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The Concept of Corporate Criminal Liability in the Indonesian Criminal Law System

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Abstract

The development of corporations as main actors in economic activities brings significant impacts, both positive and negative on society and the environment. The phenomenon of corporate crime that harms the state, the public, and the environment drives the urgency of reforming corporate criminal liability in the Indonesian criminal law system. This study conceptually examines corporate criminal liability through a normative juridical and comparative approach, analyzing doctrines of criminal liability such as strict liability and vicarious liability (Article 37 of Indonesia's new Criminal Code), as well as exploring the development of other liability models like corporate culture, identification theory, and management failure, which are relevant for application in Indonesian Criminal Law. In Indonesia's new Criminal Code (KUHP), the recognition of corporations as criminal law subjects and their criminal liability is regulated under Articles 45 to 49, although normative problems persist concerning fault boundaries, structural relationships, criteria, and limitations of criminal liability. The study's findings indicate that corporate punishment demands a legal system that is adaptive, and accountable, and considers organizational structure and internal corporate culture while upholding the principles of justice and proportionality in criminal law. By adopting contemporary theories and strengthening norms in sectoral laws, the corporate criminal liability system is expected to be able to provide deterrent effects and more effective protection for public interests.

Keywords: Corporate Criminal Liability; Corporate Crime; Criminal Law System; New KUHP.

1. INTRODUCTION

Indonesia's abundant natural wealth attracted the Dutch to establish the first corporation in Indonesia; VOC (*Verenigde Oost-Indische Compagnie*) in 1602, aiming to control the archipelago's natural resources.[1] In the 1850s, the Dutch enacted the mining regulation Indische Mijnwet Stb. 1899 No. 214.[2] During the early New Order regime, the first contract of work was signed in 1967 between

1 Budi Frensidy, "Sadisnya Kejahatan Korporasi Di Pasar Keuangan," Fakultas FEB UI, accessed January 20, 2025, https://feb.ui.ac.id/2024/08/08/budi-frensidy-sadisnya-kejahatan-korporasi-di-pasar-keuangan/.

2 WALHI, "Menilik Kembali Sejarah Dan Regulasi Industri Pertambangan Di Indonesia | WALHI," WALHI, accessed January 20, 2025, https://www.walhi.or.id/menilik-kembali-sejarah-dan-regulasi-industri-pertambangan-di-indonesia.

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Freeport and Indonesia[3] followed by 16 foreign mining corporations,[4] and other corporations engaged in natural resources exploitation.[5]

Along with development progress, the industrial and corporate sectors have become driving forces in accelerating national economic growth. This condition certainly brings various positive benefits, such as mass labor absorption, increased tax revenue, and royalty earnings as state foreign exchange. However, on the other hand, various negative impacts also emerge, such as environmental pollution, losses suffered by workers, consumers, and competitors, as well as crimes that harm the general public and even the state. Sutherland[6] (1949) an American criminologist, conducted research on *"white collar criminality",* which he defines as "*a crime committed by a person of respectability and high social status in the course of his occupation".*

Several forms of typologies of crimes committed by corporations according to Sutherland,[7] indicate that corporate crimes also include false or misleading information (*misrepresentation*). Clinard and Yeager[8] state that corporate crimes relate to administrative, environmental, financial, labor, product-related matters, and unfair trade practices. Meanwhile, Steven Box[9] categorizes them as crimes against competition, government, employees, consumers, and the public. Additionally, economic crimes include fraudulent practices by corporations in taxation matters, such as *transfer pricing*.[10] Corporate crimes in capital markets, for example, insider trading in the stock market, involve exploiting insider positions (informational advantages) in stock trading. [11]

The rapid economic development has also brought negative impacts through the emergence of corporate crimes in Indonesia. In the financial services sector, as noted by Budi Frensidy, cases include Bank Century antaboga Delta Sekuritas, Sarijaya Permana Securities, Signature Capital, Optima Kharya Capital Management, and PT Katarina Utama Tbk., with losses ranging from tens of billions to trillions of rupiah.[12] The case of PT Freeport-McMoran Indonesia (Freeport) allegedly involved environmental destruction with mining pits in Grasberg measuring 2.4 kilometers in diameter.[13] The latest case involves Indonesia's Attorney General Office naming five corporations as suspected in a tin commodity trade corruption case within the mining business permit (IUP) area of PT. Timah during 2015-2022, causing total state losses of approximately 152 trillion rupiah.[14]

Corporate crimes are also frequently committed by multinational giant corporations such as Caterpillar, Chevron, Coca-cola, Dow Chemical, DynCorp, Ford Motor Company, Nestle USA, and Philip Morris International. Others include British Petroleum, General

3 PT Freeport Indonesia, "PT Freeport Indonesia," accessed January 20, 2025, https://ptfi.co.id/id/sejarah-kami.

4 WALHI, "Menilik Kembali Sejarah Dan Regulasi Industri Pertambangan Di Indonesia | WALHI."

5 Carolyn, "Perusahaan Asing Yang Mengeruk (Atau Mengincar) Batubara Indonesia," Down to Earth, February 12, 2010, accessed January 20, 2025, https://www.downtoearth-indonesia.org/id/story/perusahaan-asing-yang-mengeruk-atau-mengincar-batubara-indonesia.

6 Mardjono Reksodiputro, "Kejahatan Korporasi Suatu Fenomena Lama Dalam Bentuk Baru," *Indonesian Journal of International Law* 1, no. 4 (August 12, 2021): 693–708, https://doi.org/10.17304/ijil.vol1.4.566.

7 Arif Amrullah, *Kejahatan Korporasi* (Malang: Bayumedia Publishing, 2006).

8 Amrullah.

9 Muladi, *Bunga Rampai Viktimisasi* (Jakarta: Badan Pembinaan Hukum Nasional, 1995).

10 Yenni Mangoting, "Aspek Perpajakan Dalam Praktek Transfer Pricing," Jurnal Akuntansi Dan Keuangan 2, no. 1 (2000): 69–82, https://doi.org/10.9744/jak.2.1.pp.69-82.

11 Najib A Gisymar, *Insider Trading Dalam Transaksi Efek* (Bandung: Citra Aditya Bakti, 2002).

12 Frensidy, "Sadisnya Kejahatan Korporasi Di Pasar Keuangan."

13 Suhartati, Elfina Lebrine Sahetapy, and Hwian Christianto, *Buku Ajar Anatomi Kejahatan Korporasi* (Surabaya: PT Revka Petra Media, 2018).

14 Tempo, "PT RBT Dan 4 Perusahaan Jadi Tersangka Korupsi Timah, Diminta Mengganti Kerusakan Lingkungan Rp 152 T | Tempo.Co," accessed January 21, 2025, https://www.tempo.co/hukum/pt-rbt-dan-4-perusahaan-jadi-tersangka-korupsi-timah-diminta-mengganti-kerusakan-lingkungan-rp-152-t-1189213.

Motors, Toyota, Takata Corporation, Flat Chiysles,[15] as well as criminal cases involving banks like Citigroup, JPMorgan Chase, Barclays, Royal Bank of Scotland, and UBS. There is also the case of toxic waste dumping by Anadarco Petroleum. [16]

Given the extensive negative impacts of corporations, the law as an instrument of public protection must give serious attention and effectively regulate corporate activities.[17] Corporate crimes must be punishable as they cause harm to humans and the environment. The state must facilitate redress for victims and the public as a response to achieve societal justice. The state must deliver safety and collective justice as a constitutional promise of a rule-of-law state. The relationship between law and justice is often interconnected, as reflected in the legal adage *iustitia fundamentum regnorum* which means justice is the supreme, fundamental, or absolute value in law.[18]

With corporations being recognized as subjects of criminal law, they can consequently be held criminally liable. Several adjudicated corporate crime cases encompass offenses related to corporations, money laundering, taxation, mining, banking, and environmental violations. Some of these cases include criminal convictions against: PT.GWJ, PT.Green Planet Indonesia, PT.Nusa Konstruksi enjinering, PT. Kalista Alam, PT. Putra Ramdhan (Tradha), PO.Sumber Rezeki, PT.Vikri Abadi Group, PT. Asian Agri Group, PT. Duta Grahara Indah/PT. Nusa Kontruksi Enjinering, PT. Nindya Karya, PT. Tuah Sejati, PT. Putra Ramadhan, PT. Tharda dan PT. Merial Esa.

