

Corporate Criminal Liability in Indonesian Law Concerning Fund Transfer

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Abstract

Fund transfers can now be done virtually. Innovations in fund transfers have not only positive but also negative impacts. Legal protection is needed so that there is legal certainty for the community in carrying out fund transfer activities. Law No. 3 of 2011 concerning Funds Transfer is a statutory regulation that was passed to provide such protection. This paper aims to describe the corporate criminal liability in Indonesian law concerning fund transfer. One arrangement that is different from the general provisions of the Criminal Code is related to the subject of criminal law. The Funds Transfer Law expands the subject of criminal law, namely not only humans but also corporations. Unfortunately, the expansion of the subject of criminal law in the Funds Transfer Law is not accompanied by the existence of a new type of crime. The absence of new crimes in the Funds Transfer Law can be used by corporations to not carry out court decisions.

Keywords

Poverty, Subjects of Criminal Law, Transfer of Funds, Criminal Liability

1. Introduction

Technological advances have a major influence on all aspects of life, one of which is the transfer of funds. In the past, fund transfer activities were carried out in the conventional way in the form of direct submission. Goods and money are transacted simultaneously in the same time

and place. Now, along with advances in technology, fund transfer activities can be carried out more practically by the community. The practicality is the opposite of the setting.

Law No. 3 of 2011 concerning Funds Transfer (Fund Transfer Law) is a statutory regulation that was passed with the aim of providing protection for people and business entities that carry out fund transfer activities. Legal certainty is an aspect to be provided by the government in addition to justice and expediency. Legal certainty is one of the principles needed in order to provide protection to the community. The existence of legal certainty can provide guarantees to the community if in the future their rights are harmed by other parties. With legal certainty, people know what to do and know the law from their actions or other people who influence them. However, it should be underlined that the issue of decision-making, in accordance with the state constitution, the authority is given to the competent institution in this case the judiciary. The community must not make arbitrary judgments, but must submit the matter to be tried in an authorized institution.

Legal protection for fund transfers is provided in several fields, one of which is protection through criminal law. Criminal law can be defined as a rule of law, which binds to an act that fulfills certain conditions an effect in the form of a criminal (Sudarto, 1990). Prodjodikoro (2015) defines criminal law as a legal regulation regarding crime. The word "criminal" means something that is "criminalized", that is, by the competent authority delegated to a person as something that is uncomfortable for him and also something that is delegated on a daily basis. Of course, there is a reason for delegating this sentence, and this reason should have something to do with a situation in which the person concerned acted unfavorably. So, the element of "punishment" as a revenge is implied in the word "criminal". Moeljatno (2002) defines criminal law as part of the overall law applicable in a country, which provides the basics and rules for:

1. Determine which actions should not be carried out, which are prohibited, accompanied by threats or sanctions in the form of certain crimes for anyone who violates the prohibition.
2. Determine when and in what cases those who have violated the prohibitions can be imposed or sentenced to the punishment that has been threatened.
3. Determine how the imposition of the punishment can be carried out if someone is suspected of having violated the prohibition.

The functions of criminal law can be divided into general functions and special functions. Because criminal law is part of the entire legal field, the function of criminal law is also the same as the function of law in general, namely regulating social life or organizing governance in society. The law only pays attention to actions that are socially relevant, meaning those that have something to do with society. It basically does not regulate a person's mental attitude related to morals. Likewise, criminal law. A special function for criminal law is to protect legal interests against acts that want to rape them (Rechtsgüterschutz) with sanctions in the form of criminal sanctions that are sharper in nature when compared to sanctions contained in other branches of law (Sudarto, 1990).

The Funds Transfer Law contains criminal provisions in Articles 79 to 88. The criminal provisions contained in the Funds Transfer Act differ from the general provisions contained in the Criminal Code (KUHP). One thing that is different is related to the expansion that can be

qualified as a criminal subject. The criminal subject in the Funds Transfer Act is not only human (*natuurlijk persoon*) but also corporations (*rechtsperson*). This paper aims to describe the corporate criminal liability in Indonesian law concerning fund transfer.

