

# A PSYCHOLOGICAL PERSPECTIVE OF CORPORATE CRIMINAL LIABILITY IN ENVIRONMENTAL CRIMES

Mahrus Ali<sup>1,2</sup>, Al Halim<sup>1</sup>, Rahmi Yunita<sup>1</sup>, Wahyu Priyanka Nata Permana<sup>2</sup>, Barda Bawawi Arief<sup>1</sup>, Pujiyono<sup>1</sup>

<sup>1</sup> Universitas Diponegoro, Semarang, Indonesia

<sup>2</sup> Universitas Islam Indonesia, Yogyakarta, Indonesia

## ABSTRACT

This study aims to analyze the corporate criminal liability system in Indonesia in a psychological perspective. The object of this research is limited to the Attorney General's Regulations, Supreme Court Regulations, and 18 laws outside the Criminal Code that recognize corporations as the subject of offenses in criminal law. The results of the study found that there is no single rule studied that regulates when a corporation can be held liable for criminal acts committed by the management, the corporation or both. Corporate criminal responsibility theories that develop in theoretical discourse are also not used. This condition will clearly make it difficult for law enforcement officers in handling criminal cases committed by or involving corporations. Even though the Attorney General and Supreme Court Regulations were made to fill weaknesses in corporate regulation in various laws, these two regulations are also inaccurate because they regulate legal norms that should be contained in legal products of law. Also, neither of them regulates the criteria for corporate criminal liability, especially regarding the punishment and the determination of actors in a psychological perspective.

**Keywords:** Corporate Criminal Responsibility, Psychological Perspectives, Law, Environmental Crimes, Supreme Court.

## Correspondence:

Mahrus Ali  
Universitas Diponegoro, Semarang,  
Universitas Islam Indonesia, Indonesia  
Tamansiwa 158 Yogyakarta, 55151  
mahrus\_ali@uii.ac.id

## INTRODUCTION

The recognition of a corporation as the subject of offenses in a number of laws outside the Criminal Code has implications for the criteria for determining a crime committed by a corporation which is different from when a criminal act is committed by an individual. Corporate crime is always a functional action (*functioneel daaderschap*) and takes the form of a participation offense (Huda, 2015). In the socioeconomic environment, the maker (*corporation*) does not need to always do the act physically, but it can be done by an employee, provided that the act is still within the scope of the corporate functions and authority (Reksidiputro, 1994). If the employee commits an act that is prohibited by law (*a criminal act*), in fact the act is a criminal act which is essentially committed by the corporation. Corporations also cannot commit criminal acts directly, but through intermediary management who act for and/or on behalf of the corporation (Muladi & Priyatno, 2010). Mentovich & Cerf (2014), Mentovich et al. (2016), Suhariyanto (2018) have adopted a psychological side in punishing corporate liabilities

With such characteristics of corporate crime, the theory and system of corporate criminal liability must be based on a different concept, including psychological perspectives, compared to the concept that applies to humans. In this context, psychologically, a corporation can only be said to have a fault if it is unable to pursue policies or security measures in order to prevent prohibited actions from taking place (Huda, 2015). When a corporation is guilty, as in psychological perspectives, criminal responsibility is generally borne by the management alone, the corporation only, or both.

In accordance with the provisions of Article 103 of the Criminal Code, the criteria and parties who are criminally responsible for corporate criminal acts must be regulated in detail and completely in the relevant Law because the

Criminal Code only recognizes individuals as the subject of offenses. If this is not regulated, it will cause juridical problems and at the same time affect the enforcement of criminal law at the application stage by the police, prosecutors and courts. This research examines the corporate criminal liability system against a number of laws that recognize corporations as the subject of offenses. The focus of research is directed at the criteria and parties who can be held responsible for criminal acts by corporations.

## RESEARCH METHODS

This research is included in normative legal research because what is being studied is the legal norm in the legislation regarding the corporate criminal liability system (Wignjosoebroto, 2002). The primary legal materials in this study are criminal legislation outside the Criminal Code which explicitly recognizes corporations as the subject of offenses, the Attorney General's Regulation on Guidelines for Handling Criminal Cases with Corporate Law Subjects, and the Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases. Criminal By Corporations. In order for the analysis not to be too long, the Laws studied were limited to 18 Laws. Secondary legal materials in the form of books, journals or research results related to the theory of corporate criminal responsibility.

