

Application of the Vicarious Liability Principles in Environmental Crime

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Abstract- Environmental crime is one of the criminal acts that may lead to significant negative impact and/or damage to human sustainability. Therefore, in criminal law, criminal acts related to the environment needs to be specifically regulated. The regulation can exist outside or comes in different form from the Criminal Code. The application of the vicarious liability principle include but not limited to the subject of criminal acts and criminal liability. The study aim to analyze the primary reason for the application of the vicarious liability, whether the application of the vicarious liability is appropriate and the formulation of sanctions for perpetrators in environmental crime . The method used is normative juridical with descriptive specifications and qualitative analysis. The primary reason to apply the doctrine of vicarious liability so that not only individual person that can be a subject to criminal sanctions but also to include corporations, thus this doctrine appropriate to be applied in environmental crime. The formulation of the regulation that offer application of sanctions in law No. 32 of 2009 on protection and management of the environment is to apply the doctrines of strict liability with vicarious liability simultaneously and doctrine of *premium remidium* so as to provide a deterrent effect for the perpetrators.

Keywords-Vicarious Liability, Environmental Crime, Premium remidium

I. INTRODUCTION

The coaching and development of educational sports conducting through a learning process carried out by sports teachers or lecturers qualified and have a competency certificate and supported by adequate sports facilities and infrastructure. The Universitas Negeri Medan is as one of the universities which will produce superior, professional graduates, skilled in their fields and The right to get a clean environment is the right of every person protected by the state, therefore the state is obliged to enforce it so that every citizen able to enjoy this right, In reality this right is not immediately accessible, rather environmental damage increases in quality and quantity as time goes by. A recent publication from the World Health Organization (WHO) indicates that urban outdoor air pollution alone has increased by about 8 per cent between 2008 and 2013 [1]. To enforce this right the state has ratified Law number 32 of 2009 on Protection and management of the environment (henceforth abbreviated as UUPPLH) in lieu of the previous law, number 23 of 1997 on Environmental Management. The definition of environment as stated in Article 1 point 1 of UUPPLH is the unity of space with all objects, energy, condition, and living things, including humans and their behavior, which affect nature itself, the its sustainability, and the welfare

of humans and other living beings [2]. In 2016 has been a colorful year in policy and enforcement of environmental law in Indonesia. Opened with a negative note on the decision of the Palembang District Court in favor of PT Bumi Mekar Hijau (PT BMH) against the Ministry of Environment and Forestry (KLHK) in a case of forest fires (Karhutla) [3]. Forest fires are one of the crimes that are regulated in UUPPLH. The criminal act in the Criminal Code Bill is interpreted as an act of doing or not doing something which is stated as a prohibited act and threatened by criminal law.

According to Soedarto; To justify punishing someone for his or her action is not enough only by considering that the person has committed an act that is against the law or is unlawful. Therefore, there other requirement, that the person who committed the act has a guilty mind or error [4]. The definition of error according to Jan Remmelink is a denunciation directed by the community that applies ethical standards at a certain time to humans who commit deviant behaviors that can be avoided [5]. The first element of error is accountability [6]. In criminal law, doctrine of criminal responsibility are strict liability and vicarious liability.

According to the doctrine of strict liability, a person can be accounted for for certain criminal acts even though in that person there is no guilty mind (*mens rea*). In short, strict liability is defined as a liability without fault [7]. Vicarious liability is a criminal responsibility imposed on someone for the actions of others [7]. Thus, in criminal law vicarious liability is exceptional [8].

II. RESEARCH METHOD

Based on these problems, the method used is normative / doctrinal juridical method with a conceptual approach. The data used is secondary data, with primary legal material. Research specifications is analytical descriptive. The analysis is done qualitatively by inductively drawing conclusion.

The objective is to analyze the primary reason to apply the doctrine of vicarious liability in environmental crime and whether the application of the doctrine of vicarious liability is appropriate and the formulation of the regulation on the implementation of sanctions toward the perpetrators.

III. FINDINGS AND DISCUSSION

1. Primary reason of application of the doctrine of vicarious liability).

Three important things in criminal law are acts, perpetrators, and punishment. These three things are known as the trias of criminal law. Actions, refer to the definition of unlawful action. The perpetrator, refer to the subject of a criminal offense in the sense of whoever commits such act, as for a punishment, refer to the application of sanctions to the perpetrator who has committed criminal offense.

From the description above, what meant by perpetrator is human. In this regard, according to Jan Remmeling, at first, lawmakers were of the view that only humans could be subject to criminal acts. So, a corporation cannot be the subject of a criminal acts. In its development, lawmakers take into account the fact that people carry out actions in or through organizations [5]. Triggered by the development of science and technology, which eventually influences the development in society, and changing the understanding of subject of criminal acts in the community, which were previously only known to be carried out by human, but can also be carried out by legal entities (recht persoon) or corporation [9].

With the enactment of corporations as the subject of criminal acts, it becomes a question of who have the responsibility over the errors that have been made. Errors are fundamental in criminal law in addition to unlawful action because it related with criminal liability.

The criminal offense regulated in the UUPPLH is a special criminal offense, meaning that the regulation can exist outside or comes in different form from the Criminal Code (KUHP). One of them is the regulation of accountability, by applying the doctrine of vicarious liability for the perpetrator of criminal acts with a legal entity / corporation as its subject.

There are several definitions of corporation. According to Wirjono Prodjokikoro, corporations are an association of people, in corporations the party that usually have interests are people who are members of said corporation, members have power in corporate regulations in the form of general meetings as the highest means of power in corporate regulations [7]. The definition of corporation in criminal law as ius constituendum can be found in the New Criminal Code Bill Book 1 as an organized association and from people and / or wealth both legal entities and non-legal entities.

