CORPORATE ENTREPRENEURIAL CRIME AND CORPORATE CRIMINAL LIABILITY

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ABSTRACT

Corporate crime is an extra ordinary crime that should be fought against with extra ordinary prevention. Such efforts, however, are inversely proportional to the policies in the criminal laws serving as a base for their law enforcement. The Criminal Code (KUHP) that becomes the main foundation of the law merely recognizes natural persons as the subjects of the criminal law. And, it doesn't consider corporations as the subjects of the criminal law. Therefore, it is necessary to renew the criminal laws. Based on the condition, the penal policy on the system of corporate criminal responsibility in Indonesia will be examined.

The research results showed that the criminalization in all forms of corporate crimes, according to the positive criminal law in Indonesia, was recognized as crimes. However, the arrangement between one criminal code and the others varies. The Criminal Code states that the modus of crimes the corporations often did was regarded as a form of criminal act, but it was supposed to be done by a natural person. In other words, it can be stated the Criminal Code did not consider corporations as the subjects of the criminal law. However, in some regulations in the criminal law out of the Criminal Code, corporations were treated as the subjects of the criminal law and they should be responsible for their actions.

The system of the criminal responsibility adopted in the positive law in Indonesia tends towards the identification and delegation theories where those who do the mistakes and the source of authorities they possess would be examined. However, comprehensively, the stipulations in one criminal law and the others are different. For example, the one who commits a crime does not have to be the management, but anyone who does something under the name of or for the sake of corporation and the act is done under the scope of the corporate body. However in the draft of a law on the Criminal Code, it is not explicitly stated that the criminal would be condemned, so that it can be interpreted that the criminal should not be responsible for the crime he does since the criminal responsibility has been moved to the corporation.

The draft of a law on the Criminal Code (RKUHP) as accommodated corporations as the subjects of the criminal law and arranged the mechanism of the criminal responsibility. In the concept of the renewal of the criminal law, it can be seen that the future criminal law will consider corporate crimes as criminal acts and the corporation can be given criminal sanctions. Viewed from the existing stipulations, it is clear that the model and concept adopted are vicarious liability doctrine, although in the model some weaknesses exist.

Keywords: Corporate, Entrepreneurial, Corporate Crime, Corporate Criminal Liability.

INTRODUCTION

The development of crime along with the growth of corporate entrepreneurship, which grew rapidly in the fields of economic activity, there has been an evil corporation. Corporate crime is an extraordinary crime. In fact, the impact is not only a loss for a moment, but the impact in a very long time. Therefore, Soesanto(1998: 5) found the notion of punishment against the corporation through the criminal policy became stronger and important.

Although some of the rules of criminal law outside the Criminal Code regulate corporate crime (recognizes corporations as subjects of a criminal offense), but the system is not set explicitly renponsible. Thus, it must be returned to the legal provisions of the Criminal Code, which clearly does not recognize the corporation as the subject of a criminal offense.

Therefore, there needs to be an effort to renew the system of criminal law policy on corporate criminal liability is based on the theoretical-empirical studies in order to tackle corporate crime in Indonesia. One such effort is to conduct a series of research and scientific study of the ins and outs of corporate crime and accountability system, as the basis of academic papers for renewal of national criminal law policy formulation.

Research conducted by this author author originated from a concern over the lack of criminal law policy on corporate crime in Indonesia. Various problems which later became the focus of the research is formulated in several ways, namely: How does corporate governance and corporate crime in a positive criminal law and how the effectiveness of law enforcement? How doctrines in corporate accountability system? And How did the concept of criminal policy in the prevention of corporate crime in Indonesia? These three problems are studied with comparated between criminal law policy (penal policy) current (*ius constitutum*) with the concept of criminal law policy in the future (*ius constituendum*) in the frame of normative legal studies.

This research was conducted by combining two research models known in legal research, legal research is normative and empirical legal research. This research was conducted in several cities in East Java as the study sample. As key informants in this study certainly is some law enforcement officials, and some practitioners and academics / experts competent legal. In a study evaluating the operation of the criminal law in society and systematic interpretation of the law, then of course this research is directed as qualitative legal research.

