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Criminal Liability for Economic Criminal Actions Conducted by a Corporation in the Era of Globalization

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Abstract: During the era of globalization, corporations provide an impactful role for human kinds worldwide, especially in increasing the national economy. At the same time, corporations have given birth to Transnational Organized Crime (TOC) in economics. Thus, a legal instrument is required against corporations, concerning legal liability and legal sanctions, among others. The research method used in this study is juridical normative, namely research oriented to literature survey. Data sourced from statutory regulations, literature books containing legal principles, and doctrines relating to the problem. The results showed that the criminal law doctrine recognizes four forms of criminal responsibility: direct liability, vicarious liability, strict liability, and company culture doctrine. Meanwhile, criminal sanctions against corporations are fines and, if necessary, are supplemented with additional penalties on the condition that they must pay attention to the continuity of the corporation's existence and the employees' interests if the corporation falls bankrupt due to criminal sanctions.

Keywords: corporations, transnational organized crime, criminal liability, criminal sanctions, globalization.

全球化时代公司对经济犯罪行为的刑事责任

摘要: 在全球化时代, 公司在全球范围内为人类发挥着重要作用, 尤其是在促进国民经济方面。同时, 公司在经济学中催生了跨国有组织犯罪(目录)。因此, 需要针对公司的法律文书, 其中包括法律责任和法律制裁。本研究采用的研究方法是法律规范性的, 即以文献调查为导向的研究。数据来自法规, 包含法律原理的文献以及与问题有关的教义。结果表明, 刑法学说承认四种形式的刑事责任: 直接责任, 替代责任, 严格责任和公司文化学说。同时, 对公司的刑事制裁是罚款, 并在必要时附加罚款, 条件是如果公司由于刑事制裁而破产, 则必须注意公司的持续存在和雇员的利益。

关键词: 公司, 跨国有组织犯罪, 刑事责任, 刑事制裁, 全球化。

1. Introduction

Globalization and modernization as a result of advances in technology, communication, transportation, and information technology, especially in the fields of economy, trade, investment, world progress, and development, have made national boundaries, sovereignty, and sovereign rights become thinner and more unclear. This situation, of course, has a negative impact which is concerning. Humans or a corporation often take advantage of these advances to commit crimes that are often accompanied by violations contrary to human civilization. The development of various types of crimes that are

increasingly complex in the global era requires prevention and prosecution capable of solving problems in crime development due to advances in technology, communication, transportation, and information technology, especially in the economic field.

International cooperation is also needed to combat crimes on an international scale called international crime or Transnational Organized Crime (TOC). Several forms of international cooperation in an effort to catch fugitive criminals (fugitives) and return of assets that were taken abroad are the Interpol Mutual Legal Assistance (MLA) extradition treaty and

diplomatic relations based on the principle of reciprocity.

Article 1 of the United Nations Convention against Transnational Organized Crime (TOC) of 2000 stated emphatically that the purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively. The 5th and 6th UN Congress reports regarding the Prevention of Crime and Treatment of Offenders stated that crime as a business is a crime in the economic or business sector, especially those committed in an organized manner.

In the era of globalization, corporations' existence has a very big share and role, both for humans' interests, the interests of society, and the interests of the state. Corporations have a very important role in increasing state revenues in the form of tax revenues, job creation, technology experts, especially for a bank. This means that the corporation is one of the supporting pillars of the national economy. Corporate crime can be categorized as a transnational organized crime because corporate crime results in a systematized system and its very conducive elements. Corporate crime involves a systematic system because of the existence of a very solid criminal organization, whether due to ethnic ties, political interests, economic interests, or other interests, with a clear code of ethics. Meanwhile, related to the most conducive elements, corporate crimes often involve groups (protectors), which, among others, consist of law enforcers and professionals and community groups who enjoy the proceeds of crimes committed systematically [1]. It should also be noted that corporate crimes generally contain the elements of cheating (squeaking), misrepresentation, concealment of facts, manipulation, breach of trust, subterfuge, or circumvention of regulations (illegal. circumvention); therefore, it is very detrimental to society at large [2].

