

The Formulation Policy on Corporate Criminal Liability for Criminal Violations of Crimes against Biological Natural Resources and Ecosystems

Jazau Elvi Hasani

Airlangga University, Indonesia

Jazau-elvi-hasani.2019@unair.ac.id

ABSTRACT:

Indonesia is blessed with extraordinary natural wealth. Article 33 paragraph (3) of the 1945 Constitution stipulates that "Earth, water, and natural resources contained there are controlled by the state and used as much as possible for the prosperity of the people." biological natural resources development can take place in the best possible way with conservation effort. So that the biological natural resources and its ecosystem are always maintained. Development of biological natural resources and their ecosystems is essentially an integral part of sustainable national development. Efforts to conserve biological natural resources and their ecosystems are realized through efforts to analyze and evaluate legislation in the field of support in order to provide future improvements.

This paper aims to discuss the corporate criminal liability in Indonesia of conservation of biological natural resources and its ecosystem and suggested revision for this law. Revision of the draft Law About conservation of biological natural resources and its ecosystem has been doing by legislators since 2018. So, the Draft Law is still on processing of revision in the national legislation program (prolegnas). The protection of biological natural resources and its ecosystem becomes the government's main concern because it's regulation still has no deterrent effect for violators. This was proven by many cases about animal trafficking after the rampant raids or raids of protected wildlife traders. The Law No. 5 of 1990 About: Conservation of Biological Natural Resources And the Ecosystem has weakness of violation animal and plants trafficking, the imposition of low fine and low penalty to corporations for criminal violations of crimes against biological natural resources and ecosystems. This law needs substantial revision in the corporate criminal liability of violation poaching of wild animals in order to make the implementation effective.

Keywords : *Conservation law, Conservation of biological natural resources and its ecosystems, sustainable development, Corporate criminal liability, crimes against biological natural resources and ecosystems.*

INTRODUCTION

Indonesia has a high level of diversity of natural and biological wealth that is included in one of the mega biodiversity countries. It requires great responsibility to maintain a balance between the preservation of functions (ecological) and the preservation of (economic) biodiversity benefits (Herliyanto, 2019, p. 844). Indonesia's biological natural resources and

its ecosystem have an important position and role in our life. Therefore, it needs to be managed and utilized sustainably, in harmony and balance for the welfare of society (Herliyanto, 2019).

Development of biological natural resources and their ecosystems is essentially an integral part of sustainable national development as a practice of Pancasila.¹⁴ Sustainable development has three main aims, namely: economic goals (efficiency and growth), ecological goals (conservation of natural resources), and social goals (reducing poverty and equity) (Susiana, 2015, p. 213). According to the World Commission on Environment and Development (WCED), "The Brundtland Commission," in 1987, sustainable development is a development that balances the fulfillment of human needs with natural environment protection systems. So that these needs can be met not only for now but also in unlimited time without reducing the ability of future generations to meet their needs (a development that meets the needs of the present without compromising the ability of future generations to meet their own needs). so that, the development to be sustainable, planned development must be environmentally sound, economically viable, and socially acceptable (Mochtar & dkk, 2014, p. 4).

The elements of biological natural resources and their ecosystems are basically interdependent with one another and affect each other so that the destruction and extinction of one of the elements will result in disruption of the ecosystem (Herliyanto, 2019). Development must bring quality of life for all humans, now and future. The principle of sustainable development is translated into three pillars, where development must be able to prosper economically, socially just, and environmentally sustainable (Widjajanti, 2014, p. 16). To maintain the best use of biological natural resources, efforts are required to conserve the natural resources and its ecosystems in certain ways. Those have been determined to be in line with the development.

Biological Natural Resources and Animal natural resources constitute these natural resources, both individually and together having functions and benefits as an element in forming the environment (Herliyanto, 2019, p. 2). Therefore, efforts are needed to develop biological natural resources in the best way with conservation efforts. So that biological natural resources and its ecosystems is always maintained. Conservation of the biological natural resources and its ecosystem aims to ensure the preservation of the biological natural resources and the balance of the ecosystem. because it is our shared responsibility. Without realizing that the species that have become extinct or endangered have a very important role for an equilibrium ecosystem, the extinction of these species has killed plants and developed an ecosystem and ultimately bring adverse impacts that are vital for the survival of all creatures in the earth (Herliyanto,

¹⁴ Law on Conservation of Biological Natural Resources and its Ecosystem No. 5 of 1990, TLN.No.3419.