The imposition of criminal sanctions on corporations in such cases gives rise to juridical issues, particularly concerning how to determine corporate culpability in accordance with the principle of fault specifically, whether such culpability constitutes the fault of the corporation as a legal entity (*corporate fault*) or is entirely attributable to its management (*managerial fault*). Another issue lies in the imposition of criminal fines, which appears to be fundamentally inconsistent with the spirit of corporate criminal liability. In several court decisions, corporations were not formally designated as defendants; nevertheless, the courts imposed fines, ordered compensation, and even mandated certain corrective actions against them. This raises questions regarding the consistency of applying the principle of *nullum crimen sine culpa* (no punishment without fault) in the judicial practice of corporate criminal law in Indonesia. A corporation is a legal subject within legal relations, capable of possessing legal rights and obligations.[19] As such, a corporation may be held legally accountable through criminal, administrative, and civil sanctions.

Based on the aforementioned background, the research problem addressed in this study is: How is the Concept of Corporate Criminal Liability formulated within the Indonesian criminal law system?

2. ANALYSIS AND DISCUSSION

The existence of corporations in legal scholarship is recognized not only as subjects of civil law but also as subjects capable of bearing criminal liability. This juridical

15 Sutan Remy Sjahdeini, *Ajaran Pemidanaan: Tindak Pidana Korporasi & Seluk-Beluknya*, 2nd ed. (Jakarta: kencana, 2017).
16 Sjahdeini.
17 H. Setiyono, *Kejahatan Korporasi: Analisis Viktimologis Dan Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia* (Malang: Bayumedia Publishing, 2005).
18 Hyronimus Rhiti, *Filsafat Hukum: Dari Klasik Sampai Postmodernisme* (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2011).
19 Chadir Ali, *Badan Hukum* (Bandung: Alumni, 1991).

foundation raises a critical issue for the discussion in this study: The conceptual framework of corporate criminal liability within the Indonesian penal system.

General overview of Corporate Criminal Liability in legal Development within the broader evolution of criminal jurisprudence concerning the recognition of legal entities as subjects of criminal liability, a protracted doctrinal debate initially emerged regarding the very capacity of juridical persons (*recht persoon*) to incur criminal responsibility. From a historical perspective, the conceptual foundations of legal personality were profoundly shaped by the 19th-century Germanic jurisprudential tradition, particularly the influential Works of von Savigny and von Feurbach which were recognized as the *fiction theory*.[20] However, this perspective failed to gain recognition within the Dutch criminal law at that time, as the colonial administration expressly rejected the transposition of civil law principles into criminal jurisprudence. The legal construct of corporate personality remained confined exclusively to civil law domains. In this regard, von Savigny, as cited by Friedman, posited that; *All laws exist for the sake of liberty inherent in each individual; therefore original concept of personality must coincide with the idea of man.*[21] All legal systems fundamentally serve to protect the inherent freedom of individuals. Consequently, the original conception of legal personality must align with the notion of human agency, as only natural persons possess the capacity to bear rights and obligations. Friedman, in his seminal work *Legal Theory*, further examines *theories of corporate personality and legal practice*, arguing that:[22]The recognition of corporations as subjects of criminal law-artificially endowed with human-like legal personality. From a practical standpoint, jurisprudence has increasingly acknowledged parallels between natural and juridical persons in certain cases.

Friedman states:

> *From a practical point of view, these cases fall into three groups: (1) Cases in which it becomes relevant to analyze the character of corporate persons ;(2) Cases in which the interpretation of legal obligation or transaction makes it necessary to look at human individuals covered by the mask of juristice person ; (3) Cases in which the devices of Corporate personality used fraudulently, in particular for the evasion of tax obligations. These groups present essentially different aspects of one problem: to what extent is it necessary and permissible to pierce the veil of legal personality, to look at the real persons, purposes, and intentions covered by the legal form?*[23]

Corporate offenses constitute a form of latent criminality, systemic violations that are often imperceptible, as they strategically conceal unlawful conduct behind a veneer of legal legitimacy. These acts are routinely justified under the pretense of procedural compliance, creating the illusion that such operations adhere to legal frameworks. In criminology discourse, corporate criminals are frequently characterized as professional thieves, a conceptualization advanced by Sutherland, who observed that *"Businessmen, being like professional thieves*" or in other terminology called "*white collar crime*" wherein offenders persistently perceive themselves as morally unimpeachable. As Sutherland notes "*they think of themselves as honest men, not as criminals".*[24]

20 P.A.F Lamintang, *Kitab Pelajaran Hukum Pidana* (Bandung: Pioner Jaya, 1992).
21 W Friedman, *Legal Theory* (London: Steven & Son Limited, 1949).
22 Friedman.
23 Friedman.
24 Edwin H Sutherland, *On Analyzing Crime*, ed. Karl F. Schuessler (Chicago: University of Chicago Press, 1973).

The evolution of crime from conventional forms to corporate crime has prompted many countries, including the Netherlands since 1976, to recognize corporations as criminal subjects in their penal codes (KUHP). Indonesia itself only formally recognized corporations as criminal subjects in its new KUHP. Previously, such regulation only existed in sectoral laws outside the KUHP. The initial recognition of corporations as criminal offenders appeared in law no. 1 of 1951, which penalized legal entity administrators. Explicit recognition of corporations as punishable offenders first emerged in Law No. 7/ Drt/1955 on Economic Crimes. The term "corporation" itself was first formally defined in Law No. 5 of 1997 on Psychotropics. The old KUHP adhered to the principle that only natural persons (*naturlijk persoon*) could be criminal offenders, as reflected in the use of the phrase "any person" and the offender classification in Articles 55, 56, and 59 which referred to individuals, not corporations. Therefore, legal entities were not recognized as criminal subjects under the old KUHP.

Regarding corporate executives as perpetrators who bear responsibility, certain obligations are imposed on these executives. According to Roeslan Saleh, these obligations are actually the corporations' duties, and failure by the executives to fulfill them is punishable by criminal sanctions. Thus, this system contains grounds for excluding criminal liability. The underlying rationale is that the executives who commit the offense, therefore are the executives who face criminal punishment.[25]

Under the provisions of the old Criminal Code (KUHP), only individuals such as directors and commissioners could be held criminally liable as legal subjects, as explicitly stated in Article 59 of the old KUHP. According to Muladi, this reflects the strong influence of the principle "*sociates delinquere non potest*" (legal entities cannot be punished) or "*universitas delequere nonpotest"* (legal entities cannot be punished).[26] According to Hamdan, the developments in criminal law demonstrate that in economic and environmental matters, punishing only corporate executives is inadequate, since legal entities also benefit from these criminal acts. Moreover, the damages caused, particularly to the environment, often far exceed the fines or prison sentences imposed on executives. Therefore, to create an effective deterrent effect, the legal entity itself must also be held criminally responsible.[27]

Roeslan Saleh similarly emphasized that punishing only the executives proves inadequate for deterring offenses committed by or through a corporation. Therefore, it is also necessary to enable the punishment of both the corporation and its executives alone.[28]

Regarding corporate criminal liability, the first legal formulation recognizing corporations as perpetrators of criminal offenses appeared in Law No. 7 Drt. of 1955 concerning the Investigation, Prosecution, and Adjudication of Economic Crimes (TPE). Specifically, Article 15 stipulates that punishments or measures may be imposed on legal entities, companies, associations, and foundations. This provision is particularly relevant given that many economic crimes are committed by corporate entities. Although national criminal law has established the possibility of corporate criminal liability, further clarity remains necessary regarding the underlying principles of such liability.

Beyond Economic Crimes, provisions recognizing corporations as legal subjects are also established in various regulations, including 1) Article 1(13) of Law No. 21 of

25 Roeslan Saleh, *Tentang Tindak-Tindak Pidana Dan Pertanggungjawaban Pidana* (Jakarta: BPHN, 1984).
26 Muladi and Dwidja Priyatno, Pertanggungjawaban Pidana Korporasi (Jakarta: Kencana Prenada Media Group, 2011).
27 M Hamdan, *Tindak Pidana Pencemaran Lingkungan Hidup* (Bandung: Mandar Maju, 2000).
28 Saleh, *Tentang Tindak-Tindak Pidana Dan Pertanggungjawaban Pidana*.

2024 on Geothermal Energy. 2) Article 1(4) of Law No. 17 of 2019 on Water Resources. 3) Article 1(23) and Article 116 of Law No. 32 of 2009 on Environmental Protection and Management (UUPLH). The UUPLH explicitly stipulates that if an environmental offense is committed by, for, or on behalf of a business entity, criminal charges, and sanctions may be imposed on both the business entity and the individuals who ordered or directed the offense.

Perspectives on criminal policy (criminal policy) regarding the prosecution and sentencing of corporations require conceptual and legal frameworks within Indonesia's criminal justice system. In relation to various forms of corporate criminal liability, Reksodiputro identifies several key issues, namely:[29]

1. The first issue concerns acts committed by corporate executives or other individuals that must be legally construed as acts of the corporation,
2. The second issue concerns corporate fault (culpability) - specifically, how acts committed by one or more corporate executives, other individuals (such as corporate employees), or even non-employees holding delegated authority can be legally attributed to the corporation itself. The fundamental question is: under what precise circumstances can a corporation be deemed to have committed a criminal offense?

