Harahap, 2009)

The imposition of responsibility of directors or corporation management must be proven by a violation of the authority. In this case, the corporate management must be proven to have violated the good faith entrusted to him in running the corporation or company, as stipulated in the principle of fiduciary duty (Harahap, 2009)

The director's criminal liability in the case of environmental damage, based on article 116 paragraph (1) of UUPPLH in the case of a criminal offense carried out by, for and on behalf of a business entity, can be prosecuted and punished as follows:

1. Business entities and people who give order to commit environmental crime;
2. Business entities and people who act as leader of activities in doing environmental crime;
3. Business entity;
4. A person who gives an order to commit environmental crime;
5. People who act as leader of activities in criminal act;

Furthermore, based on article 116 paragraph (2) of UUPPLH, in the case of a criminal offense committed by a person based on a work relationship or other relationship, which can be prosecuted and sentenced were:

1. A person who giving order in environmental crime without regard to the crime is carried out alone or together
2. The leader in environmental crime without regard to criminal act is carried out alone or together.

According to Alvi Syahrin, the provision of article 116 paragraph (1) of the UUPPLH open the possibility if a business entity commits a criminal act, not only the business entity demands it, but also the person who ordered the incident and the person who led the action prohibited. It means that the management as the giver of the order and the leader of the real action can be accounted for for the action committed by the business entity (Syahrin and Hasanah, 2014)

The Indonesian Supreme Court at the end of December 2016 issued a Supreme Court Regulation (Perma) No. 13 of 2016 concerning Procedure for Handling Criminal Case by Corporation. In its consideration, the Supreme Court stated that PERMA 13/2016 was needed because:

a. There are various corporate crimes that cause losses to the State and society;
b. Corporation can be a place to hide assets resulting from criminal act that is not identified by legal processes in corporate criminal liability, and
c. Many laws or constitutions in Indonesia put corporation as the subject of criminal act that can be held accountable, but cases with corporate legal subject submitted in criminal proceedings are still very limited, one of the reason is that the procedure for examining corporation as perpetrator of crime is still unclear.
From the description above, it can be seen that corporate accountability and the director's personal responsibility play an important role in ensuring accountability from the corporation. The problem is how to become a corporation or corporate management that responsible for corporate crime.

METHODOLOGY

This research used the normative legal research method. Normative legal research is a legal research that puts law as a system of norm (Fajar & Ahmad, 2010). Normative legal research is intended to get answer to the legal problem that was studied. To support the normative legal research, the approach used was the Statute Approach by reviewing the laws, constitutions and regulations relating to the issues that were studied.

REASONS FOR REQUESTING ACCOUNTABILITY OF DIRECTORS REPRESENT THE ORGAN OF THE LIMITED LIABILITY COMPANY FOR ENVIRONMENTAL CRIME

According to Article 92 paragraph (1) Law No. 40 of 2007 concerning the Company that regarding the responsibility of the Board of Directors stated: “The Board of Directors runs the management of the Company for the benefit of the Company and in accordance with the purpose and objective of the Company”. Knowing the responsibility and position of the Board of Directors show that the existence of the Board of Directors in a company is a necessity because the board of directors is as an “artificial person” and nothing can be done without the existence of the Board of Directors as a “natural person” (Subekti, 2008).

The relationship between the Company and the Director is not seen as a relationship to the basis of the employment agreement as stipulated in Article 1601 of the Civil Code and also cannot be interpreted as the relationship between the employer and the worker, as described by Imam Soepomo as the other party's employee because the laborer's obligation is to do work according to the instructions of the Employer (Wijaya, 2000).

According to Hartono Soerjopraktikno, “representative can arise from actions, intentionally intended to cause consequences (lastgeting machtiging). An understanding of the representative stated above can be specified as: 1) Representative based on the will or the agreement. 2) Agreement which is not based on the meaning born of the law (Soeparno, 2001)

Representative in the relationship between the Company and the directors is included in the definition of representative born not because of agreement but born because of the provision of the law. The duties of Directors in detail have been formulated in the Articles of Association, so that in acting in law, the Directors must always test their actions on the Articles of Association.