In Indonesia, the development of corporations cannot be inseparable from the development of corporations globally. The development of the corporation is closely related to the development of the industrialization era in England. Since then, industries and society have begun to develop into the era of industrialization and slowly leave the economic pattern that relies on the agrarian sector. This industrialization requires the provision of funds and capital, which is not small. Therefore, an entrepreneur cannot rely solely on his personal capital. The bigger the corporation, the wider its reach, the greater the capital requirement. This situation causes corporate ownership to shift no longer limited to individuals and a group of people, even by the community. The development of corporations in Indonesia is getting bigger opportunities since Indonesia liberalized the trade sector [3]. Liberalization is something unavoidable as an effect of globalization on the economy. Globalization by Muladi is defined as a process forced

by global flows of people, information, trade, and capital [4]. In addition to liberalization, the development of corporate crime in the era of globalization is also caused by the aggressive impact of international corporations in developing their businesses and increasing their influence to enter the international market and dominate industry and trade in developing countries. The expansion of corporate organizations beyond the boundaries of morality recognized by civilized nations is not only carried out by accumulating capital and investment but also by holding business mergers and the formation of cartels that are monopolistic in nature, in terms of financing cartels, price cartels, quality cartels, or a profit-sharing cartel and so on, whose purpose is to reduce and even eliminate competition. In addition, acquisitions can also be carried out, holding companies, whether intentionally formed or formed by themselves through fair means or by fraudulent business practices, conglomerates trying to control companies from upstream to downstream of a certain type of product [3].

According to Muladi [5], this negative corporate culture is driven by organizational goals, namely:

- a. Priority of profit in the form of growth
- b. Control of the market
- c. The personal ambitions of the corporate leadership are limitless
- d. Weak law enforcement
- e. Lack of Surveillance.
- f. The immoral sub-culture that engulfs society

All of which will increase the rise of corporate crime in modern society.

In line with Muladi's statement above, Susanto stated that "... with the increasing role of corporations in the future, especially in industrial society, corporate crime will increase. Moreover, we are not paying attention to the corporate crimes that we have committed so far. Our delay in dealing with corporate crime in this era of globalization is none other than the result of "our common stupidity" [6]. Studies on corporate crime have revealed that a large proportion of societies are either unfamiliar with a corporate crime or are often less aware of the dangers it poses [6]. The roots of public ignorance, among others, are caused by the invisibility of corporate crimes caused by the complexity, sophistication of planning and implementation, the absence or weakness of law enforcement and law enforcement, and by the flexibility of legal sanctions and social sanctions, thus failing to strengthen and re-enforce collective sentiment towards moral ties [6]. In the criminal justice system, corporate crimes have not been fully and clearly regulated in legislation but instead follow the types of crimes committed by the corporation concerned, such as narcotics crimes, terrorism crimes, trafficking in persons, and especially economic crimes.

On that basis, the corporation as a legal subject raises debate whether the corporation can be criminally liable or not. This debate rests on the presence or absence of an element of *mens rea* in the corporation according to the adage *actus non facit reum nisi mens sit rea* (actions do not make a person guilty unless the mind is guilty). Therefore, corporate crimes in the form of economic crimes will apply the provisions of criminal procedure law, both those contained in the Criminal Procedure Code and those outside the Criminal Procedure Code resulting from economic crime as a special crime.

In terms of the country's finance and economy, the phenomenon of the development of criminal acts related to the existence of corporations in the era of globalization in Indonesia, the emergence of economic crimes committed by corporations, using various modes that deviate from legal provisions to obtain large profits for corporations. Economic crimes committed by corporations have a detrimental impact on the economy and state finances, which results in disruption of growth and the continuity of national development, which demands high efficiency. The phenomenon of economic crime that is developing in Indonesia is not accompanied by strict and harsh law enforcement against corporations, so what happens is that corporations often escape the trap of the law. Whereas the direction of law enforcement that is expected by the public so that criminal acts committed by corporations are not enough only to ensnare the board of directors or corporate management, but to place the corporation responsible for the criminal acts committed [7].