Theories of Corporate Crime and Criminal Accountability System

The corporation is a term commonly used by the criminal law and criminology experts to refer to what in other fields of law (in particular in the field of civil law) is called a legal entity (*recht persoon*). Satjipto Rahardjo (1986: 110) provide a definition that the corporation is a legal entity creations. Board which consists of the creation of the "*corpus*", the physical structure and incorporate into it the law of "*animus*" that makes the body has a personality. Therefore it is a legal entity created by law, then unless its creation, death was also determined by law.

While corporate crime, Simpson declared "*corporate crime is a type of white-collar crime". Simpson, then quoting John Braithwaite, who define corporate crime as "conduct of a corporation, or employees acting on Behalf of a corporation, the which is proscribed and punishable by law*." Clinard and Yeager, gives the sense that "*a corporate crime is any act committed by the corporation that is punished by the state, regadless of whether it is punished under administrative, civil, or criminal law*" (Veda, 1993: 3).

At first, the subject of criminal law only *naturlijke persoon*, while corporate / *recht persoon* not recognized as subjects of criminal law. This is because the implementation of the principle of non potest Universtas delinquere (Projodikoro, 1986: 193). However, the possibility of a criminal prosecution against a corporation based not only on considerations of utility, but also on the basis of theoretical as well justified (Setiyono, 2003: 11).

By making corporations as subjects of criminal law is not new, according to Maine, because long ago, the corporation has been the subject of criminal law. Even in Indonesia as the first village corporation also subject to criminal penalties. Sahetapy (1994: 32) believe that those who reject the corporation as the subject of criminal law, because it held that the corporation was "*persona ficta*" (subject / *human fiction*), it can be justified. However, when considered in the socio-economic life, the movements of the corporation shall be controlled by law, and if it deviates, then corporations can be.

> Criminal responsibility born by the continuation of reproach (*verwijbaarheid*) objective of the act is declared as a criminal offense under the applicable law, and subjectively to meet the requirement for players who may be subject to criminal because of his actions (Priyanto, 2004: 30).
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> This was based on the principle of "*actus non facit reum nisi mens sit rea*", that person will be convicted if he has a fault (Ramelan, 2004: 6). Long before that, Sudarto (1988: 85) states that:
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> *"Dipidananya someone is not enough if the person has committed acts contrary to law or is against the law. So even though such actions meet the formulation of the offense in the legislation, but for punishment is still necessary to drop the requirement for a criminal, that the person doing the act has a fault or guilt (subjective guilt). "*

Reid (1985: 7) are write:*"the law requires criminal intent, or mens rea, the element required to establish culpability. This element is extremely important, for in many cases it will be the critical factor in determining whether and act was or was not a crime."*

As above, criminal liability is very dependent on fault (liability based on fault). However, criminal liability for corporations little deviation from the theory of criminal responsibility in generally. The element of "fault" in the corporate crime was not absolutely enforced, despite the presence of faults should still be noted. In this case, known as the doctrine of strict liability, where if a person (*corporation*) run the types of activities that can be classified as extrahazardous or abnormally dangerous, he or she must be responsible even though he had to act cautiously (Santosa, 1998: 3). On this, many agree with Muladi and Priyatno (1991: 87) that: "On the issue of criminal responsibility, the principle of the error is still maintained, but the developments in the field of law, especially criminal law concerning corporate criminal liability, or fault principle" principle no crime without errors "absolutely not true. The fact that the victim used as a basis to prosecute the perpetrators of criminal responsibility in accordance with the adage "*ipsa res loquitur*", that the facts already speak for themselves. "

In the theory of corporate criminal liability, originally known there are two kinds, namely the doctrine of strict liability doctrine and the doctrine of vicarious liability. However, because still have to consider the elements of the error, then as explained by Muladi (2004: 6), emerged a new theory introduced by Haldane that "Theory of the primary corporate criminal liability" is famous for its "Identification Theory"

