Corporate Strict Liability in Environmental Crimes in Indonesia and the Netherlands

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Abstract. The purpose of this study is to analyze the regulation of corporate responsibility between the Indonesian and Dutch legal systems and the development of the principle of strict liability for corporations in environmental crimes in Indonesia and the Netherlands. The approach used in this research is a statutory approach and a comparative approach. This research data collection technique was carried out through conventional and online literature searches. The data analysis technique used in this research is qualitative because the data is presented in a descriptive-narrative way. The results of the study show that in Indonesian criminal law it has been recognized that corporations are the subjects or perpetrators of criminal acts, but responsibility in criminal law is still ambiguous. Several laws and regulations outside the Criminal Code formulate that corporations are explicitly recognized as legal subjects and can be accounted for. Regulations on the corporate responsibility system in the Netherlands are no longer scattered outside the Criminal Code. The application of the principle of strict liability to corporations committing environmental crimes is regulated in the Law on Environmental Protection and Management. In the Job Creation Act, there is an abolition of the strict liability provision which risks liberating corporations destroying the environment from liability.

Keywords: Comparison; Corporation; Environment

1. Introduction

Environmental damage in Indonesia is getting worse day by day. This damage is generally caused by human activities that are not environmentally friendly. Disgraceful acts and crimes against the environment, not only humans as private entities can do them, but corporations as a legal entity can also commit such acts [1]. Environmental damage carried out by corporations results in physical changes in an environment. The sustainability of a clean and healthy living environment is decreasing, this is caused by several factors. The first factor is due to the fact that the earth is currently getting older and the other factor is caused by human activities. To be able to fulfill life satisfaction, humans often ignore environmental sustainability by triggering environmental damage to fulfill personal satisfaction and business activities.

The perspective of workers is a determinant of the paradigm and politics of employment. [2] Environmental crimes are categorized as crimes in the economic field in a broad sense because the scope of crimes and environmental violations is wider than other conventional crimes, the impact of which results in economic losses for the country, as well as environmental damage [3]. The consequences of pollution and/or environmental destruction are the victims [4]. Victims are also the ones who suffer the most losses, both material and immaterial losses and even result in the victim being disabled for life. Some examples of environmental crime cases involving corporations are the environmental pollution case in

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Rancaekek and the Lapindo Mud case. The environmental pollution case in Rancaekek stems from the disposal of toxic and hazardous industrial liquid waste which was allegedly carried out by three textile factories located around the Cikijing River, Rancaekek District. The Regional Environmental Control Agency of West Java Province stated that 24,000 meters3 of wastewater from one factory is discharged into the river every day. Another example of a case that has caught the public's attention is the Lapindo Mud case. Apart from inundating agricultural land, the mudflow also affects the irrigation canal which functions to irrigate the residents' rice fields and plantations as well as the carrier channel during the rainy season for the Porong community.

To prevent the spread of corporate crime, the legal system in Indonesia since 1951 has introduced corporations as the subject of offenses [5]. It didn't stop there, in 1955 it was reaffirmed the position of the corporation as the subject of a crime in a crime so that it could be held criminally responsible [6]. With the existence of a wet economische delicten in the Netherlands, since 1950 it has been possible for corporations to be held criminally responsible [7]. A corporation in the Netherlands that is considered capable of committing a criminal act is no longer a problem, because it has been regulated in the Dutch Criminal Code, so it is no longer an exception but there has been a development in criminal law in the Netherlands. Corporations in Indonesia which are considered to be able to commit a criminal act are still an exception, because in principle in Indonesian criminal law only humans can commit criminal acts, whereas if in an association a criminal act occurs, accountability can be asked for the person who made a mistake or The association is represented by its management to account for criminal acts that occur in the association [8].

