

# Juridical Problems of Corporate Criminal Liability Formulation in the Information and Electronic Transactions Law

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## ABSTRACT

Corporations as legal subjects by consensus have been accepted in criminal law. The impact of this acceptance toward legal subjects in various existing laws in Indonesia is formulated as expansion of the meaning of people, so that people are individuals and legal entities. One of laws that expands the scope of corporations as legal subjects is Law No. 11 of 2008 concerning Information and Electronic Transactions in conjunction with Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions (IET Law). Although it has been formulated in the provisions of the law, it is possible that there are juridical problems in it, including the IET Law. The juridical problem is not testing the formulation of an article formulation in legislation with the Constitution, but testing the legislation formulation with policy of criminal law formulation. The juridical issue of corporations as legal subjects in the IET Law is interesting to study because nowadays the pace of technology and information development is increasing rapidly, it is possible that the perpetrators of cybercrimes are corporations. The legal research method used in this paper was normative juridical. The normative juridical legal research method is legal research conducted by examining library materials or secondary data. The approach used was the statute approach. The Statute approach is an approach that carried out by examining the statutory provisions relating to the issues being raised. The study results concluded that there are juridical problems in the formulation of corporations as legal subjects in the IET Law. The juridical problem in the form of formulating a corporation formulation as legal subject only in the explanation part of the law, not in the body of the law itself. This violates the rule that the explanation part of a law should not create new norms other than the provisions contained in the body of the law. The consequence is that the criminal law must be clear (*lex certa*) has been violated

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## 1. INTRODUCTION

The sophistication of advances in communication and information technology, especially through the internet network, is indicated to be a network that has developed and has become something fun for all over the world.[1] Advances in information and communication technology are very helpful for human life with the convenience and benefits provided.[2] Communication and information technology is very useful for various groups such as individuals, corporations, governments and community groups to support various human activities in the fields of communication, health, entertainment, education, business, and government. Activities carried out in virtual world or often called as cyberspace have become an efficient, fast, and practical forum for everyone's

desire to gain convenience in communicating more broadly for their goals and objectives. So, it has changed the lifestyle of the community at large. Because community activities in the real world have now shifted to being carried out in the virtual world. Thus, the use of information and communication technology needs to be monitored in terms of security and legal certainty so that it can run well. Therefore, there are three approaches to prevent unwanted things in cyberspace, namely social aspects, technological aspects, legal, cultural and ethical aspects. In order to avoid and prevent security disturbances in the operation of the electronic system, the legal approach is absolute because without legal certainty the problem of using information technology will not be optimal. To overcome this, the government and the House of Representatives enacted Law No. 11 of 2008

concerning Information and Electronic Transactions in conjunction with Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as IET Law). The perpetrators of crimes are no longer individuals, but the position of corporations has been widely accepted as a new legal subject. The impact is legal liability also extends to corporations engaged in social media with significant accessor such as Facebook, YouTube, Twitter, Instagram, and Tik-Tok. The role of the application designing company also that makes the access or the distribution of content that has the potential to violate the law. Therefore, corporations engaged in social media have the potential to be criminally liable when they intentionally do not block access to unlawful content. According to the Circular of the Minister of Communications and Information Technology Number 3 of 2016 concerning Application and/or Content Service Providers through the Internet, groups the social media such as YouTube, Tik-Tok, Facebook, Twitter, Instagram, and so on are referred to as Over the Top. The Circular has determined the definitions, responsibilities, obligations and prohibitions that Over-the-Top companies must comply with. The Circular regulates the prohibition of providing services that have potentially unlawful content. In addition to containing rules that prohibit the dissemination of unlawful content, application and/or content service providers through the internet are required to establish Permanent Establishment in Indonesia in the form of individuals or business entities that are legal or non-legal entities. This means that application and/or content service providers via the internet (Over the Top) as legal subjects should be legally responsible for their actions. However, this Circular Letter only contains information or announcements to be notified to an institution only. So that it cannot be juxtaposed with laws that are absolute and must be obeyed and have legal force. In the IET Law, there is an expansion of legal subjects, not only individuals, but also legal entities. So, the problem formulation that can be drawn from the background above, is the corporation formulation as legal subject in the IET Law, correct?

## 2. RESEARCH METHOD

Based on the problems above, the type of research used was normative legal research. Normative legal research is legal research conducted by examining library materials or secondary data.[3] So this normative legal research uses secondary data such as laws and regulations, court decisions, legal theory, and can be in the form of the scholars' opinions. The approach used in this paper used statute approach,[3] which is approach that examines all laws and regulations related to legal issues and needs to find the ratio legis of the birth of a law.