1. **Doctrine of Identification Theory**
   This doctrine considers that the act / offense and fault / inner attitude of senior officials seen as deeds and inner attitude of the company. The elements of a criminal offense can be gathered from the acts and mental attitudes of senior officials. On the basis of this identification theory, then all the actions carried out by people who can be identified with a corporation or those who are called "who will constitute its directing mind of the corporation", can be identified as acts or criminal acts committed by the corporation. Thus, corporate liability is not based on the concept of accountability substitute (*vicarious liability*).
2. **Doctrine of Vicarious Liability**
   Vicarious liability means that a person who has no personal fault, is responsible for others act (accountability substitute). Such accountability is almost entirely devoted to the offense in law (statutory Offenses). According to Arief (1996: 236), vicarious liability is the legal responsibility for the actions of any person committed by another person (the legal resposibility of one person for the wrongful acts of another). According to this doctrine, an employer (employer) is the main responsible of the actions of the workers / employees who perform the act within the scope of the task / job. This was based on "employment principle" which states "the servant's act is the master's act in law".
3. **Doctrine of Strict Liability**
   In the doctrine of strict liability, liability should not be considered an error. Because the responsibility of corporations, not absolute error applies. Person / corporation can already be accounted for in that person even though no errors. This doctrine does not require mens rea or fault of the manufacturer (Atmasasmita, 2000: 79).

Model of corporate criminal liability answers can not be separated from the two subjects of criminal law in corporate crime, that person as a director and the corporation itself. So related to the position of the corporation and the nature of corporate criminal liability in corporate crime, there are three models of corporate criminal liability, namely: (1) The Board as a maker and board responsible; (2) The corporation as a maker, and board responsible; (3) Corporations as well as makers and responsible (Reksodiputro, 1994: 72).

Corporate Setting the Indonesian Penal Positive

Positive criminal law in the scholarly study of criminal law is meant any criminal laws were declared valid or enforced at this time. Therefore, it is a positive Indonesian criminal law is the Code of Penal (Penal Code) were enacted under Law No. 1 of 1946 and several amendments there to, and any criminal legislation specifically enforced in outside the Criminal Code.

From the results of a normative study of the criminal justice system and subsystems, discovered the fact that the law of the Criminal Code which became

the parent of any criminal legislation apparently does not regulate corporations as subjects of criminal law. The formulation of the articles that many use the phrase "He who ....", ".... Everyone", "A mother ...." and others indicate that the Criminal Code only recognizes *naturlijke persoon* or natural person (human) as the subject of criminal law. While the corporation or legal entity is not at all recognized as subjects of criminal law in the Criminal Code. Despite the provisions set forth in Article 59 which states that "In determining the penalty for a violation, then the board, one member of the board or the commissioner, the penalty imposed on the board or commissioner, if it is obvious that the violation has occurred outside of dependents. "Although this provision only applies to the crime of violation, but obviously it can be concluded that the Criminal Code does not recognize corporations as subjects that could be subject to criminal sanctions.

However, when seen papa provisions of law outside the Criminal Code, then found some provisions governing the corporation. Of the many existing regulations, can be grouped in three models of regulation:

1. define the corporation as the subject of criminal law but his criminal responsibility remains charged to the person as the subject of criminal law;
2. define the corporation as the subject of criminal law and imposes criminal responsibility to the corporation;
3. define the corporation as the subject of criminal law and imposes criminal responsibility to corporations, as well as threaten the corporation with criminal deprivation of liberty.

From other studies suggested that positive criminal law in force in Indonesia is still chaotic. This is related to the absence of consistency between the regulation set out in the Criminal Code with a setting outside of the Criminal Code. Where corporate settings outside the Criminal Code there are some who have recognized corporations as legal subjects. But setting it still tends to be in doubt, because of the recognition of the law of the corporation as a legal subject is still denying liability corporation in law enforcement (Zulkarnain, 2007: 37).

What is presented above, is justified by several research resource persons who also had conducted a similar study that the system of corporate criminal liability in the Indonesian criminal justice system still refers to a paradigm that puts people as criminals (Sunardi & Tanuwijaya, 2002). So despite the obvious offender is a corporation, but that is the nature accountable.