The existence of corporations as the subject of criminal acts in criminal law reform policies has consequences on the principle of criminal law, namely that corporations can be accounted for the same as natural persons [9]. It is not easy to determine when criminal responsibility can be requested from the management of a legal entity or to the management and legal entities, so this becomes a problem in itself in practice. The number of environmental cases involving corporations certainly needs specific and firm regulations to deal with these problems [5]. Considering that Indonesia is a legal state as stipulated in the provisions of Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The state of law in question is a state in which all its operations must be based on law. Legal practitioners are still fixated on the principle of no crime without guilt adopted by Indonesian general criminal law, it is suspected to be one of the causes that make it difficult for investigators and prosecutors to include corporations as suspects, defendants, and even convicts [10]. The formulation of the problem in this research are : How are corporate liability arrangements between the Indonesian and Dutch legal systems?, and How is the principle of strict liability for corporations developed in environmental crimes in Indonesia and the Netherlands?

2. Method

This type of research is library research [11]. Library research is research that is carried out through library data collection or research carried out to solve a problem which basically relies on a critical and in-depth study of relevant library materials. [12]This research includes library research because data sources can be obtained from libraries or other documents in written form, both from journals, books and other literature.

3. Discussion

3.1. Corporate Liability Arrangements Between Indonesian and Dutch Legal Systems

Indonesian criminal law provides a broader understanding of corporations when compared to Indonesian civil law[13]. According to civil law, legal subjects consist of two types, namely humans (natural persons) and legal entities (rechtpersoon) [14]. Corporations in the sense of civil law are legal entities (rechtpersoon). However, in criminal law, the notion of a corporation is not only a legal entity, but includes a business entity that is a legal entity or not a legal entity.

In Indonesian criminal law, it has been recognized that corporations are the subjects or perpetrators of criminal acts, but accountability in criminal law is still ambiguous. If we look at the Criminal Code, corporate crimes cannot be caught, because corporations are not legal subjects or perpetrators. In the Criminal Code, the subject of law is only a human or a person [10].

However, several laws and regulations that are outside the Criminal Code include Law of the Republic of Indonesia Number 7 Drt of 1955 concerning Economic Crimes, Law of the Republic of Indonesia Number 2 of 1992 concerning Insurance Business, Law of the Republic of Indonesia Number 11 Year 1995 concerning Excise, the Law on Environmental Protection and Management and the Law on the Eradication of Criminal Acts of Corruption have formulated that corporations are expressly recognized as being legal subjects or perpetrators and can be accounted for in criminal law. However, there are other laws that have no clear direction regarding corporate criminal liability.

From a historical perspective, recognition of corporations as criminal law subjects who are considered capable of committing criminal acts and can be held criminally responsible has been going on since 1635. Recognition of corporations as subjects of criminal law began when the British legal system recognized that corporations could be criminally responsible but limited. on minor crimes[15].

In the national legal system, it is necessary to realize that the development of the regulation of corporate criminal liability in the fourth stage is still ius constituendum. The regulation regarding corporate criminal liability at this fourth stage is by regulating corporate criminal liability in general in Book I of the Indonesian Criminal Code, so that it applies to all criminal acts. [16]Thus, at this fourth stage, we no longer talk about who can be held criminally responsible (whether organ or corporation or both) but will focus on regulating corporate criminal liability in general criminal law which will apply to all criminal acts.

Given that corporations are currently qualified as subjects who can commit criminal acts and can be accounted for in addition to people (management), this is a reflection of two things, namely the ability of corporations to commit crimes and the ability of corporations to be accounted for in criminal law . With regard to the position as maker and nature of corporate criminal liability, there are three models of corporate responsibility, namely corporate management as responsible maker and manager, corporation as responsible maker and manager, corporation as maker and also responsible person.

Corporations can be blamed if there is intentional or negligence or negligence on the part of the people who are the tools of the corporation. The fault is not individual but collective. Corporations can still have errors with the construction of errors of management or members of the board of directors.

The principle of wrongdoing in corporations does not absolutely apply, but it is sufficient to base it on the adage res ipsa loquitur (the facts speak for themselves) . Actually this is not foreign anymore because in Anglo Saxon countries the principle of mens rea (inner attitude) is known with the exception of certain offenses, namely what is known as strict liability and vicarious liability [17].