2. The Politics of Criminal Law

Several experts have conducted in-depth studies on legal politics, for example by Mahfud (1998); Mahfud, 2006; Syaokani & Thohari (2004). This study shows that legal politics has become an important part of the development of the study of Indonesian legal science and at least these materials can help understand legal politics in its theoretical conception for further study. Meanwhile, sectoral studies of legal politics are still needed to develop future laws, such as studies of civil law politics, criminal law politics, procedural law politics, administrative law politics and so on. This development also shows that legal studies in the socio-legal approach (sociological jurisprudence) are increasingly getting a place other than the juridical normative approach (Najih, 2014).

Legal politics must be placed as a tool that works in certain social and legal systems to achieve a community or state goal (Hartono, 1991; Mahfud, 1998). In line with this, Saleh (1984) argues that, the new law made is one of the many tools to implement a government policy (legal politics). In such a context, it reminds us of the view put forward by Roscoe Pound that law has the function of a means and a tool to change society and build society (law as a tool of social change and law as a tool of social engineering) (Najih, 2014).

Rahardjo (2000) defines legal politics as the activity of choosing and the methods to be used to achieve certain social goals and legal goals in society. In the study of legal politics, several basic questions are asked, namely: (1) what goals are to be achieved through the existing system; (2) the best way to achieve that goal; (3) when and in what manner the law needs to be changed; (4) can a standard and established pattern help formulate and decide on the selection of goals and how to achieve them.

Arief (2010) has suggested three meanings regarding criminal policy, namely:

1. In a narrow sense, it is the overall principles and methods that form the basis of reactions to violations of the law in the form of crimes.
2. In a broad sense, it is the overall function of the law enforcement apparatus, including the workings of the courts and the police.
3. In the broadest sense (which he took from Jorgen Jepsen), is the whole policy, carried out through legislation and official bodies, which aims to enforce the central norms of society.

On another occasion, he put forward a brief definition that criminal politics is a rational effort of society in overcoming crime (Sudarto, 1990). This definition is taken from the definition of Ancel (1998) who defines it as the rational organization of the control of crime by society. Hoefnagels (1973) suggested that "criminal policy is the rational organization of the social reaction to crime". Various other definitions put forward by Hoefnagels (1973) are:

1. Criminal policy is the science of responses.
2. Criminal policy is the science of crime prevention.
3. Criminal policy is a policy of designating human behavior as crime.

4. Criminal policy is a rational of the responses to crime.

Regarding when there should be criminal sanctions, norms or rules in the field of constitutional law and state administrative law must first be responded to with administrative sanctions, as well as norms in the first civil law field must be responded to with civil sanctions. If administrative sanctions and civil sanctions are not sufficient to achieve the goal of straightening the social balance, then criminal sanctions will also be held as the ultimate goal (Prodjodikoro, 2015).

Law enforcement and justice are a series of processes that are quite long and involve various authorities of law enforcement agencies/apparatus (in the field of criminal law enforcement involving investigators/police officers, public prosecutors/prosecutors, court officials, and criminal implementing officers). The essence of legal reform/development does not lie in the formal and external aspects (such as the formation of new laws, new institutional structures and mechanisms/procedures, the addition of new buildings and other facilities/infrastructure), but lies in this immaterial aspect, namely building culture, and psychological values of the law.

In addition to improving moral quality, legal reform and the enforcement of justice also require an increase in the quality of science. Legislative policies or formulations (in the framework of reforming the preparation of laws) and judicial policies or applications (in the context of reforming law enforcement) need to be accompanied by reforms in the quality of their knowledge (law and justice).

