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Criminal Liability against Business Entities Committing Forest Burning in the Perspective of the Development of Environmental Criminal Law

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ABSTRACT

This study aims to investigate issues on how corporate deforestation (by fire) occurs and the responsibilities of business entities for the crime they have committed. Employing the descriptive method, this study relied on secondary data. Destruction of forests has impacted many sectors, e.g., environment, economics, institutional, socio-politics, and others associated with accessibility and biodiversity of forest resources. Such an issue blames factors, such as illegal logging, forest fires, poor monitoring and management of operationalization of the licensing system in forest areas, conversion of forest to plantations, and settlements and other non-forestry development agendas. Corporate deforestation, which is mainly aimed to open new space, is a form of intolerable criminal act given its detrimental effect on the ecosystem and public health. As the one that is responsible for any actions, corporates or business entities are urged to monitor all of their agendas and development. This notion, however, seems insufficient to address the issue of corporate deforestation since legal consequences have little to no effect in reducing primary forest loss.

1. Introduction

Forest, an ecosystem unit, refers to land containing biological natural resources, primarily trees. The resources and forest are inseparable (Law Number 41, 1999). According to the status, forest comprises state forest and private forest. A state forest is defined as a forest located in a land area that has not been assigned with any land rights (Law Number 41, 1999). On the contrary, a private forest refers to a forest located in a land area that has been assigned with any land rights (Law Number 41, 1999). According to its function, the state forest is further divided into several areas: protection forest, conservation forest, and production forest.

In principle, all forest areas can be utilized for several purposes. However, one should take into account the characteristics and vulnerability level of the forest to benefit much from the forest. Another approach worth considering is not to change the primary function unless in-depth and comprehensive studies have been conducted. The utilization of forest should be in line with the main dynamic function of forest, namely conservation, protection, and production. Further, the forest should be utilized synergically to maintain the quality of the area. Preventing conversion of the production forest is an obligation, even though such an act is not prohibited in the law (Law Number 41, 1999).

Uncontrolled forest exploitation has been an increasingly alarming issue these days. Such ultimately leads to environmental degradation, extinction of flora and fauna, social conflicts, and declined state revenue. Indonesia, formerly known as a state with mega diversity, has now on the brink of mega extinction. This phenomenon suggests that the impact of the destruction of forests and extinction of species has been worsened. The main potential threat is human greed, with little to no concern regarding the importance of natural resources and overemphasizing the economic aspects without considering future ecological losses (Iskandar, 2011).

Destruction of forests has impacted many sectors, e.g., environment, economics, institutional, socio-politics, and others associated with accessibility and biodiversity of forest resources. Such an issue blames factors, e.g., illegal logging, forest fires, poor monitoring

and management of operationalization of the licensing system in forest areas, forest conversion to plantations, and settlements and other non-forestry development agendas. Exploitation and business-oriented utilization of natural resources have led to a fall in people's welfare, specifically the community leaving inside and nearby forest areas. Wrong principles of forest area management that have been implemented for the past decades lead to a rise in deforestation cases these days.

Forest exploitation has led to a rise in the deforestation rate of 2.1 million hectares per year from 1997 to 2001, threatening 282 watershed areas and biodiversity. Water and air pollution are inevitable in big cities, and landslides, which cause massive loss every year, become more common. Such phenomena are an accumulation of the ecological crisis caused by the failure to manage environmental sustainability (Presidential Regulation, 2010).

Criminal environmental law can be effective if it is determined by the criminal sanctions and the concept of the applicable criminal liability. The concept of criminal liability is essential because activities (that involve many people with various levels of responsibilities) can trigger the problem of pollution and destruction. For this reason, corporate crime cases must consider the development of the concept of corporate criminal liability.

As based on the explanation above, this research is intended to investigate issues on how corporate deforestation (by fire) occurs and the responsibilities of business entities for the crime they have committed.

2. Methodology

Aiming to investigate issues on how corporate deforestation (by fire) occurs and the responsibilities of business entities for the crime they have committed, the study employed a qualitative descriptive method. The data comprised secondary data taken from books, journals, laws and regulations, and internet sources.