As a criminal act maker (as a legal subject), a corporation can be held accountable for a criminal act it commits, either directed at the corporation concerned or directed at its management (corporate organs). The recognition of corporations as criminal law subjects that are considered capable of committing criminal acts that can be held accountable (corporate criminal responsibility) is not a new thing that has caused many legal problems and debates both among academics and legal practitioners.

The problem regarding corporate criminal liability arises when corporate criminal liability is linked to the adage "Actus non facit reum nisi mens sit rea" (*Asas mens rea*). Apart from the problem of corporate criminal liability, corporations as legal subjects are mentioned in various laws, such as Article 15 of Law Number 7 Drt of 1955 concerning Economic Crime, Article 20 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Elimination of Corruption Crime, and Article 4 paragraph 1 of Law Number 15 of 2003 in conjunction with Law Number 25 of 2003 concerning the Crime of Money Laundering, legally the corporation is inseparable from criminal liability if the corporation commits a criminal act.

Previously, the importance of corporate criminal responsibility was implied by the fact that corporate crime not only threatened economic stability and financial system integrity but could also endanger the joints of life in society, nation, and state.

1.1. Problem Formulation

1. What are the forms of criminal responsibility for economic crimes committed by corporations?
2. What criminal sanctions can be imposed on the corporation?

2. Research Method

The normative juridical method was used in this research. Normative juridical research is oriented towards literature study, namely the review of secondary data. Secondary data include international conventions, laws and regulations, literature books that contain legal principles and legal doctrines, especially those related to corporate criminal liability and corporate criminal sanctions.

3. Results and Discussion

3.1. Definition of Corporation

According to Viscount Haldane, a corporation is an abstraction. It no longer has a mind of its own than its own body: an exercised and directing will must be consistently seen in a person who for some purpose may be called an agent or representative, but who actually directs the thoughts and will of the corporation, namely the ego and the corporate center [8].

As defined by Kenneth S. Ferber, a corporation is an artificial person. It can do anything a person can do. It can buy and sell property, both real and personal, in its own name. It can sue and be sued in its own name. It is formal [8].

The definition of a corporation is taken from the English term "corporation," which means a legal entity or group of people who are allowed by law to carry out acts as an individual as a legal subject, in contrast to the shareholders.

According to the narrow meaning, namely, as a corporate legal entity corporation is a legal figure whose existence and authority to be able or authorized to carry out legal actions is recognized by civil law. That is, it is civil law that recognizes the existence of a corporation and gives it life so that it can be authorized to carry out legal actions as a legal figure, likewise, with the "death" of corporations. A corporation only dies legally if the death of the corporation is recognized by law [9].

The corporation body consists of a corpus. Its physical structure and the depth of the law incorporate the animus element that gives the body its personality

because this legal entity is a legal creation unless the creator's death is determined by law [10].

Regarding the corporation, 2 (two) opinions were developed about the definition of a corporation. The first opinion states that what is meant by a corporation is a group of trades that are legal entities. The second opinion defines the corporation broadly, where it is said that a corporation that can be criminally liable does not need to be a legal entity [11].

A corporation is commonly used as a term by criminal law and criminology experts to refer to a legal entity, legal body, or legal person. The concept of a legal entity actually originated from the concept of civil law that grew as a result of community development. The definition of a corporation in Indonesian criminal law is broader than that of civil law. In various laws and regulations on Indonesian criminal law, it is stated that the definition of a corporation is an organized group of people and/or assets, whether it is a legal entity or not [12].