3. Corporations as Subjects of Criminal Law in Law no. 3 of 2011 concerning Fund Transfer

The Criminal Code stipulates that only people (*natuurlijk persoon*) can be accounted for as the subject of a crime. This determination can be found expressly in the Criminal Code. Article 59 of the Criminal Code states: "In cases where a criminal offense is determined against the management, members of the management body or commissioners, then the management, members of the management body or commissioners who apparently do not interfere in committing the offense are not punished". The article indicates that even if the crime is committed by a corporation or for the benefit of a corporation, only a person (corporate management) can be punished while the corporation remains free to carry out all its business activities.

In addition to looking at Article 59, the determination that only people can be convicted according to the Criminal Code can be seen from the formulation of articles beginning with the phrase "whoever". The use of the phrase whoever indicates that all acts that are said to be criminal acts in the Criminal Code can only be carried out by people (*natuurlijk persoon*). This thought is strengthened by the inclusion of an inner attitude as one of the elements of the article.

The Criminal Code (KUHP) stipulates that only persons or *natuurlijke persoon* can be punished. This conclusion can be seen from the formulation of the articles contained in Book II and Book III of the Criminal Code, especially in the penalties that can be imposed on perpetrators. Article 9 of the Criminal Code determines in a limited manner the types of crimes that can be imposed by perpetrators of criminal acts, including:

- a. Principal Crimes:
 1. Death penalty,
 2. Imprisonment,

3. Imprisonment,
 4. Criminal fines, and
 5. Criminal cover.
- b. Additional penalties:
1. Revocation of certain rights,
 2. The confiscation of certain goods, and
 3. Announcement of judge's decision.

Limiting the types of punishment that can be imposed, it can be seen that only humans can be sentenced to punishment. It is impossible for corporations to be sentenced to death, imprisonment or confinement.

Other evidence related to only humans who can be convicted in the Criminal Code can be seen from the types of acts that are regulated. These regulated actions mostly require bodily attitude and instincts. For example, in Article 340, "Anyone who intentionally and with premeditated plans takes the life of another, is threatened with premeditated murder, with a death penalty or imprisonment for life or for a certain period of time, a maximum of twenty years". The phrase "intentionally" shows the necessity of proving the intention of the perpetrator of a crime. This intention can only be proven if the person doing it is human, if the person doing it is not a human it will certainly cause its own problems.

Such arrangements have an impact on the freedom of corporations to conduct business activities. Administrative and civil sanctions that are traditionally imposed on corporations for violating the law are considered no longer able to provide a deterrent effect for corporations to stop acts that injure the sense of justice in society. Criminal sanctions can be used as a way out to stop or deter corporations that carry out business activities that violate the law (eg narcotics production) or business activities in ways that violate the law (eg production of food with chemical raw materials that are dangerous for human consumption).

In relation to the law on the transfer of funds, the perpetrators of criminal acts who can be accounted for have experienced an expansion of the existing arrangements in the Criminal Code, in the sense that not only humans but corporations can also be held accountable, as can be seen in Article 87 paragraph (2):

"Corporations are criminally liable for an act committed for and/or on behalf of the corporation if the act falls within the scope of its business as specified in the articles of association or other provisions applicable to the corporation".

The theory that forms the basis of corporate responsibility in the Funds Transfer Act is the theory of functional behavior. Based on this theory, Krismen (2014) says that corporations can be punished if it is proven that:

1. There is a corporation's authority to determine the actions of its employees, and
2. The corporation's acceptance of the act as a series of normal business activities.

The adoption of functional behavior theory has its advantages. Based on this theory, corporations can be accounted for even though the actions were not carried out by management who have strategic influence in determining corporate policies. The actions of technical employees or non-employees who perform tasks based on delegation can still bind the corporation

as long as it can be proven that the actions were carried out for and on behalf of the corporation. While the lack of adoption of the theory of functional behavior is related to the breadth of its scope. It could be that an employee because he is upset with the company commits an unlawful act using the assignment letter, he has to harm the corporation.