## 3. RESULT AND DISCUSSION

### A. Criminal Liability Against Individuals and Corporations

In criminal liability, if a person does not commit a crime, he cannot be held criminally responsible. The elements of criminal acts and criminal liability must be fulfilled in imposing a punishment. Legislators use the term "strafbaar feit" to translate the word "criminal act". In the Criminal Code of Indonesia (hereinafter referred to as Criminal Code) and in laws outside the Criminal Code, there is no definition about what "strafbaar feit" is. The word "feit" in Dutch means 'part of a reality'. While "strafbaar" means "can be punished", so literally the term "strafbaar feit" is part of reality that can be punished. This definition is considered inaccurate, even though understanding the definition of a crime is very important, so that the elements contained in it can be known. The elements of criminal act are a benchmark in deciding how to qualify a person's act as a criminal act or not. Therefore, legal experts provide definition and elements of criminal acts. The following is a description of some of the opinions of these legal experts. According to Moeljatno, the definition of a criminal act is an act that prohibited by rule of law, where the prohibition is accompanied by certain criminal threats for anyone who violates the prohibition. He also said that a criminal act is an act which by a rule of law is prohibited and is punishable by punishment. As long as the prohibition is aimed at an act (a condition or event caused by a person's behavior), while the criminal threat is aimed at the person who caused the incident. Simons argues that "strafbaar feit" or criminal act is behavior that is punishable by punishment, is against the law, and is related to a mistake committed by a person who is capable of being responsible.[4] Pompe provides two definitions of "strafbaar feit" or criminal acts, namely the first, criminal act can theoretically be formulated as violation of norms (disruption to the rule of law) which has intentionally or unintentionally been committed by perpetrator, in which the sentence against the perpetrator is necessary for the maintenance of the rule of law and the guarantee of the public interest. Furthermore, criminal acts according to positive law, namely an action formulated by law and declared as an action that can be punished.[5] The definition of criminal act is not included in criminal liability. Criminal acts only refer to prohibited and threatened actions with punishment. Can the person who commits the crime be punished? Depending on whether in doing the deed the person has a mistake or not. So that mistake is very basic element in determining criminal liability. The assessment of the existence of mistakes in criminal law will determine whether or not there is criminal liability. This thinking is closely related to the principle of no punishment without mistake (geen straf zonder schuld, or actus non facit reum nisi mens sit rea or an act does not make a person guilty unless his mind

is guilty). Criminal liability is defined as the continuation of objective reproach on a criminal act and subjectively as a condition to fulfil the punishment for the act. The basis for criminal act is the principle of legality, while the basis to punish perpetrator is the principle of mistake. This means that a person who commits criminal act will only be punished if he has made mistake in committing the criminal act. Therefore, criminal liability is the responsibility of people for the crimes they have committed. The occurrence of criminal liability because there has been crime committed by someone. Criminal liability is essentially a mechanism built by criminal law to react toward violations of an agreement to refuse certain act. Sudarto argues that a person's convict is not enough if that person has committed an act that is contrary to the law or is against the law. So, even though the act fulfils the formulation of the offense in the law and is not justified, it does not meet the requirements for punishment. The condition for imposing punishment is that the person who commits the crime has a mistake or is guilty.[6] The person must be held accountable for his actions or if viewed from the point of view of his action, it is only be held accountable to that person. Generally, criminal law experts view mistake solely as a matter of person's mental state when committing crime. Mistakes are understood in several definition that are always related to the psychology of the perpetrators of criminal acts. Mistake is the mental state of the mistake maker and the inner connection between the maker and his actions. If someone makes mistake, that person can be reproached.[7] Regarding the mental state of a person who does action is what commonly referred to as the ability to be responsible, while the inner relationship between the maker and his actions is intentional, negligence and forgiving reasons. Thus, to determine the mistake existence, person must meet several elements. Included in these elements are the ability to be responsible at the maker; the inner connection between the maker and his actions in the form of intentional (*dolus*), this negligence (*culpa*) is called the forms of mistake and there is no reason for the elimination of the mistake or no excuse for forgiveness. The liability as explained above applies to individual legal subjects.[8] Regarding criminal liability against corporations, it is contained in Article 1 point 8 of the Regulation of the Supreme Court Number 13 of 2016). A criminal act by a corporation is crime for which corporation can be held criminally liable in accordance with the laws that governing corporations.[9] Article 3 stipulates that criminal act by corporation is crime committed by person based on employment relationship, or based on another relationship, either individually or jointly acting for and on behalf of the corporation inside and outside the corporate environment. The formulation of corporate criminal liability based on the provisions of Article 4 paragraphs (1) and (2) of the Regulation of the Supreme Court Number 13 of 2016 stipulates that corporations can be held criminally liable in accordance with the

provisions of corporate crime in the law that governing corporations. In imposing a sentence against corporation, the judge may assess the corporation's mistakes as referred to in paragraph (1), among others:

- a. The corporation may obtain profits or benefits from the crime or the crime is committed for the benefit of the corporation;
- b. Corporations allow criminal acts to occur;
- c. The corporation does not take the necessary steps to prevent, prevent a bigger impact and ensure compliance with applicable legal provisions in order to avoid the occurrence of criminal acts.