2019, p. 5). The large number of extinctions nowadays is caused by animal poaching and trading that accelerates the rate of endangered species extinction. High profits obtained may trigger protected animal poaching and trading.

The legal basis of sustainable development in Indonesia is contained in Law No. 14 of 1982 (LN 1982 No. 12) concerning the basic provisions in integrated environmental management by mandating the need to link the implementation of development with environmental management through what is called "Environmentally sound development" In article 4 d letter of this Law it is stated that one of the goals of environmental management is "the implementation of Environmentally sound development for the benefit of present and future generations" (Abdurrahman, 2003, p. 14).

The Crime of protected wildlife is still occurs in this time, especially the trade in protected animals. Protected Animals according to Article 4 Paragraph (2) of Government Regulation Number 7 of 1999.

About Preservation of Plants and Animals that protected animals as attached to Government Regulation are orangutan, Javanese tiger, Sumatran tiger, Javanese rhino, turtle and others. Wildlife poaching and trading is one of the contributors in the decreasing number of Indonesian endemic animals, in addition to changes in land and forest functions. Indonesia is one of the countries has the greatest natural biodiversity in the world. However, Indonesia also is one of the countries has many practices of crimes against wild animals.

The modus operandi of illegal wildlife traffickers is through conventional buying and selling which is often carried out directly in traditional markets or social media (Herliyanto, 2019, p. 1). Protected animal trafficking is doing not only by individuals, but also by corporations and systematic crime networks.

Data compiled by WWF Indonesia about animal crime in Indonesia. Perpetrators of smuggling turtles in Papua, arrested by the police. In other hand, officers had found 5050 turtles as evidence (Septian, 2019). The Semarang Quarantine Center had found 296 birds of various species from raids smuggling activity (Safuan, 2019). The Ministry of Environment and Forestry (KLHK) has handled 187 cases of wildlife trade during the last three years. The total confiscation reached 10 thousand items including 117 wild animals, 213 sacks of turtle shells, 248 kilograms of pangolin scales, and 6,168 pieces of reptile skin (Aprilia, 2018). In 2015, the Surabaya Regional Police found 5 tons of pangolin meat in the raid of protected wildlife illegal trade (Kontan.co.id, 2015).

The trend of illegal wildlife trade by online is widespread. According to International Animal Rescue (IAR) Indonesia, more than 80 percent of the animals online trade in social media had caught is sourced from nature. IAR data had show that during 2012-2018 there were 64 people netted operations. A total of 2,957 slow loris trade ads were monitored on social media (Almutoif, 2019).

Indonesia was publishing the regulation on convention on international trade of endangered wild species of fauna and flora (CITES) through the presidential decree (Kepres) No.43 of 1978 concerning ratification of convention on international trade of endangered wild species fauna and flora (CITES) to protect various types of animals and plants. The regulation and protection was realized by the Indonesian government through the establishment of Law No. 5 of 1990 concerning Conservation of Biological Natural Resources and Ecosystems. The Law on Conservation of biological natural Resources and Ecosystems still has weaknesses. There is no regulation regarding crime carried out by corporate perpetrators.

DISCUSSION

Normative Juridical Analysis Of Law No.5 Of 1990 Concerning The Concervation Of Biological Natural Resources And Its Ecosystems

The terminology of criminal act (Strafbaarfeit) is a basic definition in criminal law. According to Simon's opinion, an action can be classify as criminal act if it fulfills various elements as follows (Aritonang & dkk, 2017, hal. 38):

- a. Human action (legal subject), both active and passive acts;
- b. Formulated and threatened with crime in a statutory regulation;
- c. Unlawful;
- d. Made with mistakes
- e. By people who are able to take responsibility

Criminal liability is a form of the offender's ability to account for a criminal offense that violates the law. Criminal regulations only refer to prohibited and threatened acts with a crime. The criminal law that develops in Indonesia, there is the principle of accountability, that is "not convicted if there are no mistakes" (*Geen straf zonder schuld; Actus non facit reum nisi mens rist rea*). The elements of fault relating to criminal responsibility are (Purwoleksono, 2013, p. 63):

- a. Committing a crime;

- b. Above a certain age and able to takes a responsibility;
- c. With deliberately or negligently;
- d. There is no excuse for forgiveness.