Being accountable for the corporation on the basis of these two principles is very much needed in its development. Because with the development of technology, it is not easy to get adequate evidence of wrongdoing from the owner of the corporation. The two doctrines mentioned above need to be considered to what extent they can be taken over.

The Netherlands as a country with a European Civil Law tradition views the criminal justice process as a process that must be carried out legally to find the truth rationally and impartially [18]. Therefore, the legal system is seen as a rational instrument that applies the scientific method to find truth and justice, so that law is a science because it is a product of rational decisions that can present truth and provide justice through balanced logic and analysis.

The Netherlands is a country that adheres to a civil law system. the legislators (formal wet) are carried out by the royal government (regering) and the general staten, but not all regulations, especially in the material sense (wet materiele zin) which are equated with laws, are not always made or formed by the royal government (regering) and staten general, but can be made by the minister, governor and mayor. The Netherlands has a constitution or constitution called the Regeringsreglement (R.R.) then the constitution was changed to Wet op de Staatsinrichting van Nederlands Indie, abbreviated Indische Staatsregerling (I.S.).

The civil law system emphasizes the principle of binding force and legal certainty for a norm, this principle must be realized in regulations in the form of laws that are systematically arranged in the form of a written codification or compilation [19]. The basic principle and main value of the law adopted by the Continental European legal system is that legal certainty and legal certainty will be realized if the regulations are in written form. The principle that emphasizes that a norm must be in written form is a principle that is influenced or follows the codification school of thought, this is different from the principles adopted in the Anglo Saxon legal system or the common law system.

The legal system in the Netherlands accepts corporate criminal liability more quickly and in a more pragmatic way, without academic and theoretical debate. In practice, prosecution of legal entities does not appear to be a problem. Corporate criminal liability is not limited to specific categories of actions and corporations are considered to be able to commit acts or have the intention of committing crimes.

From a historical point of view, provisions regarding the corporate criminal liability system were generally introduced and regulated in the Dutch Criminal Code in 1976. Previously, the provisions regarding the corporate criminal liability system had been explicitly regulated in the law governing economic crimes. However, the regulation regarding the corporate criminal liability system in this law is regulated in a narrow sense. The corporate criminal responsibility system in the Netherlands has entered its fourth stage, namely the regulation of the corporate responsibility system is no longer spread outside the Dutch Criminal Code (KUHP-WvS), because with the enactment of the law on June 23, 1976 Stb 377, which ratified on September 1, 1976, a new formulation of Article 51 of the Dutch WvS emerged.

With the enactment of this law, all provisions of the special criminal legislation that are spread outside the Dutch Criminal Code which regulates corporate criminal liability are revoked because they are deemed unnecessary, because with the regulation of the corporate criminal liability system in Article 51 of the Dutch Criminal Code, as a provision In general, based on Article 91 of the Dutch Criminal Code, this provision applies to all regulations outside the codification as long as they are not violated.

The criminal responsibility of a legal entity (rechtpersoon/legal person) is regulated in Article 51 Paragraph (1) of the Dutch Criminal Code (wetboek van strafrecht). This article

stipulates that a criminal act can be committed by natural persons (naturlijkepersoon) and corporations. If a crime is committed by a corporation, criminal prosecution is very likely and criminal penalties are very likely to be imposed against (a) the legal entity or (b) the person who ordered or directed the commission of the crime or (c) the person referred to in (a) and (b) jointly (Article 51 Paragraph (2) of the Dutch Criminal Code), where the public prosecutor has full authority to choose who will be charged depending on each case [20].

In the Dutch Criminal Code, individuals (humans) and legal entities (corporations) are equal. This equality is accepted for practical reasons, namely that it is possible to hold corporations accountable for the behavior they may be associated with, as if they were human beings. Unincorporated corporations, partnerships, shipping companies and special purpose funds are considered the same as legal entities for the above purposes.

In 2003, the Dutch Supreme Court (Hoge Raad) in its decision stated that whether or not a corporation is responsible for a criminal act must be judged from the special circumstances contained in a case. Whether or not criminal liability can be imposed on the corporation in the circumstances of whether a criminal act can be properly imposed on the corporation.