Based on several definitions about the corporation above, it can be concluded that there are five elements to be called a corporation, namely;

1. Artificial legal subjects who have a special legal position
2. A group of people and/or organized wealth
3. An organization with a specific structure and purpose
4. An unlimited life span
5. The power (from the state) to carry out certain business activities.

3.2. Characteristics of Corporate Criminal Acts

As stated in [8] and [13], the scope of corporate crime covers:

- a. Crime for corporations, namely crimes or law violations committed by corporations in achieving certain business and goals in order to gain profit
- b. Criminal corporation, namely a corporation that aims solely to commit crimes (in this case, the corporation is only a cover for a criminal organization)
- c. Crimes against a corporation, namely crimes against corporations such as theft or embezzlement of corporate property, in this case, the corporation acts as a victim.

In terms of victims of corporate crime, Muladi distinguishes between victims of conventional crimes and victims of corporate crimes as follows:

In conventional crimes, the victims can be identified easily, whereas, in corporate crimes, the victims are often abstract, such as the government, other companies or numerous consumers, while individually, the losses are small [14].

Meanwhile, 6 (six) types of victims were stated [14]:

- a. Consumer (product safety or quality)

When risk, safety, and health are combined with the product use, the consumer becomes a victim of the product.

Consumers (Economic power)

b. Credit violation, which is providing false information in advertising to influence consumers.

c. Most economic systems have been directly affected by dishonest trading practices (violations of antitrust regulations and violations of other regulations) and most financial violations except those relating to consumer purchases.

d. Environmental violations (air and water pollution) that become victims, namely the physical environment

e. Employees are victims of violations of wage provisions

f. The government is the victim because of administrative violations or court orders and tax fraud cases.

3.3. Types of Corporate Criminal Acts

According to Article 4 paragraph (2) of Perma Number 13 of 2016, there are four types of actions that constitute corporate criminal acts:

- a. The corporation gains or benefits from a criminal act
- b. Criminal acts are committed for the benefit of the corporation
- c. Corporations allow criminal acts to occur
- d. The corporation does not take the necessary steps to:
 - take precautions
 - prevent a bigger impact
 - ensure compliance with applicable legal provisions to prevent criminal acts.

3.4. Corporate Criminal Liability Issues

Placement of a corporation as a criminal law subject and therefore can be held accountable for the crime for its actions is still a matter/debate. These problems or debates give rise to attitudes of agreeing and disagreeing with corporations as subjects of criminal law.

British courts do not recognize criminal liability against corporations on grounds:

a. The existence of the *respondeat superior* doctrine (namely the principle that a person is held accountable for actions committed by an agent/subordinate) in the tort law in the 19th century which lacks a conceptual basis for being accountable for individual actions to the corporation

b. It is difficult to find elements of *mens rea* in corporations.

c. The ultra vires doctrine contained conceptual obstacles because, until the 19th century, this doctrine limited the corporation's power to actions justified according to the AA (Articles of Association). Since AA only formally authorizes corporations to commit

acts in compliance with the law, logically, the corporation does not have the power to commit crimes

d. Corporate prosecutions cannot be reconciled with rigid procedural requirements, including that the defendant must be personally presented to the court. British law dislikes a trial *in absentia* [15].

The opinion that legal entities/corporations cannot be convicted is reinforced by the adage “*societas delinquere non-potest*”, namely that legal entities cannot commit criminal acts [16].

Meanwhile, those who agree to place corporations as subjects of criminal law state the following reasons:

a. It turns out that being convicted of the management alone is not enough to carry out repression against offenses committed by or with a corporation. Therefore, it is also necessary to punish corporations, corporations and managers, or managers only [17].

b. Since in social and economic life, corporations are increasingly playing an important role as well [17]; besides the dangerous nature of crimes on an international scale and even transformed into Transnational Organized Crime.

c. Criminal law must function in society, namely, protect society and enforce norms and provisions that exist in the society. If the criminal law only emphasizes the individual aspect, which only applies to humans, then that goal is ineffective. Therefore, there is no reason always to press and oppose the criminalization of corporations [18].

d. A corporation convicted of a criminal threat is one of the efforts to avoid criminal action against the corporate employees themselves [19].