Policy System for Protecting Animal Crimes Protected in Positive Criminal Law discusses the position and regulation of protected wildlife acts described in accordance with the three main problems / substance of the criminal law, namely acts (problem of criminal acts), people (problems of fault or criminal liability), and criminal / criminal. The provisions regarding the Criminal Acts against protected Animals are only regulated in Law No.5 of 1990. Law Number 5 of 1990 concerning Conservation of Biological natural Resources and their Ecosystems, namely article 21 paragraph 2, and criminalization paragraph 40 paragraph 2, 4 and 5.

According to Article 21 Paragraph (2) that Everyone is prohibited from:

(2) Everyone is prohibited from:

- a. Capture, injure, kill, save, own, maintain, transport, and trade animals that are protected while alive;
- b. Storing, possessing, maintaining, transporting and trading protected animals in a state of death;
- c. Eject protected animals from one place in indonesia to another place inside or outside indonesia;
- d. Trade, save or have skin, body, or other parts of animals that are protected or items made from such parts or removing them from a place in indonesia to other places inside or outside indonesia;
- e. Take, destroy, destroy, trade, store or own eggs and or protected animal nests.

Then, About Criminal Provisions is regulated Based on Article 40 :

1.) *Paragraph (2), Whoever intentionally violates the provisions as referred to in Article 21 paragraph (1) and paragraph (2) and Article 33 paragraph (3) shall be sentenced to a maximum imprisonment of 5 (five) years and a maximum fine a lot of Rp. 100,000,000.00 (one hundred million rupiah).*

2.) *Paragraph (4), Whoever, due to his negligence, violates the provisions as referred to in Article 21 paragraph (1) and paragraph (2) and Article 33 paragraph (3) shall be sentenced to a maximum imprisonment of 1 (one) year and a fine a maximum of Rp 50,000,000.00 (fifty million rupiah).*

3.) *Paragraph (5), The criminal acts as referred to in paragraph (1) and paragraph (2) are crime and crime as referred to in paragraph (2) and paragraph (4) ia a violation.*

As stated in Article 21(2) of Law No. 5 of 1990, the killing of protected animals is expressly a criminal offense. According to the Law of Conservation of Biological Natural Resources and its Ecosystems has clearly regulated the element of fault in which there is a criminal offense. Whereas in Article 40 there are criminal provisions that regulate every criminal act against are based on an article contained in the Law on the Conservation of Life and its ecosystem. The regulation concerning the Criminal Acts of protected Animals in Law Number 5 of 1990 according to the provisions, the criminal threat is contained in Article 40 paragraph 2 concerning intentionality and paragraph 4 regarding negligence. This is based on two types of mistakes that result in an actor having to account for his actions, namely intentional or negligence.

1. Criminal liability in this law is contained in Article 40, regarding criminal acts against animals, criminal liability is imposed on people, this can be proven from the element of whosoever referred to Article 40 paragraph (2) which can be criminally accountable is a person.

2. Law Number 5 of 1990 adheres to a special maximum criminal system and its type consists of imprisonment and fines (adhering to the cumulative criminal threat formulation system using the word "and", where the judge in imposing his decision must impose a sentence The second criminal sanction is regulated in the formulation of the article, namely imprisonment and fines.

The Law Number 5 of 1990 concerning Conservation of biological natural resources and its ecosystem, the article containing few reasons for criminal based on the theory of punishment as a justification, that contained in Article 22, whose articles are as follows:

(1) Exemptions from prohibitions as referred to in Article 21 can only be conducted for research, science, and / or purposes rescue of the relevant plant and animal species.