3.2. Development of the Strict Liability Principle on Corporations in Environmental Crimes in Indonesia and the Netherlands

Strict liability or absolute liability or in some literature is also called liability without fault or called no fault liability or liability without fault. In this principle, criminal liability can be requested without having to prove the guilt of the perpetrator of the crime. Therefore, strict liability is a principle that negates the principle of error that applies absolutely in criminal law [21].

Since Indonesia does not recognize the strict liability teaching originating from the Anglo-American legal system, then as a justification, the feit materiel teaching originating from the Continental European legal system can be used as a justification. In these two teachings it is not important that there is an element of error [22]. The strict liability teaching is only used for minor criminal offenses (regulatory offences) which only threatens a fine, as in most public welfare offenses. However, because Indonesia has taken over concepts originating from legal systems with different roots into the legal system in Indonesia, it requires the perseverance of Indonesian criminal law experts to explain this concept by linking it to the principles that have been institutionalized in Indonesian criminal law.

In the Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management, the concept of responsibility is known, namely liability based on fault and strict liability, especially Article 87 and Article 88. Article 87 regulates regarding liability for environmental pollution in general which is based on unlawful acts.

Based on the explanation of Article 88, what is meant by absolute responsibility or strict liability is that the element of fault does not need to be proven by the plaintiff as the basis for payment of compensation. The provisions of this paragraph are lex specialists in lawsuits regarding unlawful acts in general. The amount of compensation that can be charged to polluters or environmental destroyers according to this article can be determined to a certain limit, what is meant by a certain limit, is if according to the stipulation of the prevailing laws and regulations and/or the activity concerned or environmental funds are available [23].

Observing the regulation of strict liability in the Law on Environmental Protection and Management requires restrictions on the implementation of strict liability [24]. Its implementation is limited to activities related to the utilization and management of hazardous

and toxic materials, as well as those related to the utilization and management of hazardous and toxic wastes. Based on the Law on Environmental Protection and Management outside of these activities, strict liability cannot be applied.

The limitation is reasonable because its implementation ignores the element of error. This means that the implementation of strict liability itself is unusual. Usually a person is sentenced to pay compensation if he is proven guilty of committing the act he is accused of.

One of the ideals that the Indonesian government is trying to realize in the field of law is the simplification and harmonization of laws and regulations [25]. It aims to bypass complex bureaucracies that are vulnerable to various corrupt actions. The embodiment of these noble ideals was the emergence of the omnibus law on the Job Creation Act (which was later changed to the Job Creation Act).

One of the points that got the spotlight was the issue of the environmental impact of the existence of the Job Creation Act. There is a high risk to the environment behind the investment efficiency and ease of doing business offered by the Job Creation Act when a permit is granted easily, there is a high risk involved.

The Job Creation Law contains changes and deletions related to articles that regulate environmental management as a matter of responsibility in carrying out business activities. The Job Creation Act tries to simplify all existing permits in carrying out activities or businesses that have an impact on the environment. In running a business, of course it will produce waste from the remnants of production. The waste has the potential to disrupt the community in facing a decent life in terms of the environment.

There are many articles in the Job Creation Act that can accelerate environmental damage. The most visible thing in environmental protection in the Job Creation Act is the weakening of law enforcement. This can be seen from the amendments to Article 88 of the Law on Environmental Protection and Management. The existence of the abolition of the provision of absolute responsibility or strict liability for environmental destroying corporations previously contained in Article 88 of the Law of the Republic of Indonesia Number 32 of 2009 concerning Environmental Protection and Management.

Absolute responsibility (no fault liability or liability without fault) itself in the literature is usually known as the phrase strict liability. Absolute responsibility is defined as responsibility without having to prove a fault. Strict liability focuses on the impact of an action regardless of whether it was intentional or not or consciously or negligently by the maker who caused an effect. This means that the maker can already be punished if he has committed the act as formulated in the law regardless of his inner attitude.