3. Results and Discussion

3.1 Accountability of Business Entities for the Forest Fire

Indonesia adhered to the principle that the duty of caring (*zorgplicht*) individuals or corporations should be on the management team, and the management team is not a subject of criminal law. This opinion later became an acknowledgement that corporations can be deemed a perpetrator (*dader*), yet criminal liability (prosecution and punishment) remains with the management. Exclusion of punishment is possible if the perpetrators prove that they are not involved in the crime. According to Article 59 of the Criminal Code, this principle is still applied in Indonesia. Still, other than as stated in the Criminal Code, a corporation can be a perpetrator (*dader*) in a criminal act (Reksodiputro, 2004).

As based on the development of the liability formulation in the criminal law previously mentioned, there are three position systems of a corporate as the one responsible in the law: (a) Corporate management as responsible makers and administrators; (b) Corporate as responsible makers and administrators; (c) Corporate as makers and the responsible parties (Hatrik, 1995).

In many literature and laws in Indonesia and other countries, including international laws, corporations are criminal law subjects. Theoretical arguments are essential to state that human actions are regarded as corporate actions, considering that corporations cannot act like humans and corporate actions are carried out through human actions.

In the currently recognized concept of corporate criminal liability, corporations can be held accountable for crimes against public order or public health and other crimes not only directed to the corporation. A corporate can be held accountable for fraud and manslaughter in the Common Law system (Kadish, 1977). Such a concept can also be seen in the criminal legislation that has regulated corporate liability for broader criminal acts. In the analysis of corporate liability, the use of these principles is not based on their use for types of criminal acts. However, their use to construct a corporation as a subject of criminal law can be accounted for according to criminal law. This is because, at the beginning of the development of the law, a corporation could not be held criminally accountable (Kadish, 1977).

The corporation's recognition as a subject of criminal law or the subject of criminal acts and corporate criminal liability leads to the formulation of corporate criminal provisions in legislation and the prosecution and punishment in judicial practices. Although corporations are recognized as the subject of criminal acts, corporations cannot be prosecuted and punished if no criminal provisions govern criminal liability and punishment of corporations as stipulated in Law number 32 of 2009 concerning Environmental Protection and Management. However, other laws analyzed above have provided criminal liability and punishment for corporations. Therefore, there are no longer obstacles to prosecuting and imposing criminal penalties against corporations since Indonesian laws have regulated the legal consequences against the corporation. Still, the laws are yet perfect and consistent with the latest developments in the theory of corporate criminal liability. For example, several laws that provide punishment for corporations (legal persons) are still biased with the sentencing of natural persons.

Corporations as a subject of criminal acts can be prosecuted according to criminal law and sentenced according to the corporation's characteristics. Nevertheless, the prosecution and imposition of criminal charges against corporations differ from

people due to the social and economic impacts of the legal processes. Considerations in the prosecution against corporations are essentials to prevent worse consequences caused by the imposition, including the economic crisis of the workers or labourers of the corporation. In the 2012 Draft Criminal Code, provisions relating to criminal prosecutions against corporations have been formulated in Article 52 Paragraph (1) of the draft of the Indonesian Criminal Code. The article states that criminal prosecutions against corporations must consider whether other parts of the law have provided more significant protection than imposing criminal charges against corporations.

3.2 Forest Fire Caused by Corporations

The separation of criminal acts and criminal liability is built on the principle of balancing the act and the committer (*daad-daderstrafrecht*). Such a concept describes the balance of the interests of the community covered in the criminal law and the interests of the individuals in criminal liability. These interests must be met as a condition for imposing a sentence on a person. In contrast to criminal acts emphasizing generalizations and general societal standards, criminal liability refers to specific conditions within the offenders. Fletcher (1998) argues that attribution captures the idea of bringing home the crime to the offender and holding the offender responsible for the crime. Criminal liability is based on the idea of returning the crime to the offenders and holding the offenders accountable for their crimes. Thus, the public interest is not the only consideration in imposing a criminal offence. It is of paramount significance to consider individual interests to promote balanced concepts of the interest in the imposition of a crime against the offenders.

Criminal liability as a concept is different from the requirements for criminal liability, which encompasses the inability to take liability for mistakes and the absence of reasons for forgiveness. The concept of criminal liability experienced a shift because of criminal liability, which was initially identical to *men's rea* (Hart, 2008). Criminal liability is often negatively interpreted as an inability to take responsibility and find reasons for forgiveness.