(2) Included in the rescue as referred to in paragraph (1) are giving or exchanging plant and animal species to other parties outside country with Government permission.

(3) Exemptions from prohibitions on catching, injuring and killing animals protected can also be done in terms of due to some reason that animal protected endangering human life.

(4) Further provisions as referred to in paragraph (1), paragraph (2), and paragraph (3) regulated by Government Regulation.

There are three subjective elements of criminal conditions. The element of deliberate and negligence (*culpa*) and can be accounted for three scopes of fault in the broadest sense. in addition, that the no reason excusatory is also part of a mistake (Hamzah, 2017, p. 105).

The Legislation Of Corporate Crime Liability For The Protected Animals Crime

Law No. 5 of 1990 does not have any corporation liability regulation for the crime of protected animals. As a result, law enforcement is poor due to criminal threats in Law No. 5/1990 on the Protection of Biological Natural Resources and Ecosystems (Aprilia, 2018).

In relation to corporations as the creators of the crime of wildlife, if the corporation commits a crime, then the corporation should be held accountable for the crimes committed either directly shown to the corporation concerned or shown to its management (organs) corporation). Corporations are recognized as subjects of criminal law which are considered to be able to carry out criminal actions which can be held criminally liable. As is known at this time that conservation law enforcement has not been able to ensnare corporate actors against wildlife crime, especially those whose concessions are protected wildlife habitats (Septian, 2019). Corporation is a term used by criminal law experts to refer to what in the field of civil law is called a legal entity (rechtsperson). Until now, the legal system in Indonesia, known as legal subjects is divided into two forms: *first*, human (person) and *second*, legal entity (rechtsperson) (Setiyawan, 2014, p. 3).

The corporation is a term commonly used by criminal law experts to refer to what is generally used in the civil law field. As a legal entity or as a right person in the Dutch language (Budianto, 2012, p. 56). In its development, however the corporation areviewed not only as legal entities or legal entities (Soemitro, 1993, p. 10), but more generally as a structured collection of individuals or property, whether legal entities or not (Muladi, 2013, p. 6). Legal entities (rechtsperson) are legal subjects who have their own rights and obligations even if they are not human (person), in this case in the form of an entity or association consisting of a group of people who enter for a particular purpose and also have some property (Setiyawan, 2014, p. 3).

Regarding corporate criminal liability, Hulsman stating that the element of fault (intentional or negligence) can be carried out by the organs of the corporation or other workers who set organizational policies (Remmelink, 2003, p. 108). Therefore, with regard to such incidents, there must be a certain connection between the actions of these people (Remmelink, 2003).

Corporate crime is an organizational crime (Manthovani, 2010, p. 4) corporations can be held accountable for what their employees have done, known as "actus reus," which means that the actions taken should fall within the scope of their jurisdiction, which in other words, is still within the scope of corporate duties in carrying out that mission. Without a purpose and

achievement of the goals of the corporation, the existence of a corporation is not formed, always realized through natural human acts. Therefore, the obligation of persons to be accountable works for and on behalf of the corporation is converted to the ability to be accountable as the victim of a criminal offence (Setiyawan, 2014, p. 7).

According to Van Bemmelen's Opinion, the corporation can still have fault taken from the management or directors in carrying out their functionaries. This is because the corporation in doing or not doing, through or represented by individuals. In its development came the doctrines that set aside the principle of "no criminal without fault" (Setiyawan, 2014).

According to Reksodiputro's opinion, Indonesia in its arrangement regarding corporations as subjects of criminal law, has three models of corporate criminal responsibility (Reksodiputro, 1989, p. 9):

- 1) Corporate management as the maker and responsible corporate management
- 2) Corporations as responsible makers and administrators
- 3) The corporation as a maker and also a responsible corporation.

In the third corporate criminal liability model, the position of the corporation as a legal subject can be said to be fully recognized. This is because the corporation has been considered as a maker, and can also be held accountable for it (Reksodiputro, 1989).