According to Muladi, a corporation can be deemed to have committed a criminal offense if the act was carried out within an employment relationship or other connection and occurred within the legal entity's sphere. During judicial proceedings, liability may fall upon: The corporate executives collectively, an individual executive, and an executive specifically designated by the court. Sentencing may be imposed on either: The corporation itself, the individual(s) who ordered or directed the criminal act, or both concurrently (the executives and the corporation).[30]

The formulation of corporate criminal liability in Indonesian criminal law, as regulated in the new Criminal Code (KUHP), establishes the legal construction of a corporation's status as a perpetrator and the nature of its criminal responsibility under Articles 45-49 of the new KUHP. The regulation of corporate criminal liability without requiring specific *mens rea* is stipulated in Article ٣٧ of the new KUHP, which explicitly governs the application of *strict liability* and *vicarious liability*. Both of these forms deviate from the general principle in criminal law that necessitates personal fault (*culpa*) and direct involvement in the criminal act.

In the context of corporate criminal liability, the expansion of liability forms is understandable to penetrate complex organizational structures. However, Article 37 of the new Criminal Code (KUHP) introduces criminal liability that deviates from the general principle of fault (culpa), namely through *strict liability* and *vicarious liability*. Point (a) of the Article 37 explanation permits punishment without proving fault, requiring only that the elements of the offense are satisfied. Point (b) allows holding a person criminally liable for the acts of another, particularly within employment or command relationships.

However, the regulation of corporate criminal liability raises several normative concerns. First, its delegative nature without clear limitations in the new Criminal Code risks violating the principles of legality and proportionality. Second, the broad phrasing of "any person" and "criminal acts committed by others" could ensnare parties without direct involvement. Third, the absence of guidelines on which offenses should warrant strict liability may lead to its erroneous application to serious crimes. Fourth, the lack of

29 Reksodiputro, "Kejahatan Korporasi Suatu Fenomena Lama Dalam Bentuk Baru."
30 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

defined legal relationships or requirements for vicarious liability creates a potential for misuse. Fifth, the unrestricted and undefined application of strict and vicarious liability fosters judicial ambiguity and legal uncertainty**.** Thus, while Article 37 reflects modern criminal law's flexibility, its vague formulation threatens substantive justice unless accompanied by clear normative boundaries and adequate legal safeguards.

Given these jurisprudential challenges, Article 37 necessitates clearer normative reforms whether through implementing regulations, judicial guidelines, or legislative revisions. Without such refinements, this provision risks becoming an expansive tool of criminal liability that undermines fundamental principles of modern criminal law: legal certainty, substantive justice, and the protection of human rights.

The objectives of criminal sanctions, as formulated in the new Criminal Code (KUHP), particularly regarding the criminal liability of corporations as perpetrators of offenses, reflect two fundamental aspects of criminal law's function according to Hamzah Hatrik. In the context of modernization, these are termed protective mechanisms (sarana pengayom): [31] First, the protection of society from criminal acts, including those committed by corporations, aims to prevent, control, and restore social order. Second, the protection of offenders whether individuals or corporations seeks to prevent arbitrary punishment outside the law while promoting rehabilitation and behavioral reform.

The justification for holding corporations criminally liable, as articulated by Muladi, is grounded in the following principles: Integralistic Philosophy All matters should be evaluated based on balance, harmony, and alignment between individual and societal interests. The Principle of Familialism (Kekeluargaan) As enshrined in Article 33 of the 1945 Constitution, emphasizes collective welfare over individualism. Combating "Anomie of Success" Preventing unregulated or unethical corporate success that disregards legal and moral norms. Consumer Protection & Technological Advancement[32] which ensures corporate accountability safeguards public interests while fostering responsible innovation. These justifications align with Pancasila's values of justice and constitutional principles, forming the foundation for Indonesia's criminal law reform.

2.1. The concept of Corporate Criminal Liability

Legal entities or corporations can ultimately be recognized as subjects of criminal law and held accountable in the same manner as natural persons (*naturlijk persoon*). However, this becomes a mere legal fiction if, in reality, corporations remain beyond the reach of existing legislation despite numerous national regulations now recognizing them as legal subjects capable of bearing liability.

The most fundamental element in imposing criminal liability on corporations is proving the existence of fault within the corporation itself**.** Although the principle of fault is not explicitly regulated in the old Criminal Code (KUHP), this principle remains a fundamental tenet of Indonesia›s criminal justice system. According to Hamzah Hatrik, Indonesian criminal law maintains a distinction between: Menurut Hamzah Hatrik, Criminal acts referring to acts prohibited and condemned by law. Criminal liability is the process of attributing blame to the perpetrator subjectively if legal requirements for punishment are met.[33]

31 Hamzah Hatrik, *Asas Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia (Strict Liability Dan Vicarious Liability)* (Jakarta: Raja Grafindo Persada, 1996).

32 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

33 Hatrik, *Asas Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia (Strict Liability Dan Vicarious Liability)*.

Within the framework distinguishing criminal acts (*tindak pidana*) from criminal liability (*pertanggungjawaban pidana*), a critical question arises: when can an individual who commits a criminal act be subjected to punishment? According to Hamzah Hatrik, this depends on several conditions:

1. A person cannot be punished if they did not commit a criminal act.
2. A criminal act occurs when a person engages in culpable conduct prohibited by law.
3. Even if a person commits a criminal act, they may not be held criminally liable if they lack the legal capacity to bear responsibility for their actions.[34]

The rapid development of corporations as key actors in global economic activities, accelerated by technological advancements and transnational reach, has generated increasingly complex risks. The expanding scope and diversity of corporate operations have made it difficult to trace direct causal links (causa proxima) of unlawful conduct, thereby complicating the evidentiary process of proving corporate legal violations. Current regulatory frameworks have failed to keep pace with this exponential corporate growth, resulting in inadequate legal instruments to address emerging challenges. To address this gap, Muladi argues for a departure from traditional fault-based liability (asas kesalahan) by adopting doctrines of *strict liability* or *vicarious liability*.[35] Similarly, Barda Nawawi Arief emphasizes the need for a radical shift from the conventional "no-fault" conception.[36]

In the reform of Indonesia's National Criminal Law, exceptions to the principle of fault have been adopted, whereby a person can be held liable for certain offenses even in the absence of personal fault (*mens rea*). In short, strict liability is defined as *liability without fault (pertanggungjawaban pidana tanpa kesalahan*).[37] The new Criminal Code (KUHP) explicitly enshrines the principle of "no punishment without guilt" (*geen straf zonder schuld, keine Strafe ohne Schuld*) as the foundation for fault-based liability. This principle affirms that only blameworthy conduct (*schuld*) may be punished.[38] In this context, fault is regarded as an element of the criminal act,[39] or a violation of legal norms (*normovertreding*), imposed due to the offender's culpability.[40] Punishment may only be imposed when the following elements are satisfied: *actus reus* with *schuld* (fault) and *wederrechtelijk* (unlawfulness).[41] Thus, sentencing must consider the presence of culpability-based elements of criminal liability.[42]

The principle of *mens rea* or the culpability principle (*asas culpabilitas*), though not explicitly stated in the old Criminal Code (KUHP), has long been a foundational tenet in criminal law practice. The culpability principle is one of the fundamental pillars of criminal liability systems. According to Barda Nawawi Arief, this principle serves as the counterpart to the legality principle (*asas legalitas*), reflecting the mono-dualistic balance in criminal law. However, it is not considered an absolute or rigid requirement. Consequently, the new Criminal Code (KUHP) also allows for expeptions through: Strict Liability *(pertanggungjawaban tanpa kesalahan pribadi*), and *vicarious liability*

34 Hatrik.
35 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.
36 Muladi and Priyatno.
37 Barda Nawawi Arief, *Perlengkapan Bahan Kuliah Hukum Pidana I* (Semarang: Fakultas Hukum Universitas Diponegoro, 1984).
38 Jan Remmelink, *Hukum Pidana*, ed. Tristam P. Moeliono (Jakarta: aksara Baru, n.d.).
39 J. M. Van Bemmelen, *Hukum Pidana 1 (Hukum Pidana Material Bagian Umum)* (Bandung: Bina Cipta, 1984).
40 E. Utrecht, *Rangkaian Sari Kuliah Hukum Pidana I* (Surabaya: Pustaka Tinta Mas, 1994).
41 S. A. Indriyanto, *Korupsi Dan Pembalikan Beban Pembuktian* (Jakarta: Kantor Pengacara dan Konsultasi Hukum Prof. Oemar Seno Adji & Rekan, 2006).
42 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

(pertanggungjawaban atas perbuatan orang lain).[43] As noted by L.B. Curzon, the application of strict liability is justified on the following grounds:[44]

1. It is absolutely essential to ensure compliance with certain critical regulations necessary for social welfare.
2. Proving mens rea becomes particularly difficult for offenses related to social welfare matters.
3. The high degree of social harm caused by the relevant conduct.