In the shift previously mentioned, criminal liability is defined as principles addressed to judges to determine whether the perpetrators or offenders can be reproached for their crime in certain circumstances (Dan-Cohen, 1984; Bentham, 1988; Robinsom, 2000). The rebuke of the offenders depends on whether or not a crime can be prevented. The assessment of the offender's fault is one part of the principle of adjudication in criminal liability, which serves as the basis for sentencing the offender. In other words, criminal liability is the subjective continuation of objective reproaches in a criminal act to persons who meet the requirements to be sentenced for their actions (Saleh, 1983).

Similarly, George P. Fletcher opines that the question of attribution is resolved not to the class of the potential violators but to the judges and jurors charged with the task of assessing whether individuals are liable for their wrongful acts (Fletcher, 2000). The issue of criminal liability in separate provisions is not related to the offenders. Instead, the judge's task is to find individuals liable for their unlawful actions. From this view, the primary concern of criminal liability refers to the judge's guidelines in finding the perpetrators subject to the sentence. The existence of the offenders, in this context, is seen as the center of the judge's assessment. Thereby, criminal liability is not interpreted narrowly as an inner attitude or subjective element of the offender but is interpreted broadly as an adjudication process and guideline for judges to determine circumstances that a person can be accounted for and therefore can be convicted.

Policies regulating corporations as a subject of criminal law or criminal acts in criminal legislation are still ambiguous. This is based on the analysis of the formulation of the corporation as a subject of criminal law or criminal acts and corporate criminal liability in legislation other than the Criminal Code. Further, this can be seen in the criminal legislation that regulates corporations. Some have explicitly regulated the scope of criminal law subjects, while others have not. Despite such conditions, the regulation of corporations as criminal law subjects or criminal acts has generally been formulated in the criminal provisions.

The corporate liability policy in criminal legislation is also unclear, given the differences in the formulation of corporate criminal liability in criminal legislation. Some formulate a criminal liability system covering corporations, or corporations and management, while others incorporate management or persons and corporations. Although the idea that the corporation is a subject of criminal law has been recognized, in terms of criminal liability, the law is still delegated to or represented by the management/person. Some criminal laws regulate the construction of corporate criminal liability, i.e., formulating criteria or conditions for a corporation to be liable for the actions of its person/management, in accordance with the superior respondent theory that applies in the Common Law System.

Policies for the imposition of sanctions against corporations as subjects of criminal law are ambiguous since some criminal laws have already regulated criminal sanctions according to the characteristics of corporations (by formulating penalties). However, some criminal laws have not regulated this, and thus criminal sanctions can only be imposed on individuals and cannot be imposed on corporations. In addition, most of Indonesia's criminal laws have not regulated criminal penalties in place of fines as a consequence of the formulation of criminal sanctions against corporations. The current law concerning criminal penalties in place of fines for corporations, i.e., money laundering law, remains unclear because it is still biased towards the criminal liability of persons.

In other words, the policy of formulating criminal provisions regarding the subject of criminal law or the subject of criminal acts, corporate criminal liability, and the determination of criminal sanctions against corporations is ambiguous. Further, the policy cannot describe the implications of corporate criminal liability theory. The formulation of criminal provisions in criminal legislation should consider the implications of the theory of corporate criminal liability. Such is to ensure that criminal provisions for corporations are in accordance with the characteristics of corporations and can be implemented in the practice of Indonesian criminal judicatures.

4. Conclusion

The present study aims to investigate issues on how corporate deforestation (by fire) occurs and the responsibilities of business entities for the crime they have committed. It draws the following conclusions. (1) Corporate deforestation, which is mainly aimed to open new space, is a form of intolerable criminal act given its detrimental effect on the ecosystem and public health. For this reason, corporations, both their management and business, can now be subject to sanctions as regulated in both national and international laws and regulations (including the Supreme Court Regulation Number 13 of 2016). (2) As the one that is responsible for any actions, corporates or business entities are urged to monitor all of their agendas and development. This notion, however, seems insufficient to address the issue of corporate deforestation since legal consequences have little to no effect in reducing primary forest loss. In economic offences, the fines imposed as punishment on the management may be adjusted based on the corporation's profits (due to the unlawful acts) or the losses caused to society and competitors. Imposing legal sanctions on the management does not guarantee that the corporation will not commit the same crime prohibited by the law. Besides, punishment is insufficient to enforce repression on offences committed by a corporation. On that ground, it is crucial to ensure that legal sanctions can be imposed on corporations and the management, or only the management. This study could be additional literature for a related issue like this one. As this research only limit its study from the perspective of the development of environmental criminal law, it suggests further research in different perspectives.

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