The research approach is in the form of a statutory approach and a conceptual approach. (Ibrahim, 2006; Peter, 2006). The first approach is used to identify and explain legal norms regarding corporate criminal responsibility in criminal law, while the second approach is used to explain the corporate criminal liability system that develops in the repertoire of criminal law theory. Legal materials were collected through a library study, namely tracing and

reviewing literatures related to corporate criminal liability systems.

The research analysis uses descriptive qualitative analysis, in the sense that the legal material is described in the form of a narrative that is structured systematically, logically, and is the result of the researcher's interpretation of the legal material produced. In general, qualitative analysis consists of three streams of activity that occur simultaneously, namely the reduction of legal materials, presentation of legal materials, and drawing conclusions.

The reduction of legal materials is defined as the process of selecting, focusing attention on simplifying, abstracting, and transforming "rough" data that emerge from written records in the field (Miles, 2000). In this study, the reduction of legal materials is in the form of a study of several parts of a number of criminal laws that explicitly recognize corporations as the subject of offenses. After the criminal liability system has been identified and found in the law, the next step is to present the legal material that has been found and at the same time linking it to the theoretical aspects of the corporate criminal liability system.

The presentation of this legal material means a compiled collection of information that provides the possibility of drawing conclusions and taking action. The form of presentation of legal materials that is often used is narrative text. After the legal material is presented, the next step is to draw conclusions based on the reduction of the legal material and the presentation of the legal material carried out.

### **Corporate Criminal Liability In Psychological Perspectives**

The theories of corporate criminal responsibility that develop in the realm of criminal law theory include direct corporate criminal liability theory, strict liability theory, vicarious liability theory, and aggregation theory. Direct corporate criminal liability theory is defined as direct corporate criminal responsibility. According to this theory, a corporation can commit a number of offenses directly through agents who are closely related to the corporation, acting for and on behalf of the corporation. The agents' actions, in other words, are still within the scope of the corporate work (Reid, 2008; LaFave & Scott, 1972).

Direct corporate criminal liability is closely related to the doctrine of identification, which states that the actions of certain agents of a corporation, as long as those actions are related to the corporation, are considered the actions of the corporation itself (Harris et al., 1957; Weissmann, 2007; Colvin, 1995). This theory also holds that certain agents in a corporation are considered a "directing mind" or "alter ego". The actions and mens rea of these individuals are then associated with the corporation. If individuals are authorized to act on behalf of and during the course of the corporation's business, the mens rea of those individuals is the mens rea of the corporation (Priyatno, 2004; Wagner, 2013; Sheley, 2019).

Then, who are the people who are synonymous with corporations? According to Yedidia Z. Stern (1987), with a psychological perspective, there are five approaches that can be used. First, a vague description. Experts are actually dissatisfied with terms like "very ego and center" "directing mind and will" or "control center". The analogy of these terms is the term "corporate body", in which a corporation cannot be convicted of a serious crime committed by its management if the action does not originate from the corporate mind. This condition causes legal experts to have no clear distinction between organs and people who are merely corporate employees.

Second, formal criteria. There are four criteria in it, namely the primary organs test, delegation test, authorized

acts test, and corporate selection test. According to the primary organ test, corporate criminal responsibility is imposed only on actions carried out by the main organs, namely those who have the power to carry out activities in a corporation based on official documents and regulations in the corporation. Meanwhile, what is meant by main organs are corporate officials who can act based on the direct authority of official documents and corporate rules without any intervention from other human actions. Meanwhile, based on the delegation test, what is meant by organs are people who have power based on the delegation contained in official company documents. In the authorized acts test, the determination of corporate organs is based on the actions of certain people in a corporation that have the mandate of the main organs. What matters here is not who carried out the action, but whether the action had received the mandate from the main organs of the corporation. As for the corporate selection test, the determination of corporate organs is based on direct appointment of the corporation, which is carried out every period of management.