In most common law systems, the concept of strict liability primarily applies to statutory offenses (regulatory offenses, *mala prohibita*), which are generally offenses against public welfare (*public welfare offenses*). These include regulatory violations such as the sale of hazardous food, beverages, or medicines, the use of misleading trade descriptions, and traffic.[45] Hamzah Hatrik notes that alongside the principle of "no punishment without fault" (tiada pidana tanpa kesalahan), exceptions to culpability also exist, including: "Liability for the fault of others", and Vicarious liability".[46]

The concept of vicarious liability refers to criminal liability imposed on one person for the wrongful acts of another (*the legal responsibility of one person for the wrongful acts of another)*.[47] This form of liability primarily applies to acts committed by others within the scope of their employment or official duties. Thus, it is generally limited to cases involving an employer-employee or superior-subordinate relationship. Under this principle, even if an individual did not personally commit the offense and lacks extraordinary fault, they may still be held criminally liable.[48]

In English law, the concept of criminal liability known as vicarious liability can be applied to corporations, meaning a corporation acts through intermediaries (persons). For violations of legal obligations committed by: The "*occupier*" of a factory or the acts of an employee (servant), the corporation itself may be held criminally liable.[49]

In the realm of criminal law, these two concepts (strict liability and vicarious liability) have only recently been formally recognized in the new Criminal Code (KUHP). While the new KUHP fundamentally maintains the principle of fault (*asas kesalahan*), it does so in a non-rigid and non-absolute manner. This is evidenced by the explicit inclusion of strict liability and vicarious liability under Article 37 of the new KUHP. The regulation of these doctrines serves as both: An exception to the general fault-based liability principle outlined in Article 36 of the new KUHP, and A complementary mechanism to address modern legal challenges in corporate and regulatory offenses.[50]

As entities distinct from humans, institutionalizing corporations as subjects of criminal law has been hindered by limited acceptance of the notion that corporations can bear responsibility for criminal offenses. Few legal postulates have emerged to address

43 Barda Nawawi Arief, *RUU KUHP Baru: Sebuah Restrukturisasi/Rekonstruksi Sistem Hukum Pidana Indonesia* (Semarang: Pustaka Magister, 2007).

44 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

45 Barda Nawawi Arief, *Perbandingan Hukum Pidana* (Semarang: Fakultas Hukum Universitas Diponegoro, 1984).

46 Hatrik, *Asas Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia (Strict Liability Dan Vicarious Liability)*.

47 Romli Atmasasmita, *Asas-Asas Perbandingan Hukum Pidana* (Jakarta: YLBHI, 1989).

48 Barda Nawawi Arief, *Masalah Pemidanaan Sehubungan Perkembangan Delik-Delik Khusus Dalam Masyarakat Modern. Kertas Kerja Pada Seminar Perkembangan Delik-Delik Khusus Dalam Masyarakat Yang Mengalami Modernisasi* (Bandung: Bina Cipta, 1982).

49 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

50 Ferdinandus Kila, I Nyoman Gede Sugiartha, and Ni Made Puspasutari Ujianti, "View of Pertanggungjawaban Pidana Tanpa Sifat Melawan Hukum Dalam Perspektif Pembaharuan Hukum Pidana," *Jurnal Konstruksi Hukum* 4, no. 1 (January 2023): 28–34, https://doi.org/10.22225/jkh.4.1.6027.28-34.

this issue. The recurring question challenges this possibility and centers on who should be held accountable if corporations are deemed capable of committing crimes.

The entire discourse on this theme culminates in a pivotal principle of criminal law: *societas delinquere non potest* which means the doctrine those corporations cannot commit crimes.[51] This doctrine was subsequently adopted by the criminal laws in many nations including The Netherlands, through the *Wetboek van Strafrecht* (WvS, 1888),[52] then adopted by Indonesia, via the Kitab Undang-Undang Hukum Pidana (KUHP). Nevertheless, the legal recognition of corporations as criminal subjects continued to evolve, even as many nations maintained opposing views. England, for instance, began considering this possibility through the landmark case *Birmingham & Gloucester Railway Co* (١٨٤٢). In this case, the court ruled that the railway company had failed to fulfill its statutory duty to repair a bridge, resulting in road damage.[53] Crucially, the judges held that the corporation could be found guilty in its own name. Also, punishment could be imposed for violating statutory orders, even without proof of individual fault.[54]

The United States (U.S.) formally recognized corporations as subjects of criminal liability as early as 1909 through the landmark Supreme Court decision *New York Central and Hudson River Rail Road Co. v. United States*.[55] In this case, the court imposed criminal liability on a corporation for acts committed by its *low-level employees* within their scope of authority specifically, illegal rebate payments to *The American Sugar Refining Company* in violation of the Elkins Act (٣٢ Stat. ٨٤٧)**,** which governed corporate liability for violations committed by their agents.[56] This case marked a pivotal turning point in corporate liability in the United States, expanding accountability from the civil realm into criminal law.[57]

The Netherlands ultimately recognized corporations as subjects of criminal law through the *Wet Op De Economische Delicten* in 1950.[58] Later, in 1976, the Dutch broadly institutionalized corporate criminal liability by revising Article 51 of the Wetboek van Strafrecht (WvS).[59] Theoretical Foundations is functional Perpetrator Theory. This shift was pioneered by Roling, a legal scholar who argued for expanding corporate criminal liability because: Most offenses could be committed not only by natural persons (*persona alamiah*) but also by corporations**,** given their societal functions. Corporations' structural role in modern economies necessitated their inclusion in criminal accountability frameworks.[60]

The increasing cases of corporate violations and the evolving discourse on corporate criminal liability have given rise to multiple theories to justify imposing criminal

51 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

52 Jan Remmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia*, ed. Marjanne Termorshuizen and Widati Wulandari (Gramedia Pustaka Utama, 2003).

53 Mompang L. Panggabean, Anugerah Rizki Akbari, and Aulia Ali Reza, "Anotasi Putusan Interpretasi Asimetris Pertanggungjawaban Pidana Korporasi Di Indonesia: Kajian Putusan Nomor 862 K/PID.SUS/2010," *Jurnal Dictum* , no. 12 (March 2017): 1–78, https://leip.or.id/wp-content/uploads/2017/05/Jurnal-Dictum-Edisi-12-Pemidanaan-Korporasi.pdf.

54 Panggabean, Rizki Akbari, and Reza.

55 Mark Pieth and Radha Ivory, eds., *Corporate Criminal Liability: Emergence, Convergence, and Risk*, Ius Gentiu (Dordrecht: Springer, 2011), https://doi.org/10.1007/978-94-007-0674-3.

56 Casebriefs, "New York Central & Hudson River Railroad Co. v. U.S | Case Brief for Law Students," accessed January 15, 2025, https://www.casebriefs.com/blog/law/criminal-law/criminal-law-keyed-to-kadish/group-criminality/new-york-central-hudson-river-railroad-co-v-u-s/.

57 Casebriefs.

58 Remmelink, *Hukum Pidana*.

59 Remmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia*.

60 Remmelink, *Hukum Pidana*.

responsibility on corporations across jurisdictions. These include: *functional perpetrator theory*,[61] *identification theory, vicarious liability,* and *strict liability theory*,[62] Below is an analysis of these doctrines and their relevance for adoption into Indonesian criminal law:

2.1.1 Identification theories

The identification theory (or *direct responsibility doctrine*) holds that a corporation can commit crimes directly through its closely associated agents who act on behalf of or in the name of the corporation. The prerequisite for imposing direct criminal liability on a corporation is that the agents' actions must remain within the scope of the corporation's business operations.[63]

Under the identification doctrine, determining whose actions can be attributed to a corporation depends on the relationship between the *state of mind* and the *human body*. In this framework the *state of mind* is represented by the 'directing mind', 'directing will', 'ego center', or 'control center' of the corporation. Dalam hal ini, *state of mind* biasa dinilai sebagai suatu *'directing mind'*, '*directing will', 'ego center'* atau '*control center'*. A corporation cannot be held criminally liable if an employee (the *human body*) commits a crime without instruction or authorization from this *directing mind* typically a director or high-ranking officer.[64] Furthermore, Yedidia Stern further clarifies those only corporate officials who hold key decision-making roles or occupy top-level management positions qualify as the *directing mind* of a corporation.[65]

This theory asserts that for a corporation to be held criminally liable, the individual who committed the act must first be identified. As also stated by Richard Card, who argues that: *"the acts and state of mind of the person are the acts and state of mind of the corporation"* (The actions or intent of the director are the actions and intent of the corporation).[66]

The identification theory assumes that a corporation can be held criminally liable if the criminal act is committed by an individual in a key position within the corporation such as a director, top manager, or owner and is carried out in their capacity as a corporate representative. This theory, known as the *direct responsibility doctrine*, is widely applied in *common law* countries like the UK, Canada, and Australia, attributing criminal liability to individuals considered the *"directing mind and will"* of the corporation. In the UK, this doctrine was reinforced through the case of *Tesco v Nattrass* (1972), while in Canada, it was established in *Canadian Dredge & Dock v The Queen* (1985). In Australia, although initially adopting this doctrine, a contemporary practice combines it with *vicarious* and *strict liability* approaches. Conversely, *civil law* systems, such as those in France and the Netherlands, do not emphasize the role of the *"directing mind"* as heavily. Instead, they focus on the *institutional structure and functioning* of the corporation.

