

## Corporate Criminal Liability

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### Abstract

*In the development of economic globalization, crimes committed by business actors in the form of companies in the economic field can cause losses and can also cause victims, and are supported by the emergence and development of science and information technology. This study aims to find out the rules and regulations that can ensnare in the case of corporations as legal entities and to be able to distinguish directors as personalities who are responsible for corporate crimes and directors as asset managers in corporations if there is corporate crime. Crime can be identified by the occurrence of losses that result in criminal liability, which until now still invites debate, how is this corporate responsibility considering that in the Indonesian Criminal Code, which is considered a subject of criminal law is an individual in the biological sense who In addition to that, the Criminal Code adheres to the principle of Sociates Delequere non Potest where legal entities or corporations are deemed unable to commit a crime.*

### Keywords

responsibility; punishment; corporation; economic globalization



## I. Introduction

In Indonesia, Law No. 40 of 2007 concerning Limited Liability Companies provides wider access (Number, 40 C.E.) and opportunities for business actors in doing business and developing their businesses (Redjeki & Affandi, 2021). The government provides various incentives and facilities (Rahman et al., 2021), especially to accelerate the process of establishing a company (Burgess & Munn, 2021). Likewise for that. The enactment of this Limited Liability Company Law is closely related to the development of science (Johnson & Green, 2021), information and technology that has spread to all corners of the world through globalization (Norouzi & Ataei, 2021) and the emergence of developments in international business (Budhwar et al., 2021). In addition, this has also prompted changes to regulations in the economic sector to keep up with these developments (Haralayya & Aithal, 2021).

The economic condition of the population is a condition that describes human life that has economic score (Shah et al, 2020). Economic growth is still an important goal in a country's economy, especially for developing countries like Indonesia (Magdalena and Suhatman, 2020).

According to article 1 point 1 of Law Number 40 of 2007 concerning Limited Liability Companies, PT is a legal entity which is a capital partnership, established based on an agreement, business activities with authorized capital divided into shares, and fulfills the requirements stipulated in this Law and implementing regulations. Thus, PT has characteristics that distinguish it from other forms of institutions, namely PT is a legal entity, and shareholders are not responsible for more than the value of the shares they take and do not include the shareholders' personal assets (see article 3 paragraph (1) of the Company Law).

In the teaching of law, the legal subjects consist of *natuurlijk persoon* and *recht* persons. Or in other words, legal subjects consist of people who are defined biologically, and people who are defined as legal entities. Research purpose is to know the rules and regulations that can ensnare in the case of a corporation as a legal entity.

## II. Review of Literature

There are views on the application of the two terms. Jeremy Bentham stated that an action that is classified as malevolent, can be immutable, meaning that in any given space and time at any time, the action is still considered an evil act and is prohibited by law. Meanwhile, an action that is classified as *mala prohibita*, cannot be changed (not immutable), meaning that in a certain different space and time, the action may no longer be considered an evil act and is prohibited by law.

According to Hans Kelsen in *General Theory of Law and State* (2007), the two distinctions are only found in the traditional theory of criminal law. He further stated that an act may be an offense in another community because of the different moral values held by each community. Because an act can be said to be an offense only when it has been attached to a legal sanction based on the law, then all offenses are *mala prohibita*. In other words, an act that is considered as something evil according to one's conscience (*mala in se*) is still not an offense, if there is no sanction (punishment/criminal) attached to it.

Muladi (2004) argues that in history there is no clear and qualitative conclusion criteria as happened in the Anglo Saxon law which defines *mala in se* and *mala prohibita*. *Mala in se* is “acts wrong in themselves”, while *mala prohibita* is “acts wrong because they are prohibited”.

## III. Results and Discussion

### 3.1 Corporate Liability for a Criminal Offence

As a legal entity, PT is a legal entity or legal entity that can be equated with people, in this case, PT is a legal subject, which can carry rights and obligations. However, because a PT cannot act alone, then in acting or taking legal actions, PT is represented by the Board of Directors acting for and on behalf of the PT. The Board of Directors must in good faith, prudence, and full responsibility carry out the duties of managing the PT for the interests and business of the PT (see Article 97 of the Company Law). The relationship that arises between the company and the board of directors is fiduciary duties, namely tasks that arise from a fiduciary relationship or trust between the board of directors and the company they lead. If the board of directors makes mistakes and omissions that cause the company to suffer losses, the board of directors is obliged to take responsibility for it jointly and severally (see Article 97 paragraph (4) in conjunction with paragraph (5) of the Company Law).

A crime can be identified by the appearance of a loss which then results in criminal liability (Bilqist, 2021). What is still being debated is how this corporation is held accountable, considering that in the Indonesian Criminal Code (Rizal & Santiago, 2021), individuals who are considered as subjects of criminal law are individuals in a natural biological sense (*natuurlijke persoon*) (Person, 2021). In addition, the Criminal Code still adheres to the principle of *sociates delinquere non potest* where a legal entity or corporation is deemed unable to commit a crime (Staffler, 2022). If an action taken for and on behalf of the corporation is proven to cause harm and must be sanctioned (Lasmadi, 2021), then the next question is who will be held responsible (Schwan, 2021).

Organization must have a goal to be achieved by the organizational members (Niati et al., 2021). The success of leadership is partly determined by the ability of leaders to develop their organizational culture. (Arif, 2019).