In the Law on Environmental Protection and Management, it is stated that any person whose actions, business, or activities either use, produce or manage B3 waste so as to pose a serious threat to the environment are absolutely responsible for the losses that occur without the need to prove the element of guilt. Different things can be seen in the Job Creation Act, the word "without the need for proof of an element of error" is omitted [26].

Initially Dutch environmental law was based on the Nuisance Act of 1875. Legislation on environmental protection only started in the 1960s. Sectoral laws were enacted afterwards, namely the Act on Chemical Waste 1976, Act on Waste 1977 and the Noise Nuisance Act 1976. Each of these laws has different procedures, thus requiring uniform procedures from environmental law regulations. . This goal was realized in 1979 since the Provisions on Environmental Health which have been amended several times and the last was on January 18, 1990 Stbl. 45. In its development, this law was finally adopted into the Environmental Management Act in 1993 and was amended in 2004 so that it is now regulated in the Environmental Management Act 2004 (EMA 2004).

The Dutch Minister of Justice has concluded that all elements of the Instruction on environmental protection through criminal law are covered by the combination of the Criminal Code, the Criminal Procedure Code, and the Economic Crime Law [27]. Environmental crimes can be seen as lex specialis in relation to the Dutch Criminal Code and the Dutch Criminal Procedure Code.

Dutch environmental criminal law has a fairly high degree of relevance to a set of administrative law regulations. In other words, the environmental laws and regulations for the most part consist of regulations that stipulate that environmental pollution is completely prohibited and acts of pollution are permitted provided that a permit or administrative license has been obtained beforehand. These environmental laws and regulations also regulate the basic requirements for the authorities through general rules or a licensing system to allow or allow certain acts of environmental pollution to be carried out.

The 1989 Dutch Criminal Code has added several new environmental crimes which are categorized as crimes. The environmental crime contains provisions that threaten to be punished with actions in the form of illegally entering materials above and/or into the ground, air or surface water, whether done intentionally or due to negligence, if the act poses a threat to public health or the lives of people. other.

In the Dutch legal system, the equivalent of strict liability teachings is risicoaansprakelijkheid. Responsibility based on risk is a form of responsibility that is not based on an element of error. Liability based on risk is limited. As for determining whether an activity can be applied to the strict liability principle, it is the duty of the judge in court. These conditions are not cumulative, but only one of them is fulfilled, so the activity can be classified as very dangerous or abnormal.

Strict liability or risico-aansprakelijkheid in the Netherlands its implementation is limited to activities related to:

1. Hazardous material processing activities.
2. Hazardous material waste treatment activities.
3. Activities of transporting hazardous materials by sea, river and land.
4. Drilling and soil activities that cause explosions.

4. Conclusion

In Indonesian criminal law, it has been recognized that corporations are the subjects or perpetrators of criminal acts, but accountability in criminal law is still ambiguous. Several laws and regulations that are outside the Criminal Code formulate that corporations are explicitly recognized as legal subjects or actors and can be accounted for in criminal law. The regulation on the corporate responsibility system in the Netherlands is no longer spread outside the Dutch Criminal Code (KUHP-WvS), which was previously explicitly regulated in the law governing economic crimes (WED).

The application of the principle of strict liability to corporations that commit environmental crimes is regulated in the Law on Environmental Protection and Management, particularly in Articles 87 and 88. In its development, the Employment Creation Act has eliminated the strict liability provision which risks liberating destructive corporations. environment of responsibility. The implementation of the strict liability principle against corporations that commit environmental crimes in the Netherlands is not carried out in court, but instead submits a claim to the insurance company. The value of the loss that must be borne is not limited, depending on the evidence.

References

[1] Efendi A. Hukum Lingkungan, Instrumen Pengelolan Lingkungan di Indonesia dan Perbandingan dengan Beberapa Negara. Bandung: PT. Citra Aditya Bakti; 2014.

[2] Permatasari A, Iqbal M, Habibullah A. Industrialization Relation Dispute Settlement Model in Indonesia. 2021.

[3] Hornman, Mark, Sikkema E. Overarching Views of Crime and Deviancy. Belanda: 2007.