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61 Van Bemmelen, *Hukum Pidana 1 (Hukum Pidana Material Bagian Umum)*.

62 Sutan Remy Sjahdeini, *Pertanggungjawaban Pidana Korporasi* (Jakarta: Grafiti Pers, 2006).

63 Sue Titus Reid, *Criminal Law*, 3rd ed. (New Jersey: Prentice Hall, 1995).

64 Yedidia Z. Stern, "Corporate Criminal Personal Liability: Who Is the Corporation?," *Journal of Corporation Law* 13, no. 1 (1987): 125–78, https://cris.biu.ac.il/en/publications/corporate-criminal-personal-liability-who-is-the-corporation.

65 Stern.

66 Muladi and Diah Sulistyani, *Muladi Dan Diah Sulistyani* (Bandung: Alumni, 2013).

In Indonesia, this doctrine is highly relevant, particularly in distinguishing liability between top management and ordinary employees. Although the *New Criminal Code (Articles 45–49)* regulates corporate criminal liability, it has not explicitly adopted the *identification doctrine*, resulting in a *normative and conceptual gap* in proving the link between an individual's intent and the corporation. Nevertheless, some court rulings appear to have applied this doctrine implicitly. Therefore, the implementation of this doctrine needs to be *formally affirmed through regulations or official guidelines* to provide *legal certainty* and prevent the *overcriminalization* of unauthorized parties.

2.1.2. The Theory of *Vicarios Liability*

Another approach is the *vicarious liability* theory, which has been widely adopted. This perspective stems from the *"respondeat superior"* doctrine (note: the meaning of this maxim is: *"a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agents" an employer is responsible in certain cases for the wrongful acts of their employees, and a principal for those of their agents*). Additionally, this theory is based on the *"employment principle"*, which holds that the employer is primarily liable for the actions of their workers/employees meaning *"the servant's act is the master's act in law."* It can also be grounded in the *"delegation principle"*, where **"***a guilty mind"* (mens rea) of an employee can be attributed to the employer if there is a **"***relevant delegation of powers and duties***"** under the law.[67] Furthermore, if there is a *causal link* between the employee's actions and the authority of management, the employee's violation can become the responsibility of senior officers.

If, in a given act, a superior is held responsible for the wrongdoing committed by a subordinate where such an act was carried out under the superior's orders—then it is hardly surprising that criminal liability is imposed on the superior.[68] Regarding this, Gobert argues that *"under the vicarious liability regime, the link between a corporation's accountability and an individual lies in the fact that, at the time of the offense, the perpetrator was still in an employment relationship with the corporation, and the act was committed in pursuit of the corporation's benefit."*[69]

The fundamental concept of the *vicarious liability* doctrine is based on the principle that an individual or corporation can be held liable for wrongful acts committed by another party acting on their behalf, such as employees, agents, or subcontractors. This liability does not require direct involvement or malicious *intent* on the part of the corporation, as long as the act was performed within the scope of employment and for the benefit of the company**.** This doctrine rests on the principle of *respondeat superior*, which states that an employer is responsible for wrongful acts committed by their subordinates in the course of employment.

In the context of criminal law, this doctrine serves as a significant approach to holding corporations accountable when they conceal liability behind formal organizational structures. The United States has been notably progressive in applying this doctrine. Through the landmark ruling in *New York Central & Hudson River Railroad Co. v. United States (1909)*, the U.S. Supreme Court established that a corporation can be criminally liable for acts committed by its employees in the company's interest even without direct orders from management. This approach has proven effective in addressing cases

67 Muladi and Sulistyani.

68 Harold J. Laski, "The Basis of Vicarious Liability," *The Yale Law Journal* 26, no. 2 (December 1916): 105, https://doi.org/10.2307/786314.

69 James Gobert, "In Corporate and White-Collar Crime," in *Corporate and White-Collar Crime*, ed. John Minkes and Leonard Minkes (London: Sage Publications Ltd, 2008), 61–80, https://doi.org/10.4135/9781446215048.n5.

involving corruption, environmental crimes, and labor violations, demonstrating its utility in piercing the corporate veil to impose criminal sanctions.

Meanwhile, Australia has developed a more comprehensive model by integrating *vicarious liability* with the *corporate culture theory*, as stipulated in the *Criminal Code Act 1995 (e.g.)*. Under this model, criminal liability is imposed not only for the acts of agents or employees but also for a corporation's systemic failure to foster a culture of legal compliance. Consequently, corporations are required to implement sound governance, effective internal oversight mechanisms, and adequate preventive measures. This approach holds particular relevance for Indonesia, given the complexity of corporate structures and delegation systems in large corporations or state-owned enterprises (SOEs). By adopting such a framework, Indonesia could advance fairer and more effective institutional criminal liability for systemic violations.

The UK applies *vicarious liability* in a limited manner, prioritizing the *identification doctrine* except in cases of *strict liability* offenses such as workplace safety violations (e.g., under the *Health and Safety at Work Act* 1974). Canada has adopted a hybrid approach that combines both *identification* and *vicarious liability* principles, where corporations may be held accountable for active involvement, negligence, or consent of senior officers (Sections 22.1 and 22.2 of the *Criminal Code* of Canada). The Netherlands employs a functional and structural approach under Article 51 of the *Wetboek van Strafrecht* (Dutch Criminal Code), which recognizes corporate liability for employee actions when conducted within the company's legal operations and meeting the *behoorlijkheidscriterium* (reasonableness standard).

In Indonesia, the doctrine of *vicarious liability* is explicitly regulated only in Article 37 of the new Criminal Code. This provision states that, "In cases determined by law, any person may: (a) be subjected to criminal punishment solely on the basis of the fulfillment of the elements of a criminal offense, without regard to the existence of fault; or (b) be held liable for a criminal offense committed by another person." Accordingly, the explicit incorporation of this doctrine in the revised Criminal Code is expected to extend liability to corporate management and even to the corporation itself for unlawful acts committed by subordinates. Comparative experiences from other jurisdictions may serve as valuable references in implementing *vicarious liability*, particularly in strengthening the realistic enforcement of corporate criminal liability.

2.1.3. The Theory of *Strict Liability*

The doctrine of *strict liability* (or liability without fault) represents one of the most significant principles in modern corporate criminal law. This legal concept establishes that an individual or legal entity (such as a corporation) can be held criminally liable even without proof of *mens rea* or criminal intent (*guilty mind*). The core emphasis of strict liability rests solely on the *actus reus*[70] (the criminal act itself), rather than the perpetrator's intention or negligence.

Thus, under the *strict liability* framework, the state is not required to prove that the perpetrator acted with intent, knowledge, or negligence. The prosecution only needs to establish that a legally prohibited act was committed. Consequently, *strict liability* is commonly applied to public welfare offenses, including Environmental crimes, food and drug offenses, and regulatory/administrative breaches.

The *strict liability* concept emerged as a solution to the structural challenges of proving *mensrea* incorporateoffenses.Giventhatcorporationsarelegalfictionsthatactthrough their organs or individual members, the traditional individualistic approach of establishing

70 Russell Heaton, *Criminal Law Textbook* (London: Oxford University Press, 2006).

malicious intent often proves ineffective. Thus, an *act-based liability approach* – requiring no proof of malicious intent serves as a strategic legal instrument for enforcing laws against collective entities like corporations.

The application of the *strict liability* doctrine serves a significant preventive and *deterrent* function, as it compels corporations to establish robust internal oversight and compliance systems. This stems from the fact that corporations can still be held criminally liable even when no individual culpability can be personally proven.