Third, the pragmatic approach. According to this approach, which includes corporate organs so that their actions are identical to corporate actions are "superior agent", "responsible agent", "important official", "primary agent", "top management", and "a directive". Fourth, hierarchical analysis. According to this approach, to determine corporate organs is based on the identification of people who have important positions in the organizational structure where their will and actions are considered as the will and actions of the corporation.

Fifth, function analysis which emphasizes functional aspects of corporate official behavior. This criterion, of course, does not specifically indicate what function makes a person acting for the benefit of the corporation considered a corporate organ. Importantly, a person's actions, regardless of who the person is, as long as they fulfill the functional aspects of the corporate action, that person's actions are considered corporate actions.

Strict liability is defined as a criminal act by not requiring the perpetrator to be guilty of one or more of the actus reus (Heaton, 2006). Another opinion regarding strict liability was put forward by Roeslan Saleh (1982) as follows:

*In practice, criminal responsibility disappears if there is one condition that is condoning. The practice also creates various levels of mental states which can become a condition for the elimination of criminal imposition, so that in its development, criminal groups are born with sufficient penalties with strict liability.*

The perpetrator's fault on strict liability is still considered to exist, although it does not need to be proven (Moore, 2018). When a prohibited act is proven to have been committed by a person, a judge can impose a sentence without having to prove that person's guilt.

L.B. Curzon (1978) suggested three reasons why it was not necessary to prove errors. First, it is essential to ensure compliance with certain important rules necessary for the welfare of society. Second, proving the existence of mens rea will be difficult for violations related to the welfare of society. Third, the high level of social danger caused by the action concerned. According to Yusuf Shofie (2011), there are many factors behind the legislators determining the use of liability in criminal law, namely because; (1) characteristics of a criminal act; (2) the punishment that was threatened; (3) absence of social sanctions; (4) certain damage caused; (5) coverage of activities undertaken; and (6) the formulation of certain verses and their context in a statutory law.

The theory of vicarious liability, commonly referred to as substitute liability, is defined as legal liability for someone

else's wrongdoing (Reid, 2008). Vicarious liability is only limited to certain circumstances where the employer (corporation) is only responsible for the wrongdoing of the worker who is still within the scope of his work (Clarkson, 2005). The rationality of applying this theory is because the employer (corporation) has control and power over them and the benefits they get are directly owned by the employer (corporation) (Swanson, 2009).

This theory can only be applied to a corporation if it meets three conditions. First, there must be an employment relationship between the corporation and someone who commits a criminal act. Second, the criminal act committed by that person must be related to or still within the scope of his work within a corporate structure. Third, the corporation gets the benefits from committing a crime (Greenberg & Brotman, 2014).

In various cases, it is often found that corporate activity is the result of the collective efforts of several or even many agents. In this situation, it is clear that there is no specific individual who is fully responsible for the activity. Therefore, the theory of corporate criminal responsibility emerged to respond to this problem, namely the existence of the aggregation theory. The main thesis of this theory is that it is an appropriate step for a corporation to be blamed even though criminal responsibility is not directed at one individual, but on several individuals. The aggregation theory allows a combination of criminal acts and/or the mistakes of each individual so that the elements of the crime and the mistakes they committed are fulfilled. A criminal act committed by a person is combined with the mistakes of others, or it is the accumulation of mistakes or omissions that are present in each perpetrator. When these errors, after being added up, meet the required elements in a mens rea, the aggregation theory is fulfilled here (Earl, 2006).

Stephanie Earl (2006) more clearly stated that:

*Aggregation is premised on the view that it is appropriate for a company to be at fault even though liability cannot be established in one particular individual, but in the behavior of several individuals. The doctrine allows the conduct and/or states of mind of individuals to be combined to satisfy the elements of a criminal provision needed to establish culpability.*

Aggregation theory allows the combination of guilt of a number of persons to be attributed criminal liability to the corporation. All actions and all mental elements of several people who are relevant in the corporate environment are considered as if they were done by one person only. This theory emerged as a response to the weakness of identification theory because it was not sufficient to solve the problems that arise in modern corporations. Between identification theory and aggregation theory there are different principles. In the theory of identification, there is only one person whose behavior can be attributed to the corporation, and this is considered sufficient for investigation, prosecution and trial although there are still other possible perpetrators of criminal acts. In the aggregation theory it is necessary to identify more than one actor.