Corporate Crime and Criminal Responsibility System in Indonesia Positive Law

Corporations are not recognized as subjects of criminal law in the Criminal Code. But in a positive criminal law outside the Criminal Code that regulates many corporations are recognized as subjects of criminal law. For example, Law No. 23 of 1997 on Environment, Law No. 20 Year 2001 on Eradication of Corruption, Law No. 8 of 1999 on Consumer Protection, Law on Money Laundering, Broadcasting Act , and so on. Even since the anti-regime economic crimes in 1955, has issued Emergency Law No. 7 of 1955 on the Investigation and Prosecution of Economics Crime (UUTPE) has been expressly acknowledges Legal Entity (in caso: Corporations) as the subject of criminal law and accountable .

The experts who agreed to put the corporation as the subject of criminal law states the following reasons:

1. Punishment caretaker is not enough to hold the repression of offenses committed by or with a corporation. So it is also necessary corporate punishment, corporate and board, or the board alone.
2. In the social and economic life, corporations increasingly play an important role as well.
3. If the criminal law is only defined in terms of the individual, the community save goal was not effective, therefore there is no reason to keep pressing and can oppose corporate penalty.
4. Punishment corporation is an effort to avoid criminal prosecution action against the corporation's own employees. "

In Sahuri dissertation research (2004) stated that for corporations criminally accountable, there are four main issues that need to be considered, namely (1), the problem formulation prohibited acts; (2), the determination of the corporation guilty problems; (3) issue sanctions against the corporation; and (4) the nature of corporate responsibility. For the formulation of prohibited acts and corporate responsibility is less clear in determining that anyone can commit criminal acts and corporate responsibility. Errors in the determination of the corporation, which is a criminal law veins, is very difficult because the error is not transferred to the corporation in private corporations, because who committed the crime is the person / committee.

From the above results, then recommends that until now there is no case law on the corporation either as defendant or (especially) as a convict, so the need for a study of the law, whatever the law is causing it to be barren. In addition, there should be a study of sentencing policy and corporate accountability in

the Indonesian criminal law policy perspective in the hope of uncovering the legal issues related to corporate responsibility.

Sunardi's research (2006: 139-140) also concluded that the regulation of corporations as subjects of a criminal act must be clear and unequivocal to authentically include the general provisions of the Criminal Code which is now being refurbished. So outside the provisions of the Criminal Code should be followed. However, Zulkarnain (2007: 38) considered that the setting of the system of corporate accountability in both the specific legislation outside the Criminal Code and the Criminal Code in the latest draft was, no clear and comprehensive. Empirical and juridical aspects as well as the public interest associated with the criminal prosecution of corporations in terms of social welfare policy has not been considered.

From the research it was found that the Indonesian criminal justice system is still not fully acknowledge that the corporation is subject to legal manner. Although there are several products policies outside the Criminal Code criminal law governing corporate responsibility, corporate accountability but the system is still adopted the doctrine of vicarious liability used. It is the same as the corporation has not been acknowledged as the subject of criminal law. Therefore, the need to recommend that the reformulation of policy on corporate criminal liability system and enter the formula in the Book of the Law of Criminal Law.

Related to criminal law reform on corporate crime prevention, it should be noted that in the design of the New Criminal Code (*Criminal Code Concept*) in the general description Book I declare that:

"Given the progress made in the field of economy and trade, the subject of criminal law can no longer be restricted only to human nature (natural person) but also includes human law (Juridical Person), commonly called the corporation. With espoused understand that the corporation is subject to the law, means a corporation as a form of business entity is also possible liability should still be shared by corporations and trustees or administrators only. "

Thus, it is necessary to remember that the policy reforms of criminal law, particularly in relation to corporate crime prevention by making the corporation as the subject of criminal law can be held accountable.
In addition to reviewing the criminal laws applicable positive, researchers also examine the concept of the new Criminal Code (Bill-Criminal Code) which is ius constituendum. Where the Criminal Code Bill has been designed (with various amendments thereto) since 1964 and the last was composed concept of the Criminal Code in 2005 In the year 2004/2005 of the Penal Code concept mentioned in Article 47 that "The corporation is the subject of a criminal offense."