In England, *strict liability* is extensively applied to *regulatory offenses* such as workplace safety and public health violations. The ruling in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong [1985]* affirmed that strict liability is lawful for maintaining legal compliance standards, provided the statute does not expressly require *mens rea.*

In the United States, this concept has evolved within the context of public welfare statutes, encompassing food, drug, and environmental regulations. In *United States v. Dotterweich and United States v. Park*, the Supreme Court affirmed that corporate officers may be held liable without proof of personal fault, as they occupy strategic positions to prevent violations.

Australia explicitly regulates *strict liability* under Section 6.1 of the *Criminal Code Act 1995*, which permits the imposition of liability without *mens rea* while still allowing for defenses through *reasonable mistake of fact*. This approach reflects a balance between public protection interests and principles of justice.

The Netherlands, while not explicitly using the term strict liability, through Article 51 of the Wetboek van Strafrecht (Dutch Penal Code) still enables corporate criminal liability without requiring proof of specific individual fault. This provides flexibility in holding corporations accountable for unlawful acts they commit.

The complexity of corporate structures and the culture of collective responsibility make it difficult to prove *mens rea*, thereby making an approach that focuses on *actus reus* more effective. In the Indonesian context, the application of *strict liability* is particularly relevant, especially in cases of environmental pollution, banking crimes, and consumer violations. The complexity of corporate structures and collective responsibility culture make proving *mens rea* difficult, rendering an actus reus-focused approach more effective.

Therefore, the adoption of strict liability in Indonesia's legal system needs to be strengthened through sectoral regulations and requires progressive interpretation of Article 37 of the New Penal Code. This step will lawfully and proportionally expand the scope of corporate criminal liability while addressing the need for more responsive and effective law enforcement against corporate crimes that impact public interests.

2.1.4. *Corporate Culture Theory*

Australia has reformed corporate criminal liability by adopting the *Corporate Culture Model,* which emphasizes a corporation's internal values and culture. This model replaces traditional doctrines deemed obsolete as they focused solely on formal structures and lower-level officials. Through this approach, corporate criminal responsibility can be imposed more comprehensively based on organizational culture that encourages or tolerates violations.[71] *Corporate culture is defined as: An attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place.*[72]

71 Heaton.

72 Jennifer Hill, "Corporate Criminal Liability In Australia: An Evolving Corporate Governance Technique?," *Journal of Business Law* 1 (2003), https://doi.org/10.2139/ssrn.429220.

The *Company Culture Theory* (Budaya Perusahaan) emphasizes that a corporation's internal culture significantly influences behavior, decision-making, and potential legal violations. An ethical culture fosters legal compliance, while a permissive culture may lead to violations. This culture is shaped through daily interactions as well as corporate policies and leadership. The theory highlights that corporate criminal responsibility should not be limited to individuals but must comprehensively consider organizational culture. Australia has pioneered this approach, particularly following the 1992 *Criminal Law Officers Committee* report that criticized the limitations of traditional approaches. Under Australian law, corporate culture encompasses the prevailing attitudes, policies, practices, and courses of conduct within a corporation.

Maurice Punch demonstrates that organizational structure, reward systems, recruitment processes, and leadership style shape the behavior of organizational members. Consequently, corporations can be held criminally liable when their internal culture permits or encourages legal violations, without requiring proof of specific individual culpability.[73]

Generally, Canada, the United States, and the Netherlands also recognize the importance of organizational culture in corporate criminal liability. While Indonesia has not explicitly adopted this theory, its adoption would be highly relevant given that many corporate violations in Indonesia are systemic and driven by internal weaknesses. Integrating this theory into the reformulation of Indonesian criminal law could strengthen the effectiveness of corporate law enforcement while promoting the development of ethical and law-abiding corporate cultures.

2.1.5. *Management Failure Theory*

The Management Failure Model (Model Kelalaian Manajemen) conceptualizes criminal offenses in relation to management failure (as opposed to corporate failure), which implicitly views crimes as being committed by individuals within the corporation. Thus, corporate mens rea can be understood as corporate failure or the corporation's inability to utilize opportunities to address legal violations occurring within its organizational environment. This implies that corporate mens rea constitutes culpability approaching intent (dolus), since the corporation had knowledge and understanding of the criminal acts, yet demonstrated either incapacity or unwillingness to resolve the unlawful conduct within its corporate sphere.

In England, the *Management Failure Model* was initially proposed by *The Law Commission of England and Wales,* an independent law reform body, but was not adopted as positive law at the time as it was deemed insufficiently developed as a form of corporate criminal liability. The offense proposed by *The Law Commission* tersebut adalah is *an offense of corporate manslaughter which would be committed when there was a management failure by the corporation that caused a person's death and that failure Constitutes conduct "falling far below what can reasonably be expected of the corporation in the circumstances"* (Law Com. No 237,c14(4)).[74]

The *Management Failure Theory* is a concept explaining that a corporation's criminal or civil liability may arise from management's failure to effectively perform its duties, leading to legal violations or other damages. In this context, managerial failure relates not only to poor decision-making but also to management's inability or negligence to

73 Maurice Punch, "The Organizational Component in Corporate Crime," in *European Developments in Corporate Criminal Liability*, ed. James Gobert and Ana Maria Pascal (London: Routledge, 2011), https://doi.org/10.4324/9780203819203.

74 Hanafi, *Strict Liability Dan Vicarious Liability Dalam Hukum Pidana* (Yogyakarta: Lembaga Penelitian Universitas Islam Indonesia, 1997).

take necessary measures to prevent or address issues that may negatively impact the company, employees, consumers, or society at large.

The Management Failure Model emphasizes that managerial failures in directing, supervising, or organizing corporate activities can form the basis for corporate criminal liability. Ultimately, this model was adopted and significantly developed in England through the *Corporate Manslaughter* and *Corporate Homicide Act 2007* (CMCHA 2007), which enables corporate prosecution when deaths result from gross management failures, falling far below reasonable expectations.

Canada adopted a similar approach through *Bill C-45*, which mandates organizations to take reasonable steps to prevent crimes by employees. Failure to strengthen internal management functions is considered a form of organizational criminal negligence. Likewise, Australia regulates this matter under Section 12.3 of the *Criminal Code Act* 1995, emphasizing senior management's responsibility to foster a culture of legal compliance. Failure to establish such a culture is regarded as a *corporate fault*.

In Indonesia, this model is particularly relevant, especially in cases of industrial disasters, mass workplace accidents, environmental crimes, and consumer rights violations. Many violations are systemic in nature and stem from weaknesses in managerial oversight, rather than merely individual field-level errors. Indonesia currently lacks explicit regulations adopting *the Management Failure Model*, whether in the New Penal Code (KUHP) or sectoral laws such as the Environmental Protection Law, Labor Law, and Consumer Protection Law.

The implementation of this model in Indonesia would significantly enhance corporate management accountability, particularly for boards of directors and executives, to ensure good governance, a law-abiding culture, and effective internal control systems. Its relevance grows increasingly important in modern contexts where corporate structures have become complex, and liability should not be limited to direct perpetrators but must also encompass systemic management failures. Adopting this model aligns with the direction of national criminal law reform that demands a system more responsive to modern corporate realities, while simultaneously strengthening criminal law's deterrent effect against collective crimes based on structural negligence.

2.1.6. The Theory of *Res Ipsa Loquitur*

Beyond the aforementioned theories of criminal liability, criminal law also permits the application of the res ipsa loquitur doctrine to hold corporations accountable. In this context, Roeslan Saleh argues that concerning the criminal liability of legal entities or corporations, the fault principle is not absolute. The mere fact of harm suffered by victims may serve as a sufficient basis to demand criminal accountability from the perpetrator, by the *res ipsa loquitur*.[75]

The *res ipsa loquitur* doctrine, which in Latin means 'the facts speak for themselves,' is a legal principle stating that under certain circumstances, the mere occurrence of an incident or harm constitutes sufficient evidence of negligence. Therefore, this theory is relevant in negligence cases but does not apply to cases requiring proof of intent (mens rea). In this context, when a corporation commits an act causing harm, the objective facts of the incident may serve as the basis for establishing criminal liability, without the need to directly prove fault elements on the part of the management or corporate entity.

Res ipsa loquitur originates from the *common law* system and has evolved in judicial practice across several jurisdictions including England, the United States, and Australia.

75 Muladi and Priyatno, *Pertanggungjawaban Pidana Korporasi*.

In England, this doctrine is applied in civil law *(tort law),* particularly in negligence cases where victims lack access to technical information or evidence exclusively held by corporate entities. The principle enables a reversal of the burden of proof, requiring defendants to demonstrate the absence of negligence. In the United States, the doctrine has been applied more broadly, with some jurisdictions even extending its logic to influence corporate criminal liability, especially in cases involving industrial accidents, environmental violations, and systemic malpractice. In Australia, the principle serves to strengthen negligence claims against both corporations and public institutions, particularly in matters generating significant social impact.