[4] Siregar. Penegakan Hukum Dalam Tindak Pidana Lingkungan Hidup Di Indonesia. Mercatoria 2015;8.

[5] Agus Santoso M. PERTANGGUNGJAWABAN PIDANA PENCEMARAN LINGKUNGAN HIDUP YANG DILAKUKAN OLEH KORPORASI. Jurnal Cakrawala Hukum 2016;7:216–28.

[6] Setiyono. Kejahatan Korporasi. Malang: Averroes Press; 2002.

[7] Weissmann A, Newman D. Rethingkin Retinal Corporate Liability. Indiana Law Journal 2007;82.

[8] Sjahdeini. Pertanggungjawaban Pidana Korporasi. Jakarta: Kencana; 2006.

[9] Muladi, Dwidja Priyatno. Pertanggungjawaban Pidana Korporasi. Jakarta: Prenadamedia Group; 2012.

[10] Kristian. Sistem Pertanggungjawaban Pidana Korporasi: Tinjauan Teoritis dan Perbandingan Hukum di Berbagai Negara. Bandung: PT. Refika Aditama; 2016.

[11] Yusuf AM. Metode Penelitian Kuantitatif, Kualitatif, dan Penelitian Gabungan. Jakarta: Prenadamedia Group; 2014.

[12] Bagong S. Metode Penelitian Sosial. Jakarta: Kencana Prenada Media Group; 2007.

[13] Marzuki PM. Penelitian Hukum. Jakarta: Kencana Prenada Media Group; 2005.

[14] Soekanto S. Pengantar Penelitian Hukum. Jakarta: UI Press; 2008.

[15] Robinson AA. Corporate Culture As A Basis For The Criminal Liability Of Corporations 2008.

[16] Satria H. Pertanggungjawaban Pidana Korporasi Dalam Tindak Pidana Sumber Daya Alam. Mimbar Hukum 2016;28.

[17] Kurniawan, Ridho, Siti Nurul Intan Sari D. Pertanggungjawaban Pidana Korporasi Berdasarkan Asas Strict Liability. Yurdis 2014;1.

[18] Faure M, Heine G. Environmental Criminal Law in the European Union. Iuscrim. Freiburg im Breisgau; 2000.

[19] Riswanti AR. Tanggung Jawab Mutlak (Strict Liability) Dalam Penegakan Hukum Perdata Lingkungan di Indonesia. Kertha Wicara Fakultas Hukum Universitas Udayana 2013;1.

[20] Luna, Erik, Marianne Wade. Prosecutors as Judges. Washington and Lee Law Review 2010;67.

[21] Haritia Bayu, Bayu, Hartiwiningsih. Penerapan Asas Strict Liability Dalam Tindak Pidana Kebakaran Hutan Dan Lahan Yang Dilakukan Oleh Korporasi. Recidive 2019;8.

[22] Muamar, Anak Agung Sri Utari. Pengaruh Penghapusan Asas Strict Liability Dalam Undang-Undang Cipta Kerja Terhadap Masif Deforestasi Di Indonesia. Kertha Negara 2020;8:1–12.

[23] S. Maria Farida Indrati. Ilmu Perundang-undangan Jenis, Fungsi, dan Materi Muatan. Yogyakarta: Kanisius; 2007.

[24] C. Marnixon R. Konsepsi Hukum Dalam Pengaturan Dan Pengelolaan Wilayah Perbatasan Antar Negara. Bandung: Alumni; 2006.

[25] Muslih, Akhmad, Sinung M. Hagabei. Subtansi Model Pengembangan Hukum Dalam Beberapa Sistem Hukum. Ilmiah Kutei 2015.

[26] Widowaty Y. Pertanggungjawaban Pidana Korporasi Terhadap Korban Dalam Kasus Tindak Pidana Lingkungan Hidup. Yudisial 2012;5:154–69.
[27] Rifai A. Penemuan Hukum oleh Hakim dalam Perspektif Hukum . Jakarta: Sinar Grafika; 2011.