Therefore, in line with Article 4 of The Regulation Number 13 of 2016, corporations can be held liable for the existence of three categories of corporate mistakes, namely:

- a. The corporation gains or benefits from the crime;
- b. The corporation allows the crime to occur;
- c. Or the corporation does not take preventive measures.

Thus, if the corporation gains or benefits from the crime, the crime is committed within the scope of the corporation's objectives.

### ***B. Juridical Issues of Corporate Criminal Liability in the IET Law***

The juridical problem is a formulation problem "in terms of the appropriate formulation policy" (according to the current criminal law/criminal system). Juridical problems do not see from the side:

- a. from philosophical point of view (fair/unfair) or from theoretical/doctrinal point of view;
- b. from pragmatic point of view (benefit/not; can be applied/not), unless it cannot be applied because there are deficiencies according to the system that should be;
- c. from sociological point of view (according to / not with the values that live in society);
- d. from the point of view of the offense weight comparison.[10]

Juridical issues in a legislation discuss the attachment between the Criminal Code and laws outside the Criminal Code, in other words discussing the material criminal law system. The current criminal system is as follows:

- a. Criminal provisions in special laws outside the Criminal Code are a sub-system of the entire criminal law system;
- b. As a sub-system, special laws are bound by general provisions/rules contained in Chapters I to VIII (Articles 1 to 85) of Book I of the Criminal Code, as long as the special laws do not make other provisions that deviate (See Article 103 of the Criminal Code). This means, the

attachment of the special law to the general rules is not absolute. Special Laws may make “other provisions” that deviate;

- c. The general provisions/rules in Chapter IX Book I of the Criminal Code (Articles 86 to 102) only apply to the Criminal Code, not to special laws outside the Criminal Code (see Article 103 of the Criminal Code).[11]

Based on this, there are five juridical problems that will arise when laws outside the Criminal Code regulate things that are different from the Criminal Code, namely: qualification of offenses, formulation of complaint offenses, conspiracy and repetition, special minimum punishment rules, and corporate liability. This study will focus on the juridical issue of corporate liability in the IET Law. The IET Law regulates criminal provisions and corporate liability that are different from the Criminal Code. The IET Law has regulated parties who can be held criminally liable in the event of criminal act committed by corporation. As explained in the explanation of Article 52 paragraph (4) which stipulates that this provision is intended to punish any unlawful act that fulfils the elements as referred to in Article 27 to Article 37 committed by corporation (corporate crime) and/or by management and/or staff having the capacity to representing the corporation, making decisions within the corporation, carry out supervision and control within the corporation also doing activities for the benefit of the corporation.

Based on this, it can be seen that the IET Law establishes the norm of corporate criminal liability in the explanation section. The formulation of corporate criminal liability in the explanation section of law, in this context the IET Law, is an incorrect formulation. The explanation serves as the official interpretation of the legislators on certain norms in the body. Therefore, explanations only contain descriptions of foreign words, phrases, sentences or equivalent words/terms in the norm which can be accompanied by examples. Explanation as a means to clarify the norms in the body should not result in the ambiguity of norms in question.[12] The explanation cannot be used as legal basis for making further regulations and may not include formulation that contains norms and does not conflict with the main material regulated in the body, does not expand, narrow or add to the understanding of the norms contained in the body.[12] The explanation of the IET Law regarding the corporate criminal liability that commit criminal acts is contrary to the rules for establishing laws and regulations. The criteria for corporate liability should not be contained in the explanation section, but in the body. Thus, there is juridical problem in the formulation of corporate criminal liability in the IET Law.

## 4. CONCLUSION

### A. Conclusion

The formulation of corporate liability in the IET Law is not appropriate because it contains juridical problem, namely placing the formulation of corporate liability in the explanation section of the IET Law, not the body.

### B. Suggestion

The drafters of laws and regulations need to read the law on the formation of laws and regulations so as not to make mistakes in formulating articles in the law.

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