Apart from agreeing and disagreeing about the liability of crimes against corporations, Indonesia’s criminal law recognizes corporations as legal subjects, and therefore corporations can be held liable for criminals.

Several provisions place corporations as legal subjects and can be justified in criminal law:

a. Law No. 7 Drt of 1953 regarding Economic Crimes (Article 15)

b. Law No. 6 of 1984, regarding the Post (Article 19 paragraph (3))

c. Law No. 5 of 1997 regarding Psychotropics

d. Law No. 31 of 1999 and Law No. 20 of 2001 regarding the Eradication of Corruption (Article 20)

e. Law No. 15 of 2003 jo. Law No. 25 of 2003 regarding the Crime of Money Laundering (Article 4 paragraph (1) [16].

3.5. Corporate Criminal Liability Doctrines

a. Basic criminal liability against corporations.

Corporate criminal liability is contained in Article 4 paragraph (1) of Perma No. 13 of 2016:

Corporations can be criminally liable under the criminal provisions of the Corporation in the law governing Corporations.

b. Doctrines of Corporate Criminal Liability

1. *The direct liability doctrine or Identification Theory*. According to this doctrine:

a. The actions/mistakes of senior officers are identified as corporate actions/mistakes.

b. The alter ego theory/doctrine or the organ theory implies

Narrow definition (England):

Only the actions of senior officials (corporate brains) can be held accountable to the corporation.

Wider definition (US):

Not only senior officers/directors but also agents subordinated to them can be held accountable to the corporation.

In general, senior officers control the company, either individually or collectively, who are generally the directors and managers [20].

Corporate crime is regulated by Article 49 of the National Criminal Code, which reads: Criminal acts are committed by a corporation if it is committed by persons who have functional positions in the corporate organizational structure acting for and on behalf of the corporation or for the benefit of the corporation, based on work relationships or based on other relationships, within the scope of the corporation’s business, either individually or collectively.

2. *The vicarious liability doctrine*

It starts from the doctrine of *respondeat superior* and implies that

A master is liable in certain cases for his servant’s wrongful acts and a principal for those of his agent.

This doctrine is based on the employment principle.

An employer is primarily responsible for the actions of employees/employees, so the servant act is the master’s act in law. This principle is also known as the agency principle (the company is liable for all its employees’ wrongful acts) [20].

Vicarious liability doctrine is often defined as substitute responsibility (legal responsibility where someone is held accountable for wrongdoing by another). The legal responsibility of one person for the wrongful acts of another) [21].

Basically, this theory or doctrine or teaching is taken from civil law, applied to criminal law. Vicarious liability usually applies in civil law regarding acts against the law (the law of torts) based on *respondeat superior* doctrine. According to the principle of *respondeat superior* where there is a relationship between a master and a servant or between a principal and an agent. According to the maxim, a person who does something through another person is considered the one who did the act. Therefore, the teaching of vicarious liability is also called the teaching of *respondeat superior* [9].

3. *The strict liability doctrine*

Corporate criminal liability can also be solely based on law, apart from the doctrine number 1 and 2 above (identification and vicarious liability doctrine) if the

corporation violates or does not fulfill certain obligations/conditions/situations determined by the Constitution. Violations of certain obligations/conditions/situations by corporations are known as companies' offenses, situational offenses, or strict liability offenses. For example, the law determines as an offense for:

- a. Corporations running their business without a permit
- b. Corporation holding a permit that violates the terms (conditions/situations) specified in the permit
- c. Corporations are operating uninsured vehicles on public roads [9].

The strict liability doctrine is based on the following principles [22]:

- a. It is essential to ensure that certain important rules are needed for the welfare of society.
- b. Proving the existence of *mens rea* principle will be very difficult for violations related to the community's welfare (in this case, an economic crime) – the high level of “social danger” caused by the action in question.