In the context of corporate criminal liability, the *res ipsa loquitur* theory provides a conceptual framework that facilitates the evidentiary process for proving systemic negligence. This doctrine operates on the presumption that when incidents such as factory explosions, major environmental pollution, or building collapses occur, such events could not logically have happened without gross corporate negligence, particularly at the management level. Consequently, the objective facts of the incident alone suffice to establish criminal liability, without requiring specific identification of individual perpetrators.

Although Indonesian positive criminal law has not explicitly recognized this doctrine, its fundamental concept remains highly relevant for strengthening the framework of corporate criminal liability. This perspective aligns with progressive legal views asserting that proof of subjective fault is not always required in cases of legal entity liability. This means that harm resulting from collective action or negligence may serve as sufficient grounds for corporate prosecution as an entity, particularly when the harm could not reasonably have occurred without structural deficiencies, managerial negligence, or systemic tolerance.

Thus, the *res ipsa loquitur* doctrine holds strategic value for the development of Indonesia's corporate criminal liability system. It can serve as the foundation for expanding the understanding of corporate fault, particularly regarding intangible negligence rooted in failed management systems. Moving forward, this principle has the potential to be incorporated into the formulation of new criminal norms that emphasize not only individual culpability but also systemic failures reflecting *corporate fault* in a more objective and structural sense.

The relevance of this doctrine in Indonesia grows increasingly vital in addressing the complexity of modern corporate structures and the difficulty of tracing individual accountability within decentralized organizational systems. The application of *res ipsa loquitur* principles could strengthen victims' positions, facilitate evidentiary processes for law enforcement, and serve as a solution for uncovering corporate negligence in industrial accidents, environmental pollution, or other mass harm cases. This principle also aligns with the direction of Indonesian criminal law reform that increasingly emphasizes effectiveness and societal protection. In the long term, normative recognition of *res ipsa loquitur* could constitute a strategic step toward strengthening corporate criminal liability.

2.1.7. The Theory of *Functional Daderschaps*

The consideration of whether an individual's act can be attributed to a corporation is closely tied to functional offenses (*functionele delicten*). In this context, corporate conduct is viewed as actions that invariably occur within a system of human cooperation - specifically through established organizational structures. Consequently, any act by an organizational actor, insofar as it occurs within employment relations and organizational

functions, can be construed as part of the corporation's collective conduct. Under this view, actors operate within collective workflows that enable liability to extend to the corporate entity itself, resulting from the expanded *actieradius* (radius of action).[76]

The Functional Daderschap theory (functional liability theory) focuses on the concept that a corporation as a legal entity can be held criminally liable when offenses are committed by individuals within the organizational structure who hold functions or positions relevant to the violation. This reflects the view that corporations remain accountable even without evidence of explicit instructions or malicious intent from top leadership. Violations are considered to stem from failures in properly executing specific functions within the organizational framework. Consequently, criminal liability no longer depends on establishing individual willfulness, but rather on the perpetrator's functional position within the structured system.

A fundamental assumption of this theory is that corporations cannot commit wrongdoing in absolute isolation from human involvement. Therefore, to establish corporate criminal liability, it is necessary to identify the individual or group within the corporation that constitutes its *'directing mind and will'* those who steer the corporation's intentions and actions. In this regard, the *Functional Daderschap theory* recognizes several models of corporate criminal liability, namely: [77]

1. The executive-as-perpetrator and accountable executive model holds that legal entities cannot bear criminal liability, thus individual executives must assume responsibility.
2. The corporation-as-perpetrator but executive-as-accountable model acknowledges that corporations can commit criminal offenses, yet liability remains imposed on executives.
3. The corporation as both perpetrator and accountable party model asserts that corporations as independent entities can be directly penalized without necessarily imposing responsibility on their executives.

This final model - recognizing corporations as both perpetrators and directly liable subjects - has emerged as the dominant approach in many developed countries. In the Netherlands, the *Functionele Daderschap* (Functional Perpetrator) theory serves as the primary legal foundation for corporate criminal liability. In the *landmark Dutch Supreme Court* case *Drijfmest-arrest* (Liquid Manure Judgment, HR 21 October 2003, NJ 2006/328), the Court established that corporate attribution requires three cumulative conditions: (1) the act occurred within the corporation's operational scope; (2) it provided substantial benefit to the corporation; and (3) the corporation either exercised or should have exercised control over the conduct.

In Germany, a similar approach is found in administrative penal law (*Ordnungswidrigkeitengesetz*), although the German legal system does not yet fully recognize corporate criminal liability under pure criminal law (*Strafrecht*). Meanwhile, in England and Australia, the *identification doctrine* remains applicable but has evolved toward functional responsibility principles by acknowledging collective organizational liability, particularly in cases of corporate *manslaughter* and systemic violations involving management failures.

In the Indonesian context, the *Functional Daderschap* theory proves particularly relevant in addressing challenges of corporate criminal enforcement, which often faces difficulties in identifying specific individual perpetrators or policy-makers within

76 Remmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda Dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia*.

77 Abdurrakhman Alhakim and Eko Soponyono, "Kebijakan Pertanggungjawaban Pidana Korporasi Terhadap Pemberantasan Tindak Pidana Korupsi," *Jurnal Pembangunan Hukum Indonesia*, 2019, 322–36, https://doi.org/10.14710/jphi.v1i3.322-336.

corporations. In practice, many economic crimes, environmental offenses, or corruption cases are committed systematically and organizationally by corporations, yet proving them as resulting from any single individual's intent remains problematic. Therefore, recognizing functional liability allows criminal prosecution to be based sufficiently on the factual premise that violations were committed by someone exercising specific corporate functions on behalf of and for the benefit of the corporation.

Indonesia's New Penal Code (KUHP) has conceptually created space for recognizing corporate functional liability. However, this approach has not yet been formally and explicitly within the country's criminal law reform framework. Moving forward, by adopting the *Functional Daderschap* approach, Indonesia could significantly enhance the effectiveness of corporate criminal enforcement - particularly for cases involving collective negligence, systemic violations, or structured and complex *white-collar crimes*.

2.2. Corporate Criminal Liability in Indonesian Legislation

Corporate Criminal Liability (hereinafter referred to as CCL) is an essential component of modern criminal law, which is expected to respond to the development of contemporary forms of crime, particularly *white-collar crimes* and *corporate crimes*. In Indonesia, the regulation of corporate criminal liability has undergone uneven developments, both in conceptual, and normative-technical aspects, as well as in its enforcement practices. An analysis of several sectoral laws provides explicit explanations regarding the methods of attributing criminal liability to corporations. This irregularity reflects inconsistencies in criminal policy, which ultimately has the potential to hinder the effectiveness of law enforcement against corporate entities.

One key finding is that several relatively new laws still fail to explicitly adopt the concept of corporate criminal liability. For instance, Law No. 1 of 2013 on Microfinance Institutions and Law No. 31 of 2004 as amended by Law No. 45 of 2009 on Fisheries, although recognizing the definition of "any person" to include corporations, still do not position corporations as subjects that can be held directly criminally liable. In practice, criminal liability continues to be imposed on corporate executives rather than on the legal entity as a separate entity.

In legislation that already regulates corporate criminal liability, there are two approaches or models for attributing criminal responsibility to corporations, namely:

1. *Vicarious Liability* attributes the fault of an agent to the corporation regardless of their position, as stipulated in Article 37 letter b of Indonesia's New Penal Code (KUHP Baru), which states that *"any person may be held criminally liable for a criminal act committed by another person."* This model effectively reaches individual offenders but disregards the institutional will of the corporation.
2. *Strict Liability* is a more stringent form that does not allow any defense, even if the corporation has taken preventive measures, as stipulated in Article 37 letter a of the New Penal Code, which states that *"any person may be punished solely because the elements of a criminal act have been fulfilled, without considering the existence of fault."*. While it promotes absolute compliance, it may overlook *mens rea* (culpable mental state) and personal accountability.

The inconsistency in models of attributing corporate criminal liability reflects the absence of a solid and integrated national framework. Consequently, corporations may either evade legal accountability due to inadequate attribution rules or, conversely, face disproportionate liability due to the neglect of due diligence and precautionary

principles. This further undermines the effectiveness of criminal law as an instrument of *social engineering* to regulate unlawful business practices.