According to Sutan Remy S. and Mardjono Reksodiputro's opinion on the corporate criminal liability model, a criminal liability model can be adopted for the corporation, namely the corporation as a criminal offense and the corporation itself must bear criminal liability. Perpetrators of wildlife crime to be included as corporations can regulate the subject of the law "everyone" as formulated in the Law on the conservation of biological natural resources and their ecosystems. With the adoption of corporate understanding as the subject of criminal acts, it means that corporations as both legal entities and non-legal entities are considered capable of carrying out criminal acts and can be accounted for in criminal law (corporate criminal responsibility).

In Indonesia, the regulation of corporations as legal subjects has begun in some legislation, which is contained in Article 49 of Law No. 9 of 1976 concerning Narcotics Crimes, Article 1 point 20 of Law Number 35 of 2009 concerning Narcotics, Article 1 point 13 and Article 59 of Law Number 5 of 1997 concerning Psychotropics, Article 1 point 19 of Law Number 22 of 1997 concerning Narcotics, Article 1 numbers 10 and 14 and Article 6 of Law Number 8 of

2010 concerning Prevention and Eradication of Money Laundering Crimes. Thus, Indonesia has recognized corporate criminal liability since 1951 (Manthovani, 2010, p. 4).

According to Law Number 32 of 2009 concerning Environmental Protection and Management. Provisions regarding the recognition of corporations as subject to criminal law can already be seen in the General Provisions section of Article 1 Number 32 regulating: "Every person is an individual or business entity, both legal and non-legal."

So, the author has a opinion to regulate the following matters:

1. The Model of Corporate Criminal Liability
2. Determination of the corporate criminal liability doctrine

The Law relating to the crime of protected animals should include matters that have not yet been regulated. there are criminal guidelines for corporations for the crime of protected wildlife including: ¹⁵

2. The corporation as subject of crime.
3. Determination of criminal sanctions / actions for the corporation
4. Determination of condition the corporation can be accounted for crime liability.

In connection with the form of liability of a legal entity (corporation), namely the punishment imposed on a legal entity (the corporation itself) then concludes the provisions regarding conviction of a legal entity or association, including (Setiyawan, 2014, p. 6):

- a. That punishment is in principle not directed to legal entities or associations, but actually to a group of people who work together for something or purpose who have joint wealth for a purpose incorporated in the body.
- b. There are some provisions which must deviate from the application of criminal law (general) to these bodies in the case of bodies that can be convicted, as such it is possible to impose the crime of deprivation of liberty (imprisonment, closure, confinement) on him and not criminal penalties may be replaced with imprisonment and etc.

Legal entities (rechtperson) are legal subjects who have their rights and obligations even though they are not human (person). If a corporation is involved in a criminal act, such a view implies

¹⁵ Benny Karya Limantara dan Eko Sopyonyono, *Ibid.*, p.11

that the corporation cannot be held responsible for an act, but rather the management that carries out the act (Saleh, 1984, pp. 50-51). Thus only the management can be threatened with criminal and convicted because who is domiciled as a legal subject, the corporation in carrying out its actions is still carried out by the management (Muladi D. P., 2011, p. 86).

The imposition of criminal liability for wildlife trafficking protected by corporations can be explained according to the theory of Corporate Criminal Responsibility Doctrine Identification Theory and Vicarious Liability (Arief, 2003, pp. 233-238). According to identification theory, rests on the assumption that all legal and illegal actions carried out by high-level managers or directors are identified as corporate actions (Maglie, 2005, hal. 556). The doctrine of identification emphasizes on the actions carried out by the high-level manager. Therefore, this doctrine is used to justify the imposition of criminal liability to the corporation, even though in reality the corporation is not something that can do itself and may not have *mens rea* because it does not have a mind (Sjahdeini, 2006, p. 100). According to Muladi's opinion, a company can commit a number of offenses directly through people who are very closely related to the company and are seen as the company itself (Muladi D. P., 2011). In this case, the actions or mistakes of "senior officers" are identified as acts or mistakes of the corporation (Muladi D. P., 2011).