According to Clarkson & Keating (2008), the aggregation theory has the advantage that in most cases it is impossible to isolate a person who has committed a criminal act, by having actus reus in committing the crime, from the company where he works. This theory can prevent companies from hiding their responsibilities deeply in the corporate structure.

#### **Corporate Criminal Liability System in Legislation**

The determination/regulation of corporate criminal responsibility in a number of Criminal Laws outside the

Criminal Code is only related to the criminal responsibility system, while regarding the theory of criminal responsibility and the determination of corporate guilt are generally not regulated. In the Psychotropic Law, the parties/perpetrators who can be burdened with criminal responsibility are humans and corporations. Corporation is defined as "an organized collection of people and/or assets, whether a legal entity or not". Unfortunately, when and what are the criminal liability criteria for corporations that commit psychotropic crimes is not regulated in the law.

In the Consumer Protection Law, the corporate criminal liability system includes three things, namely; responsible business actor/corporation; responsible corporate management; or business actors and their managers responsible for criminal acts of consumer protection. However, when a business actor/corporation is responsible for a criminal act of consumer protection, the article formulation is not found in the law. Likewise, with corporate management.

The corporate criminal liability system is also known in the Corruption Eradication Act. Article 20 paragraph (1) states that "in the event that a criminal act of corruption is committed by or on behalf of a corporation, charges and criminal charges can be made against the corporation and/or its management". This means that the parties that can be subject to criminal responsibility include corporations, corporate managers, or corporations and their managers. In the event that a criminal charge is made against a corporation, the corporation is represented by the management. The management representing the corporation can be represented by another person. In certain cases, the judge may order the management of the corporation to appear before the court himself and may also order the manager to be brought to court (Article 20 paragraphs 3, 4 and 5). However, the law does not regulate the criteria for criminal liability for corruption committed by corporations.

These criteria are also not found regulated in the Law on the Eradication of Criminal Acts of Terrorism. Article 17 paragraph (1) explicitly states, that:

*In the event that a criminal act of terrorism is committed by or on behalf of a corporation, the charges and criminal charges shall be made against the corporation and/or its management.*

Based on the provisions of this article, if a corporation commits a criminal act of terrorism, the only ones responsible for the crime are the corporation, the management alone, or the corporation and its management. Such provisions certainly provide the judge with a great opportunity to choose the party responsible for criminal acts of terrorism committed by corporations. Judges may impose crimes only on corporate management without involving the corporation itself, even though in fact the corporation is committing terrorism and obtaining benefits or benefits from its actions. If this is the case, then the chances of directly imposing a crime on the corporation are very slim because generally, based on criminal cases where the perpetrator is a corporation, judges do not impose a crime on the corporation but on its management.

Regulations regarding parties who can be held responsible for criminal acts committed by corporations are also found in the Law on the Eradication of the Crime of Trafficking in Persons. Article 13 paragraph (2) of this Law states that "in the event that the criminal act of trafficking in persons is committed by a corporation, the investigation, prosecution and punishment shall be carried out against the corporation and/or its management". Based on this provision, there are three parties that can be criminally responsible for the criminal act of trafficking in persons committed by a

corporation, namely the corporation itself, its management or the corporation and its management. However, the law does not regulate the criteria for corporate criminal liability.

The Disaster Management Law recognizes corporations as the subject of offenses and simultaneously regulates who can be held liable for criminal acts by corporations. Article 79 paragraph (1) states as follows:

*In the event that the criminal offense as referred to in Article 75 to Article 78 is committed by a corporation, in addition to imprisonment and fines against its management, the punishment that can be imposed against the corporation is in the form of a fine with a weighting of 3 (three) times the fine as referred to in Article 75 to with Article 78.*

Based on the provisions of the article above, there are two parties who can be subject to criminal responsibility for criminal acts of disaster management by corporations, namely the corporate management and the corporation itself. However, when or what criteria can be used to impose criminal responsibility on both the management and the corporation is not regulated. Theoretically, corporate crime committed by the management is characterized by its functional character. Therefore, the criteria for criminal liability should also be different from the same criteria for corporations (Waller & Williams, 2005; Rummelink & Moeliono, 2003).