When compared to other jurisdictions, Indonesia lags behind in developing a consistent framework for corporate criminal liability. For instance: The Netherlands has recognized the principle of *functioneel daderschap* (functional perpetration) since ١٩٧٦, enabling corporate prosecution based on an individual›s functional role within the organizational structure. In the United Kingdom developed the identification doctrine through jurisprudence, notably established in *Tesco Supermarkets Ltd v Nattrass* (١٩٧٢), which determines liability through the «directing mind and will» of the corporation. While in Australia and Canada, they have adopted more progressive approaches incorporating *Organizational fault theory*, *corporate culture assessment* as substantive bases for criminal liability.

In the Indonesian context, the explicit recognition of corporate criminal liability in the New Penal Code (Articles 45-49) represents a significant step forward. However, its impact on sectoral regulations remains severely limited without comprehensive regulatory harmonization. Therefore, there is a critical need for a national criminal law policy that unifies the principles, standards, and models of corporate liability ensuring effective and equitable implementation. The following presents a classification of corporate criminal liability models as proposed by the author:

2.2.1. The Model of *Corporate Criminal Liability* (CCL) 1: *Vicarious Liability-Based Model*

CCL Model 1 bases corporate criminal liability on the principle of *vicarious liability*, which attributes fault from individuals to corporations. This model is implicitly adopted in the following statutes: Article 20 (2) of Law No. 31/1999 as amended by Law No. 20/2001 on Eradication of Corruption Crimes; Article 108(2) of Law No. 10/1995 as amended by Law No. 17/2006 on Customs; Article 61(2) of Law No. 11/1995 as amended by Law No. 39/2007 on Excise; and Article 17(2) of Law No. 15/2003 on Eradication of Terrorism Crimes.

The normative formulation in this model typically employs the following phrasing: *'A criminal offense is committed by or on behalf of a corporation when perpetrated by individuals acting within the corporate framework, whether individually or collectively.* This model adopts the traditional Anglo-Saxon criminal law perspective that individual fault (*agents*) occurring within the corporate work context or authorization may be transferred to the legal entity. Theoretically, this model originates from an analogy between the principal-agent relationship (*employer-employee*) in civil law (*respondeat superior*), and the corporation-agent relationship in criminal law.

This model tends to be *over-inclusive*, as it does not require proof of direct benefit accruing to the corporation from the perpetrator's actions. This creates potential inequities in application, since corporations may be held criminally liable even when offenses are committed by corporate personnel for personal gain. The model lacks critical indicators such as *intent to benefit* the corporation or identification of the perpetrator's position within the corporate control structure.

From a criminal law policy perspective, this model demonstrates flexibility in corporate law enforcement, yet risks neglecting the principle of individualization of criminal culpability. Consequently, while effective in combating corporate crime, the model requires complementary mechanisms establishing either demonstrable benefit to the corporation, or stronger functional linkages between the act and corporate operations.

2.2.2. Corporate Criminal Liability Model (CCL) 2: *Interest-Representation Model*

The CCL Model 2 is implicitly reflected in the following statutes: Article 13(1) of Law No. 21/2007 on the Eradication of Human Trafficking Crimes; Article 441 of Law No. 1/2009 on Aviation; and Article 333 of Law No. 17/2008 on Shipping. This model's normative formulation incorporates the qualifying phrase that acts must be committed; '*for and/or on behalf of the corporation'* (untuk dan/atau atas nama korporasi), or *for the corporation's benefit'* (untuk kepentingan korporasi).

Compared to CCL Model 1, this model significantly strengthens the connection between individual actors and corporate liability. The qualifying elements of 'on behalf of' and 'for the benefit of' the corporation serve to narrow the scope of liability exclusively to actions genuinely tied to institutional functions and corporate objectives. This model reflects a functional attribution approach, where liability determination depends not merely on the perpetrator's formal position but equally on their actual organizational role and the intended institutional benefit. Such construction represents an important doctrinal shift toward more precise institutional accountability in corporate criminal liability regimes.

Under English law (as exemplified in Tesco Supermarkets Ltd v Nattrass), corporate liability hinges critically on whether the perpetrator constitutes the corporation's 'directing mind and will.' CCL Model 2 reflects a similar spirit by clarifying identification criteria for actors who may represent corporate will. However, the application of cumulative-alternative liability to both 'the corporation and/or its executives' creates normative tension. This provision risks blurring the boundary between institutional fault and personal culpability. Within a proper corporate criminal liability framework, autonomous evidentiary standards should be required to demonstrate each actor's distinct role, thereby preventing oversimplification in the attribution of criminal responsibility.

2.2.3. Corporate Criminal Liability Model (CCL) 3: *Identification Doctrine Model*

The CCL Model 3 finds implicit application in statutory provisions such as Article 6(2) of Law No. 8/2010 on Money Laundering Crimes and Article 81 of Law No. 40/2014 concerning Insurance. This model establishes specific qualifying criteria requiring that offenses be committed or ordered by corporate controlling personnel, executed in furtherance of corporate objectives, performed within the perpetrator's authorized duties and functions, and ultimately designed to benefit the corporation. These cumulative elements create a refined framework for attributing criminal liability that focuses on both institutional purpose and operational hierarchy

CCL Model 3 is grounded in the *identification doctrine* originating from English legal systems. At its core, this model treats the acts and intentions of individuals who exercise *structural and functional control* over a corporation as equivalent to the corporation›s own acts and intent. This approach addresses the overbreadth limitations of traditional *vicarious liability* by establishing a more precise and accountable normative framework through three key elements: (١) restricting liability solely to *controlling personnel* whose authority reflects corporate policy-making; (٢) requiring proof of both *corporate intent* (through the actor›s state of mind) and *scope of employment* (within authorized functions); and (٣) imposing a *corporate benefit requirement* to ensure liability arises only from acts substantively aligned with organizational objectives.

CCL Model 3 aligns with the *directing mind and will* doctrine in English law and the *managerial responsibility model* in Canadian and Australian jurisprudence. These jurisdictions similarly emphasize the need for a substantive connection between the actor and the corporation, coupled with evidence of intent to derive profit or benefit for the corporate entity. As the most progressive framework for corporate criminal liability, CCL Model ٣

achieves a critical balance between enforcement efficacy and safeguards for corporate rights and executive protections. By precisely delineating which actors qualify as *institutional representatives*, the model provides a clear normative blueprint for future reforms both in Indonesia's Penal Code (KUHP) and sectoral legislation ensuring liability attaches only to conduct that reflects corporate policy-level agency while filtering out peripheral or rogue actions.

These three models reflect Indonesia's ongoing effort to adapt corporate criminal liability doctrines primarily derived from *Anglo-Saxon common law traditions* into its civil law-based penal system. However, none have yet been formally institutionalized as the standard framework within Indonesian criminal law. Consequently, their application remains fragmented and systemically inconsistent, as they are only implicitly operationalized through ad hoc formulations in various sectoral regulations, lacking unified doctrinal coherence or consistent implementation standards.

Corporate criminal liability models have been implicitly integrated into Indonesia's positive law through provisions scattered across various sectoral regulations. The three discussed models reflect divergent approaches to addressing corporate fault ranging from the broad attribution of CCL Model 1 (vicarious liability) to the precise, accountability driven framework of CCL Model 3 (functional control-based liability). However, the absence of explicit adoption within a unified national criminal law system renders these models partial and non-systemic, requiring further codification through definitive positive law to establish a primary legal standard for attributing corporate criminal responsibility.

3. CONCLUSION

Corporations are now recognized as subjects of criminal liability in various legal systems, including Indonesia's legal system through the new Criminal Code (KUHP), marking a significant development in addressing the complexities of modern corporate crime. Although the new KUHP contains provisions (particularly Articles 37 and 45-49) governing corporate criminal liability, it suffers from normative weaknesses, such as the lack of explicit limitations on the application of strict liability and vicarious liability under Article 37, which could potentially lead to legal uncertainty. Alternative theories that can be employed to impose criminal liability on corporations include: Identification Theory, Corporate Culture Model, Management Failure Model, Res Ipsa Loquitur, and Functional Daderschap, each offering distinct approaches to establishing corporate culpability while presenting their own evidentiary challenges and advantages in the context of contemporary criminal law**.** Each theory presents distinct advantages and limitations in terms of fault attribution, structural relevance, and applicability within modern criminal law frameworks. While the principle of culpability (asas culpability) remains foundational, emerging doctrines such as strict and vicarious liability have gained acceptance as justifiable exceptions in corporate criminal liability. However, Indonesia's sectoral regulations remain inconsistently harmonized and inadequately operationalized in governing corporate liability, creating significant enforcement challenges particularly in cases involving environmental offenses, banking violations, and corporate administrative breaches. Consequently, future reforms to Indonesia's criminal law framework must establish clear and comprehensive liability models, incorporating relevant concepts from comparative jurisdictions while ensuring systematic coherence between statutory provisions and practical enforcement mechanisms.

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