And Article 48 determines that "The offenses committed by the corporation when it is done by people who act for and on behalf of the corporation or for the benefit of the corporation, based on employment or other relationship based, within the scope of the corporation's business, either individually or jointly."
Given the positive provisions in criminal law and Indonesian Criminal Code Concept which have been described above, appeared that the corporation has been recognized as the subject of criminal law under Indonesian criminal justice system even though the Criminal Code is not set. The corporate accountability system adopted by the criminal justice systems is determining the corporation as well as the makers and corporate responsibility, with due regard to the perpetrator functional theory based on the doctrine identivication.
This doctrine considers that the act / offense and fault / inner attitude of senior officials seen as deeds and inner attitude of the company. The elements of a criminal offense can collected from act of inner attitude of some senior officials.
In this context, Sutan Remy Sjahdeiny (2006: 97) said delegation doctrine of justification that can be used as the basis for imposing criminal liability can be carried out by employees of the corporation. According to this doctrine, the reason to be able to impose criminal liability on corporations is the delegation of authority from one person to another to exercise its authority. It seems that the concept of the Criminal Code also makes this doctrine as a reference in applying for corporate criminal liability.

CONCLUSION

From some initial analysis related to Indonesian criminal law policy on corporate criminal liability system, it can be concluded some of the following:

1. Corporate crime is already recognized as a form of crime under Indonesian criminal law positive. However, the arrangement between the criminal law (*Criminal Code*) with other criminal law regulations vary. Criminal Code stipulates that the modus crimes often committed by a corporation as a form of criminal offense, but it was deemed to have been done by natural persona. In other words, it can be said that the Criminal Code does not recognize corporations as subjects of criminal law. While in some criminal laws outside the Penal Code recognizes the corporation as the subject of criminal law and criminal accountability imposes on corporations and therefore can be imprisoned.
2. The system adopted criminal liability in accordance with the positive Indonesian criminal law doctrine favors the theory of identification and delegation doctrine. Where in addition to look at the location of the fault of the manufacturer also pay attention to the source of the authority to act possessed. However, when viewed in a comprehensive manner, the provisions of the criminal law one with another criminal laws also vary. For example, about the perpetrator, where the person who committed the crime should not be administrators but whoever did it on behalf of or for the

benefit of the company. It was committed within the scope of the legal entity. Moreover, in the Environmental Code confirmed that the creator remains a criminal sentenced although the corporation had forced responsible for the actions of the perpetrator. While in the Draft of Criminal Code, on fixed dipidananya the perpetrator, not confirmed, so it can be interpreted, the offender is no longer accountable for the perpetration of a criminal offense because of criminal responsibility has been transferred to the corporation.

3. Draft Criminal Code has accommodated the corporation as well as the subject of criminal law and regulate criminal accountability mechanisms. In the concept of criminal law reform, it seems that the future of the criminal law judge that corporate crime is a crime and against the corporation may be subject to criminal sanctions. If seen in some of the provisions that govern them, it appears that the model and the concept used is the doctrine of vicarious liablity.

REFERENCES

Amrullah, Arief. 2003. ***Political Framework of Criminal Law in the Protection of Victims of Economic Crime in Banking**,* Bayumedia Publishing, Malang

Arief, Barda Nawawi. 1996. ***Bunga Rampai Kebijakan Hukum Pidana,*** Citra Aditya Bakti, Bandung

Atmasasmita, Romli. 2000. ***Comparative Criminal Law,*** Mandar Maju, Bandung

Dirdjosisworo, Seodjono. 1991. ***Indonesian Penal Code and the Post- Industrial Society were indications Crime,*** Occupation Inauguration Speech Professor at the Faculty of Law. UNPAR, Bandung