The Indonesian Criminal Code only stipulates that the subjects of criminal law are individuals (*natuurlijke persoon/legal persons*). Legislators in formulating offenses must take into account that humans take actions within or through organizations which according to civil law and other laws (administration) constitute a single entity which is therefore recognized as a legal entity or corporation (Giraldo, 2021). Based on the Criminal Code, the legislators will refer to the administrators who run the organization when faced with a situation like this (Svara, 2021). So it can be concluded that the current Indonesian Criminal Code cannot be used as a basis for ensnaring a criminal act committed by a corporation (Ardi et al., 2021), but it is only possible to ensnare the management or commissioners of a limited liability company, we can see this in article 398 of the Criminal Code which states that if a manager or the commissioner of a limited company, Indonesian participating airline, or corporate association which is declared bankrupt or who has been ordered to settle a court, is threatened with a maximum sentence of 1 year and 4 months, if: with the articles of association so that all or most of the losses are suffered by the company, airline, or association.....(and so on).

Corporations as legal entities, of course, already have their own legal identity. The legal identity of a corporation is separate from the legal identity of its organs such as directors, shareholders, and commissioners. In the rules of civil law, it is clear that a limited liability company (corporation) is a subject of civil law, so that it can enter into engagements such as buying and selling, signing contracts, can also sue and be sued before a court in civil relations. The shareholders enjoy the benefits derived from the concept of limited liability, and the activities of the corporation are continuous, in the sense that its existence will not change even though there are changes, both additions and deletions of its members. However, until now, corporate criminal liability is still inviting debate. Many parties objected that a pseudo-corporation could commit a criminal act and have a criminal intent that will result in criminal liability. Besides, it is impossible to present a real physical corporation in a criminal trial and sit on the defendant's seat.

In both civil law and common law legal systems, it is very difficult to attribute a certain action (*actus reus*) and prove the existence of *mens rea* (criminal intent). That the existence of corporations in criminal law is a legal fiction that does not have a mind, so it does not have a moral value that is required to be criminally blamed.

Accountability of a Board of Directors as a personality for criminal acts that occur in the corporation. Article 97 stipulates that the Board of Directors is responsible for the management and management of the Company. This responsibility must be carried out in good faith and full of responsibility. Each member of the Board of Directors who does not carry out his responsibilities is personally responsible for the losses suffered by the Company. If the Company has more than one Board of Directors, this responsibility applies jointly and severally to each member of the Board of Directors. However, members of the Board of Directors will be relieved of the burden of responsibility, if they can prove:

- a. The loss was not due to his fault or negligence
- b. Have carried out management in good faith and with prudence for the benefit and in accordance with the aims and objectives of the Company
- c. Does not have a conflict of interest, either directly or indirectly, for actions that result in losses, and
- d. Have taken action to prevent the occurrence or continuation of the loss.

Shareholders who represent at least 1/10 (one tenth) of the shares with valid voting rights may file a derivative lawsuit to the District Court against a member of the Board of Directors whose fault or negligence causes the Company to suffer losses. This lawsuit was made for and in the interest of the Company.

### **3.2 The Nature of Corporate Responsibility (Legal Entity)**

In criminal law there are several methods or formulation systems adopted by lawmakers, namely:

#### **a. The corporate management as the maker and the manager is responsible**

In the event that the management of the corporation as the maker (actor) and the management is responsible to the management, certain obligations are imposed, the obligations imposed are actually the obligations of the corporation. Managers who do not fulfill these obligations are subject to criminal sanctions. So that in this system there is a reason that abolishes the crime. The rationale is that the corporation itself cannot be held responsible for a violation, but it is always the management who commits the crime, and therefore it is the management who is threatened with punishment and punished.

#### **b. Corporation as Maker and also as Responsible**

In the case of a corporation as a maker (actor) and a responsible manager, it is seen as being done by the corporation, namely what is done by the equipment of the corporation according to the authority based on the AD, the crime committed by the corporation, the crime committed by a certain person as the administrator of the legal entity.

The nature of the act that makes it a crime is on-personlijk. The person who leads the corporation is criminally liable, regardless of whether he or she knows about the act that was committed.

The motivation is to pay attention to the development of the corporation itself. The stipulation of administrators as those who can be punished is not enough because the legal entity receives the benefits and the community suffers greatly from the prohibited act.

## **IV. Conclusion**

Crime can be identified by the occurrence of losses that result in criminal liability, which until now is still inviting debate, how is this corporate responsibility, considering that in the Indonesian Criminal Code, those who are considered as subjects of criminal law are individuals in the biological sense who In addition to that, the Criminal Code adheres to the principle of Sociates Delequere non Potest where a legal entity or corporation is deemed unable to commit a crime. In Indonesia, there are currently 3 (three) forms of criminal liability for corporate crimes:

1. Charged to the corporation itself, for example, Article 65 paragraph 1 and paragraph 2 of Law No. 38 of 2004 concerning roads
2. Charged to the organ or management of the corporation who commits the act or those who act as leaders in committing a criminal act as regulated in Article 20 paragraph 2 of Law Number 31 of 1999 concerning corruption
3. Can be charged either to the management of the corporation as the giver of orders or to the corporation as regulated in Law No. 23 of 1997 concerning environmental management
4. Taking into account the impact that corporate crime has on society, the economy, government and other aspects that are dangerous, even more serious than the impacts

caused by conventional forms of crime, there must be consistency and a solid foundation in the law to be able to impose accountability. corporate crime, in various respects to the regulation concerning this responsibility

5. In addition, more in-depth study attention is needed both among academics, professionals and law enforcement officers, in order to build a theoretical framework for corporate criminal liability, this should also be balanced with efforts to improve the quality and ability of law enforcers who will implement it, they must be able and creative to make legal breakthroughs.

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