Generally, criminal liability is personal. This can be contrasted with the position in tort, where employers are usually liable for the torts of their employees committed in course of their employment. In criminal law, one person is not generally liable for crime committed by another. Those offences which do not require proof of

mens rea in respect of one or more elements of the actus reus are known as crimes of strict liability. Liability is rarely absolute; general defences will normally apply [8].

Mens rea according to Soedarto, is a subjective guilt that is inherent in the perpetrators. Furthermore, Soedarto explain that in the UK exist what is called strict liability, which means that in certain criminal acts or regarding certain elements of a criminal act there is no need for mens rea [4]. Mens rea, together with Actus Reus, for an offense criminal to be committed. The mens rea required to vary from crime to crime. There are four states of mind that constitute the necessary of mens rea for criminal offence; [10].

1. Intention;
2. Recklessness;
3. Negligence;
4. Blameless inadvertence;
5. Transferred intent;
6. Coincidence of actus reus and mens rea.

Actus non-facit reum nisi mens sit rea or mens rea, which is the principle in criminal law regarding errors. In criminal acts committed by individuals, the application of the doctrine of strict liability can be easily carried out, contrarily to criminal acts committed by corporations. One of them is environmental crime. In reality the losses caused by such crime can be enormous.

One form of crime that often occurs in various countries is a crime against the environment. In Indonesian state, law enforcement against corporations as perpetrators of crimes of environment and natural resources is not easy to uphold as it is organized crime, so it is difficult to reveal [11]. The losses caused by crime committed by corporation are far greater than those of individuals, while the perpetrators of criminal acts committed by corporations are not only direct errors from the perpetrators but also the responsibility of the corporation.

Although UUPPLH recognizes a business entity as the subject of a criminal acts, the responsibility is still borne by the person. Thus the person will undergo the criminal justice process [12]. With the consideration so that corporations can be established as perpetrators, the doctrine of vicarious liability is then applied.

2. Whether or not doctrine of vicarious liability applied appropriately.

Several provision in UUPPLH acknowledge that corporations as subjects of offense while others only recognize individuals. The consideration to establish a legal entity as the subject of the offense, according to Mahrus Ali, is the same as the one with economic crime. Industries that have a tendency to pollute and / or damage the environment are in the form of legal entities (corporations) [13].

In connection, a corporation may be responsible for the actions committed by its employees, its proxy, or its mandate or whoever is responsible for the corporation. The application of vicarious doctrine must be proven that there is a subordinate relationship between the employer and the person being ordered [14].

Pollution and environmental destruction carried out by developed countries can have an impact on poor countries. Highly hazardous industrial waste is disposed without considering its consequences. In the United States, chemical industries produce two billion kilograms of pesticides every year and have almost doubled exports. The export target countries, including Indonesia [2].

In Indonesia the Lapindo Mud case is one example of a corporation (PT Lapindo Brantas) which caused damage in Sidoarjo. Not only material losses suffered by the local people but also immaterial losses, such as trauma and disease. Based on these reasons, it is appropriate to apply the doctrine of vicarious liability, which is an exception in criminal law and is applied in conjunction with the doctrine of strict liability. Thus, no perpetrator will escape criminal punishment.

3. Formulation on the Implementation of Sanctions toward the Perpetrators).

From the General Explanation of UUPPLH states that enforcement of environmental criminal law still takes into account the principle of ultimum remidium which requires the implementation of administrative law enforcement to be considered less successful [15]. Ultimum remidium means that criminal law is applied to environmental cases as the last resort / last medicine, if other efforts done are inadequate/ineffective. Ultimum remidium applied to wastewater quality standards, emissions and disturbances. According to the author, the application of premium remidium will be more appropriate, looking how severe the impact of environmental loss/damage are. This is in line with the research conducted by So Woong Kim.

The research conducted by So Woong Kim offers several alternative law enforcement for environmental criminal law, but the author will quote the first, with consideration of relevancy to the research of the author. That is; Here several law policies to help uphold environmental law that need to be accomplished in the future are as follows. First, dealing with environmental crime cases need deterrence approach or commonly known as law enforcement approach or stick approach. This approach often used in environmental law enforcement policies [15]. The movement toward corporate criminal liability reflects a tendency to blur the lines between criminal and civil (private) legal liability [16].

According to article 10 of the Criminal Code the criminal act divided into primary sanctions and secondary sanctions. The primary sanctions consists of death

penalty, imprisonment, confinement, fine and special confinement (pidana tutupan). Whereas secondary sanctions consist of revocation of certain rights, seizure of certain items, and announcement of a judge's decision. For these types of criminal acts, both primary and secondary sanctions are needed. The formulation on the implementation of sanctions that can be applied to environmental crimes is; first, implementing individualization in criminal punishment for individual perpetrator, second, increase in criminal sanctions for corporations by removing the element of negligence, third, criminal law is used as premium remidium, fourth, application of both strict and vicarious liability, and fifth, imposing secondary sanctions by shutting down all or part of the businesses and or activities, but also still have to carefully considering workers interest so that they do not become criminogenic factors.

IV. CONCLUSION

The conclusions in this study were: (i) the reciprocal reason to apply the doctrine of vicarious liability, which is an exception in criminal law, so that corporations as the perpetrators of environmental crimes can be subject to criminal sanctions. The application of the doctrine of vicarious liability is appropriately implemented by applying it together with the doctrine of strict liability. In environmental crime, it is more appropriate if UUPPLH apply criminal law as premium remidium, for all criminal acts done by corporation but with ultimum remidium approach. Increase in criminal sanctions imposed on corporation as the perpetrator and imposing primary and secondary sanctions simultaneously.

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