In the Information and Electronic Transactions Law, corporations are recognized as the subject of offenses. People in this law are expanded to mean that they include individuals, both Indonesian citizens, foreign citizens and legal entities. Unfortunately, there are no regulations regarding the criteria and who can be held responsible for criminal acts of information and electronic transactions by corporations. In the perspective of criminal law policy, the absence of such regulations at the formulation stage has an impact on criminal law policy at the application stage through the enforcement of criminal law by the police, the judiciary and the courts (Priyatno, 2004).

In the Pornography Law, regulations regarding the corporate criminal liability system are contained in Article 40 (1) which is formulated as follows:

*In the event that the criminal act of pornography is committed by or on behalf of a corporation, charges and criminal charges can be made against the corporation and/or its management.*

This means that the parties that can be subject to criminal responsibility include corporations, corporate managers, or corporations and their managers. In the event that a criminal charge is made against a corporation, the corporation is represented by the management. The management representing the corporation can be represented by another person. In certain cases, the judge may order the management of the corporation to appear before the court himself and may also order the manager to be brought to trial. However, the criteria for corporate criminal liability are not regulated in this law.

The regulation of the corporate criminal liability system in the Narcotics Law is contained in the formulation of Article 130 paragraph (1), in which there are two parties who can be subject to criminal responsibility for narcotics crimes by corporations, namely the corporate management and the corporation itself. Such arrangements are not followed by provisions regarding the criteria for corporate criminal liability.

The interesting thing is regarding the corporate criminal liability system in the Environmental Protection and

Management Law which is different from those regulated in a number of other laws. Article 116 paragraph (1) of this Law states that:

*If an environmental crime is committed by, for, or on behalf of a business entity, the criminal charges and criminal sanctions are imposed on:*

- a. Business entity; and/or
- b. The person who gave the order to commit the criminal act or
- c. The person acting as the activity leader in the criminal act.

The formulation of the article shows that in addition to corporations that can be subject to criminal responsibility, there are other parties who are also burdened with criminal responsibility, namely the person who gave the order to commit the criminal act or the person acting as the activity leader in the criminal act. The meaning of "person who gives orders" means anyone who gives orders to others regardless of their existence in the corporate organizational structure. It could be that the person is the head of the corporation and it can also be the employees under him. The important thing is that the order must be in the context of carrying out corporate activities, and not in the personal benefit of the person giving the order. The meaning of "the person who acts as the leader of the activity in the crime" has two meanings as in psychological perspectives. First, activity leaders mean the core management of the corporation, when they act, their actions are basically identical to corporate actions. When acting they are proven to have committed environmental crimes for and or on behalf of the corporation, the corporate criminal responsibility is borne by them (Mardiya, 2018). Second, an activity leader means a corporate employee who is charged with the responsibility of leading a particular project or activity. When they are proven to have committed an prohibited act, criminal responsibility is borne by them.

In the Aviation Law, the corporate criminal liability system is contained in the formulation of Article 441 paragraph (2), in which there are three parties who can be charged with criminal responsibility, namely corporations, corporate or corporate management and their managers. The regulation regarding the parties is not followed by the regulation regarding the criteria of criminal liability by the corporation. Provisions regarding these parties are also regulated in Article 6 paragraph (1) of the Money Laundering Law which is formulated as follows:

*In the event that the crime of Money Laundering as referred to in Article 3, Article 4 and Article 5 is committed by a Corporation, the punishment shall be imposed on the Corporation and/or the Corporation Controlling Personnel.*

Corporation Controlling Personnel is any person who has the power or authority to determine Corporation policy or has the authority to carry out such Corporation policies without having to obtain authorization from their superiors. Corporations are not only limited to meaning both legal entities and non-legal entities, but are expanded to include organized groups, namely structured groups consisting of 3 (three) people or more, which exist for a certain time, and act with the aim of doing one or more criminal acts regulated in this Law with the aim of obtaining financial or non-financial benefits, either directly or indirectly.

In the Immigration Law, there are three parties who can be burdened with corporate criminal responsibility, namely corporations, their managers or corporations and their managers. Unfortunately, this law does not regulate the criteria for corporate criminal liability. The same thing is

found in the State Intelligence Law. Although this Law recognizes corporations that are legal entities as the subject of offenses, who can be held responsible for criminal acts by corporations is not regulated.