The doctrine of vicarious liability is a form of corporate criminal responsibility. According to this doctrine, a criminal liability is imposed on someone for the actions of another person (*the legal responsibility of one person for the wrongful acts of another*) (Atmasasmita, 1989, p. 93). Liability refers to criminal liability in the Determination of condition the corporation can be accounted for crime liability in connection with the form of liability of a legal entity (corporation), namely the punishment imposed on a legal entity or a (the corporation itself) then concludes the provisions regarding conviction of a legal entity or association, including (Setiyawan, 2014, p. 6):

- a. That punishment is in principle not directed to legal entities or associations, but actually to a group of people who work together for something or purpose who have joint wealth for a purpose incorporated in the body.
- b. There are some provisions which must deviate from the application of criminal law (general) to these bodies in the case of bodies that can be convicted, as such it is possible to impose the crime of deprivation of liberty

(imprisonment, closure, confinement) on him and not criminal penalties may be replaced with imprisonment and etc.

Legal entities (rechtsperson) are legal subjects who have their rights and obligations even though they are not human (person). If a corporation is involved in a criminal act, such a view implies that the corporation cannot be held responsible for an act, but rather the management that carries out the act (Saleh, 1984, pp. 50-51). Thus only the management can be threatened with criminal and convicted because who is domiciled as a legal subject, the corporation in carrying out its actions is still carried out by the management (Muladi D. P., 2011, p. 86).

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Considering the determination and application of criminal sanctions against corporation, the provisions of corporate criminal liability in Indonesian law are regulated in Article 20 of Law Number 31 of 1999 that has been amended by Law Number 20 of 2001. Regulations of corporate criminal liability that can be adopted are included in the Law on Conservation of

natural resources. In addition, their ecosystems can be cumulative-alternative, with the phrase "corporation and/ or management".

Corporations are subject to criminal law in the same way as natural humans, criminal sanctions that can be imposed on corporations are criminal fines. In addition to criminal fines, corporations can also be given measures to restore the situation back to previous condition before the damage caused by crime by a company.

This can be caused by the perpetrators of criminal offenses contained in the Law on Conservation of natural resources and their ecosystems are persons or humans and corporations/ legal entities. Both forms and formulations of criminal liability can be complementary. Through the revision of legislation, corporations, today, are accepted as legal subjects and treated the same as other legal subjects, namely humans (natural). Thus, corporations can act like humans.

As regards the criminal justice processes, the Law on the Conservation of Natural Resources and their Ecosystems can implement the provisions of the Corruption Crime Act Law Number 20 of 2001 concerning Eradication of Corruption, including the following:

1. If a criminal offense is committed by or on behalf of a corporation, then the corporation and or its management may be subject to a criminal guideline and sentence.
2. A criminal offense is committed by a corporation if the criminal act is committed by individuals, either on the basis of work relationships or on the basis of other relationships, the management acts within the corporate environment.

CONCLUSSION

1. The Policy System for the Protection of Animal Crimes protected under Positive Criminal Law discusses the position and regulation of protected wildlife crime which is explained in accordance with the three main problems/substance of the criminal law, namely acts (crime problems), people (problems of fault or criminal liability), and criminal / criminal According to the Law on Natural Conservation and its Ecosystems, it has clearly regulated the element of fault in which there is a criminal offense. Particularly related to criminal acts in Article 21 paragraph (2) which in the article fulfills the elements of criminal acts, namely the prohibition for everyone to trade protected animals. Whereas in Article 40 there are criminal provisions that regulate every criminal act against an article contained in the Law on

the Conservation of Life and its ecosystem. Arrangements regarding the Criminal Acts of Animals Protected in Law Number 5 of 1990, the threat of criminal penalties are contained in Article 40 paragraph 2 concerning intentionality and paragraph 4 concerning negligence.

2. Law No. 5 of 1990 does not have an arrangement for protected wildlife trade crime for the corporation. Then the necessary arrangements related to corporate criminal liability. Laws relating to the criminal acts of protected animals in the future should contain matters that have not yet been regulated, namely criminal guidelines for corporations for the crime of protected wildlife. Then, we need to regulate corporate affirmation as the subject of criminal acts, determination of criminal sanctions/actions for corporations, determination of corporations can be accounted for its actions, corporate criminal liability models, and determination of corporate criminal liability doctrine.

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