The responsibility of the Company's Directors is closely related to the nature of the collegiality of the Company's Directors. According to Article 98 paragraph (1) of the Company Law, Directors representing the LLC both inside and outside of the court paragraph (2) state that in the case the Board of Director members consisting of more than one person, the member of the Board of Directors is authorized to represent LLC, unless specified in the articles of association. Paragraph (3) state that the authority of the Board of Directors represents the LLC is unlimited and unconditional, unless stipulated in the constitution, AD or GMS Decision.

The provision of Article 98 paragraph (2) above provide an indication that the LLC Directors in the system is collegial, means that the LLC Board of Directors should consist of more than one person or in the form of a council. Even though in the organizational structure is arranged of the President Director, the Director of Personnel, Director of Compliance, Director of Production, etc., does not mean that the position of the President Director becomes higher but their position is equal. They are Council and collegial. The system of responsibility is basically together or joint responsibility.

Therefore, in Article 98 paragraph (2), the Company Law is determined to have the authority to represent LLC is each member of the Board of Directors, unless specified in the Articles of Association. Even from the standpoint of the position of each LLC organs (GMS, Board of Commissioners and Directors) on the basis that one another has the same or equal position, one party is not under other party but each of them having their own assignments given by the articles of Association.

Corporate employee who commit crime within the scope of the authority and if those actions benefit the corporation, the corporation can be asked for criminal responsibility for the actions of the employee. The employee is deemed to act within the scope of his work, if he has or is authorized to carry out such acts, including in the event that the third party acknowledges (believes) that the employee's deed is an act that has been authorized by the corporation on the basis of a contract (Syahrin, 2014)

The corporation receives benefit from criminal act commit by the employee, if the employee commits a crime with the aim of benefiting the corporation. In the case that the employee's action do not benefit the corporation and the corporation suffers losses from the employee's action, then the employee's action constitute as the individual action of the employee and he is responsible individually. However, in the case that an employee commits a criminal act for personal gain, that is to be able to quickly rise in rank (to get a promotion), the corporation can still be asked for criminal responsibility, because the corporation will also benefit from the employee's action, because the promotion of the employee is a form of success received by the corporation. As long as the employee intends to collect for corporation to benefit (get a profit) indirectly, the corporation is still considered to have received profits.
Criminal liability cannot be requested if the employee violates the trust given by the corporation (breach of fiduciary of duty), because violation of breach of fiduciary of duty carried out by unprofitable employee even cause losses to the corporation. Employee actions are unlawful and the corporation does not know it and the company does not benefit even incur losses. Means that he corporation does not have the conditions needed to cause criminal liability for the actions carried out by the employee, because the employee's actions for his personal interest or the interest of others are not for the interests of the corporation (Syahrin, 2014).

Corporation can also be held criminally responsible for action taken by employees even though each employee does not fully commit a crime, but for the actions of all employees if put together it will cause a criminal act. Corporation can be held liable for criminal acts committed by their employees, built from the "collective knowledge doctrine". This doctrine states that by gathering knowledge of all corporate employees there will be found fact that collectively lead to violation of criminal acts, because corporation in giving authority to their employees sometimes by boxing knowledge, dividing all elements of obligations and implementing in smaller components.

Provision regarding criminal liability of directors can occur in the case that subordinate employee violate or do not do things that are a corporate obligation and giving rise to criminal act, the directors or employee can be held individually accountable, and corporation is also considered to have committed criminal act of the obligations. Furthermore, there are also individual criminal liability toward directors for violation committed by the company, without the need to prove whether the directors have fulfilled the mental elements (for example, their knowledge, intention or omission) of violation (Syahrin, 2014)

According to Alvi Syahrin (2014) state that the criminal responsibility of corporate officers (directors) who are in a responsible position based on the Responsible Corporate Officer Doctrine (RCO) and Strict Liability, it is confirmed that corporate officers can be responsible for corporate criminal acts, even though they do not know because its position in the company has an obligation to ensure that these violations will not occur. Corporate officers are held personally responsible for criminal acts of corporation as long as they have the authority to prevent violation or to improve the situation. The criminal responsibility for these officers does not need to pay attention to (proven again) the existence of mens rea, because mens rea has been proven because the officers have violated the obligation.