The corporate criminal liability system in the Funds Transfer Law is regulated in the provisions of Article 87 paragraph (1), namely "if the crime as referred to in Article 80 to Article 85 is committed by a corporation, criminal liability is imposed on the corporation and/or its management". This means that there are three parties that can be burdened with corporate criminal responsibility, namely corporations, corporate managers, corporations and their managers. However, if criminal responsibility is to be borne by the corporation only, then there are certain conditions that need to be considered and met, namely:

1. A criminal act committed or ordered by the controlling personnel of the corporation;
2. A criminal act is committed in the framework of fulfilling the aims and objectives of the corporation;
3. A criminal act is committed in accordance with the duties and functions of the perpetrator or the issuer of the order; and
4. A criminal act is committed with the intention of providing benefits to the corporation (Article 87 paragraph 3).

The four criteria above are the criteria for a criminal act committed by a corporation, and have nothing to do with the criteria for criminal liability by the corporation. In addition to regulating criminal acts by corporations, the legislators should also formulate the criteria for criminal liability. This is important because criminal liability is the second stage after a person or corporation commits an act that is prohibited either in the form of commission or omission.

In the Law on Prevention and Eradication of Crime of Forest Destruction, there are no rules regarding when a corporation commits a criminal act, only those who can be held liable for criminal acts in the event that the corporation commits a criminal act, namely the corporation, management, or both. However, what are the criteria for the corporation to commit a crime is not regulated. In the Terrorism Funding Law, the determination of the criteria for corporate criminal liability is also not regulated, there are only parties that can be held liable for criminal acts in the event that a corporation commits a criminal act, namely a corporation, management, or both.

Based on the above discussion and analysis, not one of the 18 laws studied regulates the criteria for corporate criminal liability. The theories of corporate criminal responsibility that have developed in the realm of criminal law theory are not used in this law. This law only regulates the parties who can be held responsible for a crime in the event that the corporation commits a criminal act, namely the management, the corporation or both. With regard to this responsible party, the 18 laws studied follow the same pattern.

Then what about the Regulation of the Attorney General of the Republic of Indonesia Number: PER-082/A/JA/10/2014 concerning Guidelines for Handling Criminal Cases with Corporate Law Subjects and Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations? According to researchers, even though the two regulations were made to fill the void in the special criminal procedure law for corporations that commit a criminal act, their existence is still incorrect. First, the two regulations regulate things that are not explicitly ordered by the laws concerned. There is no single law that recognizes corporations as the subject of offenses ordering that further rules regarding the criteria for corporate criminal liability are regulated by a Regulation of

the Attorney General or a Regulation of the Supreme Court. Second, the material regulated in the two regulations should be regulated in the form of a law because its substance limits the freedom of citizens. In a human rights perspective, limitation must be regulated by law, and cannot be regulated by legal norms which are below the law.

Third, the two regulations do not regulate the criteria for corporate criminal liability. The Attorney General's Regulation only regulates corporate actions or corporate management that can be held liable for crime, but does not regulate the criteria for criminal liability of the corporation itself. The Supreme Court's regulation is also inaccurate because the subtitles of Criminal Liability for Corporations and Management actually contain the criteria for criminal acts by corporations. In the context of the criminal responsibility system, it refers to or in accordance with the provisions of corporate crime in the law governing corporations. This means that the criteria for corporate criminal liability in the Supreme Court Regulation are also not regulated.

## CONCLUSION

Legislation outside the Criminal Code which recognizes corporations as the subject of offenses does not regulate the criteria for corporate criminal liability. The theories of corporate criminal responsibility that have developed in the realm of criminal law theory are not used in this law. This law only regulates the parties who can be held responsible for a criminal act in the event that the corporation commits a criminal act, namely the management, the corporation or both. These three parties are found in all laws governing who should be criminally responsible for criminal acts committed by corporations. Corporate criminal liability which is regulated in the Attorney General's Regulation and Supreme Court Regulation is also inaccurate because it regulates matters that should be contained in a law and does not at all regulate the criteria for corporate criminal liability. What is actually regulated is the criteria for a criminal act to be committed by a corporation.

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