Regarding when a corporation can be sentenced to a crime, it is regulated in Article 87 paragraph (3), which stipulates that a criminal offense is imposed on a corporation if the crime:

- a. It carried out or ordered by the controlling personnel of the corporation,
- b. It carried out in the context of fulfilling the purposes and objectives of the corporation,
- c. It carried out in accordance with the duties and functions of the perpetrator or the giver of orders, and
- d. It carried out with the intention of providing benefits to the corporation.

The regulation regarding when a corporation can be sentenced to a crime in the article is cumulative, in the sense that all of its elements must be proven and cannot be separated from one another. When one element cannot be proven, the corporation cannot be sentenced. The arrangement as above is not without criticism because it can happen that someone commits a crime in the field of transferring funds with the intention of providing benefits to the corporation but does not have a working relationship with the corporation. For example, if the perpetrator is a child of the board of directors of the corporation and it is not written that it is agreed to share the proceeds of a criminal act of transferring funds to the perpetrator.

4. Forms of Corporate Criminal Liability

Article 9 of the Criminal Code determines in a limited manner the types of crimes that can be imposed by perpetrators of criminal acts, including:

- a. Principal Crimes:
 1. Death penalty,
 2. Imprisonment,
 3. Criminal Cage: V,
 4. Criminal fines, and
 5. Criminal cover.
- b. Additional penalties:
 1. Revocation of certain rights,
 2. The confiscation of certain goods, and
 3. Announcement of judge's decision.

All types of crimes above are crimes that mostly can only be committed by humans. The expansion of the subject of criminal law has consequences for the need for this type of crime for the new subject. In the Funds Transfer Act, there are several types of crimes that can be imposed on corporations that commit criminal acts. The main punishment imposed on corporations is a maximum fine plus 2/3 (two thirds), while additional penalties that can be imposed are in the form of an obligation to refund the proceeds of a crime along with services, interest, or compensation to the injured party.

Looking at the basic and additional penalties contained in the Funds Transfer Act, this type of crime can be said to be not a new type of crime. These crimes are only conventional crimes.

The problem that arises, what if the corporation does not pay the fine at the same time does not return the proceeds of the crime? Due to the absence of regulation in the Funds Transfer Act regarding this issue, the general regulation, namely the addition of the confinement period, applies. The problem is, how is it possible for a corporation to be sentenced to imprisonment?

The absence of regulation if the corporation does not pay the fine and at the same time returns the proceeds of the crime is the main weakness of the Funds Transfer Law. A new type of crime is needed that can put pressure on corporations to carry out court decisions if later found guilty.

The absence of such regulation can indeed be overcome through civil law, namely a lawsuit against the law. However, if you use a lawsuit through the courts, then the process, time, and costs required are not in accordance with the principles of an effective and efficient judiciary. In addition, the fact that it is difficult to execute decisions in the civil sector should be used as a reason to amend the Funds Transfer Act.

In the latest view, criminal law has a preventive function, namely to prevent the occurrence of criminal acts. The preventive way is to frighten the subject of a criminal act with the punishment that can be imposed on him. However, the types of crimes contained in the Funds Transfer Law do not have the power to make corporations not to commit the crime of transferring funds. The types of crimes contained in the Funds Transfer Act can actually be a reason for corporations to commit criminal acts.

5. Conclusion

The Funds Transfer Law expands the subject of criminal law to not only humans but also corporations. When the corporation can be held criminally accountable in this legislation is determined by adopting the theory of functional behavior. But unfortunately, the expansion of the subject of criminal acts is not followed by the presence of a new type of crime. The absence of new crimes in the Funds Transfer Law is a weak point that can make corporations not afraid to commit criminal acts.

The Funds Transfer Law needs to be amended immediately in order to provide maximum protection for the community. This change is especially concerning the regulation if the principal and additional penalties given to the corporation are not carried out by the corporation. In addition to these regulations, it is also necessary to provide new types of crimes that can be carried out against corporations

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