According to [23], strict liability is defined as a criminal act by not requiring the perpetrator to be guilty of one or more of the *actus reus*. Therefore, in this case, strict liability is a liability without fault. In addition to the British criminal law adhering to the principle of “*actus non facit reum nisi mens sit rea*” (a harmful act without blameworthy of mental state is not punishable), it also adheres to the principle of absolute responsibility without having to prove the existence or absence of an element of the error to the perpetrator of the criminal act. The principle of responsibility is known as strict liability crimes [24].

4. Company culture doctrine.

According to this doctrine/theory, a corporation can be held accountable for its procedures, working system, or culture (the company's procedures, operating systems, or culture). Therefore, this cultural theory is often called a systems theory/model or an organizational model (organizational or system model). Corporate error is based on internal decision-making structures) [24].

According to Lord Morris, a senior official is a person whose responsibility is to represent or symbolize the implementation of the company's directing mind and will.

Meanwhile, Lord Diplock argued that senior officials are those who, based on the memorandum and provisions of the foundation or the decisions of the directors or decisions of the company's general meeting, have been entrusted with exercising company power.

Judging from the application, the corporate culture doctrine can be applied if [25]:

- a. *An attitude policy, rule, course of conduct of practice within the corporate body general or in the part of the body corporate where the offenses occurred.*

- b. *Evidence may be found that the company's written rules tacitly authorized non-compliance or failed to create a culture of compliance.*

In practice, the application of corporate criminal liability doctrines is difficult to implement due to the following obstacles:

- a. The perpetrator of a corporate crime has a white-collar crime character. Sutherland interpreted *white-collar crime: as a crime committed by a person of respectability and high social status in the course of his occupation* [26].

- b. Corporate crime has the characteristics of crimes in the economic field, namely:

- Disguise of purpose or intent

For example, a bribe can take the form of various facilities and opportunities for the recipient and for the giver, who can also be a legal entity; the bribe can be disguised in the form of advertising fees, promotions, and so on.

- Reliance upon ignorance or carelessness. In this case, the lack of expertise, lack of knowledge, and victim's negligence will be exploited by the perpetrator.

- Concealment of the violation. In socio-economic crimes, the victim often feels that he is a victim of victimization after a while. An example is an embezzlement which is a continuing act [22].

3.6. Criminal Sanctions against the Corporation

These sanctions are regulated by Article 25 Perma No. 13 of 2016:

- a. The punishments imposed against the corporation are in the form of principal and/or additional crimes
- b. The main punishment that can be imposed against a corporation is a fine
- c. Additional penalties are imposed under the provisions of the applicable laws and regulations. In this case, Article 10, clause b of the Criminal Code applies to:

1. revocation of certain rights
2. confiscation of certain items
3. announcement of the judge's decision

In the Netherlands, when imposing additional fines and penalties, attention must be paid to the following matters:

- a. Additional fines and/or penalties must not cause the corporation to collapse/go bankrupt.
- b. Additional fines and/or penalties must not cause corporate employees to suffer losses.

For this reason, additional fines and/or penalties must be considered:

- a. Continuity of the existence of the corporation
- b. It is in the interests of employees if the corporation cannot operate due to criminal sanctions.

Thus, the imposition of additional fines and/or penalties must be oriented towards the continuity of corporate operations and employees' interests for the future [27].

What is responsible for the crime against the corporation is if the crime is committed by a functional official of the corporation whose actions are committed for the corporation's benefit. Suppose a functional official commits an act of enriching himself or someone other than the corporation to suffer a loss. In that case, the corporation cannot be held responsible for the crime [27].

4. Conclusion

There are four types of criminal responsibility towards corporations: direct liability, vicarious liability, strict liability, and company culture doctrine.

Additional criminal sanctions and/or penalties against the corporation must pay attention to the continuity of the corporation's existence and the interests of workers if the corporation falls bankrupt due to criminal sanctions

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