Gillies, Peter. 1990. ***Criminal Law,*** The Law Book Company Limited, Sidney

Hofnagels, G.P. 1969. ***The Other Side of Criminology.***

Muladi dan Barda Nawawi Arief, 1992. ***Theories and Criminal Policy,*** Penerbit Alumni, Bandung

Muladi dan Dwidja Priyatno. 1991. ***Corporate Responsibility in Criminal Law,*** Sekolah STHB, Bandung

Muladi, 2002. ***Democratisation, Human Rights , and Legal Reform in Indonesia,*** The Habibie Center, Jakarta

Muladi. 2004. ***Corporate accountability in the Criminal Law (Corporate Criminal Liability),*** Papers on National Seminar on Aspects of Criminal Liability in Public

Policy of Corruption Act , the Attorney General and FH Diponegoro University, Semarang 6-7 Mei 2004

Priyatno, Dwidja. 2004. ***Legislation Policy on Corporate Criminal Liability System in Indonesia,*** CV. Utomo, Bandung

Priyatno, Dwidja. 2005. ***Rancangan KUHP Tak Mengatur Sanksi Korporasi,*** dalam http://www.pikiran-rakyat.com/cetak/2005/1005/01/1102.htm tanggal 26 Oktober 2005

Priyatno, Dwija. 1991. ***An Overview Of Corporate Responsibility in Criminal Law and Prospects*** , Graduate Program Thesis Diponegoro**,** , Semarang

Prodjodikoro, Wirjono. 1986. ***Principles of Criminal Law Indonesia,*** Eresco, Bandung

Rahardjo, Stjipto. 1986. ***Ilmu Hukum,*** Alumni, Bandung

Ramelan. 2004. ***Corporate Responsibility in Criminal Law,*** paper at the National Seminar on Aspects of Criminal Liability in Public Policy of Corruption Act , the Attorney General and FH Diponegoro University, Semarang 6-7 Mei 2004

Reid, S.T. 1985. ***Crime and Criminology,*** Hola, Reindard & Winston

Reksodiputro, Mardjono. 1994. ***Hak Asasi Manusia dalam Sistem Peradilan Pidana,*** Pusat Pelayanan Keadilan dan Pengabdian Hukum, Universitas Indonesia, Jakarta

Sahetapy, J.E. 1994. ***Corporate Crime,*** Eresco, Bandung

Sahuri L. 2004. ***Corporate Responsibility in the Indonesian Criminal Policy Perspective*** , Dissertation Legal Studies , Airlangga University, Surabaya

Santosa, Mas Ahmad. dkk. 1998. ***Application of Principle of Absolute Liability (Strict Liablity) in the Field of Environment,*** Indonesia Center for Environmental Law (ICEL), Jakarta

Setiyono. 2003. ***Corporate Crime,*** Bayumedia Publishing, Malang

Sjahdeini, Sutan Remy. 2006. ***Corporate Criminal Liability,*** Grafittipress. Jakarta

Sudarto, 1983. ***Criminal Law and Community Development : An Analysis of the Reform of Criminal Law,*** Sinar Baru, Bandung

Sudarto. 1988. ***Hukum Pidana 1,*** Badan Penyediaan Bahan-bahan Kuliah UNDIP, Semarang

Sunardi dan Fanny Tanuwijaya. 2002. ***Criminal Deprivation of Freedom for Corporate*** , Islamic University of Malang, Malang

Susanto, I.S. 1998. ***Review of Economic Crime criminological*** , Papers on Criminal Law and Criminology Upgrading , Diponegoro University, Semarang 23-30 Nopember 1998

Weda, Made Darma. 1993. ***Beberapa Catatan tentang Kejahatan Korporasi,*** Makalah pada Seminar Nasional Viktimologi III, Fakultas Hukum Universitas Airlangga Surabaya, 20-21 Desember 1993

Zulkarnain, 2007. ***Penal Reform of Criminal Law Policy on Corporate Criminal Liability and Punishment Model***, Hasil Penelitian Hibah Bersaing. DP2M Dikti. Univ Widyagama. Malang.