The provisions of article 116 paragraph (1) letter b and Article 116 paragraph (2) UUPPLH use the word / phrase “or” between the phrases "people who give orders to commit criminal acts” with "phrases acting as leader of activities in criminal acts” are affirmation to prevent the same person twice being sued for an environmental crime that occur.

Corporation officers are corporate organ / business entity that run corporate management that is in accordance with the articles of association, including those who in fact have authority and participate in deciding corporate policies that can be qualified as criminal acts. Thus, each individual appointed as someone who has an organizational or operational responsibility for specific behavior or who has an obligation to prevent, a violation by the corporation in carrying out the obligation to protect and manage the environment as stipulated in Article 68 of the UUPPLH can be held criminal accountable for environmental crime.

Based on Article 116 paragraph (1) UUPPLH, in the case of a criminal act committed by, for and on behalf of a business entity that can be prosecuted and sentenced is as follows:

a. LLC business entity and people who give orders to carry out environmental pollution or damage;
b. LLC business entity and people who act as leaders of activities in environmental pollution or damage;
c. LLC Business entity;
d. People who give orders to carry out environmental pollution or damage activities;
e. People who act as leaders of activities in environmental pollution or damage.

The provisions of Article 116 paragraph (1) of the UUPPLH open up the possibility that if a corporation commits a criminal act, not only the corporation is prosecuted, but also the people who ordered the incident and the people who lead the action that is prohibited, means that the administrator can be accounted for for actions committed by the corporation.

The statement above is very precise, where in the representative about who according to the law as the one who does the deed, in the sense that is done by the representative or by the person represented, there are 3 (three) theories that can be used as follows: (Hartono, 1994)

1. Representation or fiction theory, that the representatives do the deed. They not only acted in a reality way but they also legally declared the intention. Based on a fiction, the legal consequences of the actions are transferred in principle;
2. Organ theory (nominus-theoretic) that sees the representative, person (people) who act according to the law. The representative is only an organ that is willing to be represented, his or their intention for legal relation is decisive;

Cooperative theory, which is a combination of representation theory and organ theory, actions taken by the representative on behalf of the principal occur because there is a juridical collaboration between the representative and the person represented.

Corporate management in a state of “as a person who gives an order to commit a criminal act", or a corporate administrator can be "as a person acting as a leader of activities in a criminal act", that is, the condition of a corporate executive who can give orders to do criminal act and can also be in person acting as leader of activities in a criminal act.
The situation of an administrator "as the giving order to commit a criminal act and also as a person acting as a leader of activities in a criminal act" will cause the officers to be prosecuted twice. Demanding management as an order to commit a crime and also as a person acting as a leader of activities in a criminal act, will be contrary to a sense of justice and also the principle of ne bis in idem that will be a barrier to demand the same person for different acts (as giving order to commit a criminal act and also as a person acting as a leader of activities in a criminal act”), means that the officer is sufficiently determined as person who order to commit a crime or as a person who acting as a leader of activities in a criminal act.

The provisions of article 118 UUPLH also affirm that the corporation can be prosecuted and sentenced to criminal. Furthermore, the existence of the word “represented by the management who is authorized to represent inside and outside the court in accordance with the laws and regulations as a functional actor” is to assert that the corporation when prosecuted in court, the representative who is authorized to represent inside and outside the court in accordance with the laws and regulations.

CONCLUSION

The criminal accountability of officers of the business entity of LLC (Limited Liability Company) could be held accountable for their actions including other people who were still in the environment of LLC business entity activities or the consequences of activities that have harmed people in environmental pollution or damage based on Corporate Responsible theory Officer Doctrine (RCO) and Strict Liability.

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