

## CRIMINAL LIABILITY TOWARDS CORPORATIONS ACTING AS NARCOTICS TRAFFICKERS IN INDONESIA

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**Abstract:** *Corporate crime is often referred to as a crime committed by a legal entity or organization. Corporate involvement in criminal activity can enable criminal access to methods of production, storage, distribution, or trading. In the context of narcotics crime, corporations could play a significant role in the trafficking of narcotics through a variety of modus operandi including production, distribution, and sales to the general public. Therefore, corporation as a legal subject can be held accountable. This study uses a statutory approach and is normative (doctrinal). It solely employs secondary data and is processed qualitatively to describe facts, documents, information, and other data related to criminal liability for corporations as perpetrators of narcotics trafficking in Indonesia. The embodiment of criminal liability towards corporations as perpetrators of narcotics trafficking is regulated in several provisions, including Article 130 of Law No. 35 of 2009 concerning Narcotics as well as Articles 60 to 64 and Article 70 of Law No. 5 of 1997 concerning Psychotropics. The crime of narcotics distribution through corporation involves businesses or legal entities such as hospitals, health clinics, pharmacies and others. Revocation of business licenses can be used as punishment for those companies, while the management may also face further legal repercussions.*

**Keywords:** *Liability, Corporations, Perpetrators, Trafficking, Narcotics, Indonesia.*

## 1. INTRODUCTION

The distribution of narcotics has spread across nations, including wealthy and developing ones as well as the impoverished. It has also affected different societal strata in both the metropolitan regions and rural communities. The classification of narcotics trafficking as an organized, systematic, and pervasive crime is thus appropriate (United Nations Office on Drugs and Crime (UNODC), 2017). According to Morgan (2013), narcotics crime is the 20th leading global cause of death for people. The UNODC estimates that around 200 million people worldwide have used these substances illegally (Jenner, 2011). According to Armaghani (2018), the UNODC claims that narcotics enter Indonesia through syndicates from West Africa, Europe, India, Iran, China and Eastern European, and Western European countries such as Poland, the Netherlands, China, and Myanmar (Sekretariat DPR RI, 2017).

In their report, UNODC (2013) stated that most of the drug abuse in Indonesia comes from *Amphetamine-type stimulants (ATS)* such as *crystalline methamphetamine* or *methamphetamine* and ecstasy. The ATS circulating in Indonesia originally comes from Iran, Germany, the Netherlands, Belgium, and China through Singapore and Malaysia as transit countries before being shipped to Indonesia via the cities of Medan and Jakarta (United Nations Office on Drugs and Crime, 2017).

In a surprising attempt in 2018, law enforcement officials apprehended more than 1.6 tons of drug-carrying vessels in the Riau Islands region. As of March 2018, the DJBC had succeeded in tackling 80 cases of narcotics smuggling with a total of 2,876 tons of drugs seized, working together with the National Police, TNI, and BNN (Sakti, 2018). These illicit goods are all transported by land, sea, and air. However, as many as 80% of the narcotics enter Indonesia via the sea route (Sakti, 2018).

International organizations such as the United Nations via its *United Nations Office on Drugs and Crime* (UNODC) made a claim that between 3.7 million and 4.7 million people in Indonesia are narcotic users. When broken down by the type of drugs consumed, it was found that 1.2 million use *crystalline methamphetamine*, while approximately 950,000 of them use ecstasy. In the meantime, there are about 110,000 heroin addicts and 2.8 million cannabis users. It was also stated that narcotics abuse throughout 2014 was estimated to affect 33.8 million people. A research conducted in 2015 by the National Narcotics Agency in collaboration with the University of Indonesia Health Research Center also estimated that narcotics users had reached 5.8 million people (Primantari, 2013).

Although the number of drug abuse cases in Indonesia is yet to be redefined, it is assumed that they have been on the rise in recent years. The actual number is even assumed to portray the "iceberg" phenomenon, where the actual number of cases is much higher than reported or collected. According to the National Narcotics Agency (BNN)

data, there were 807 drug cases in 2016 with as many as 1,238 people have been named suspects, including 1,217 Indonesian citizens and 21 foreign citizens (Saputra, 2017). However, the number of incidents rose significantly to 46,537 cases in 2017 (Adhitia, 2017).

According to its qualifications, corporate crime is classified as a white collar crime with a transnational dimension. This combination allows for a wide scope of crime and the possibility of significant impact on losses, since victims of corporate crimes also include members of society at large, people who buy the products they make, rival corporations, and unprotected workers. When corporate crime results in damage to public finances or the national economy, even the state might become the victim. In order to safeguard its economic policies, the government should consider to refine the regulations governing business activities both through establishment of new regulations and implementation of stricter enforcement, especially those related to corporate legal responsibility for criminal offenders.

The concept of criminal liability towards corporations in the Indonesian criminal law system is relatively new, even the Criminal Code (KUHP) has not explicitly stipulated corporate responsibility as perpetrators of crimes. This concept has only been recently introduced and regulated in special laws outside the KUHP. In practice, however, law enforcement views corporations differently. In the context of narcotics distribution, corporations can take on the roles of producers, collectors, and distributors to the general public. The role of corporations in the distribution of narcotics has the potential to be very substantial considering that these corporations operate as centers for health services such as hospitals, health clinics, pharmacies, drug depots, and other business entities.

However, given that corporations are legal entities rather than humans as legal subjects, it is not as straightforward to hold them accountable for being perpetrators of crimes from a theoretical perspective. This complication stems from the existence of the 'no liability without fault' principle. Faults are *mens rea*, or the heart's attitude, which only naturally exists in people.

*Mens rea* is a difficult element to establish from a corporation that is alleged to have committed a crime because corporations can only act through the board of directors' orders. Corporations can be considered to have committed a crime based on the actions committed by the persons who sit in the management. The juridical consideration that can be used to decide that a corporation has committed a crime is if the crime was committed by the management or the employees while they were still acting within the bounds of their authorities and for the benefit of the corporation.

## 2. METHODS

This research is of normative, legalistic, or doctrinal nature. Rowe claims that normative research seeks to find, explain, examine, analyze, and systematically present various types of facts, principles, concepts, theories, and specific laws to discover new knowledge and ideas that can be proposed as a change or improvement. This study looks at every document, source, fact, theory, doctrine, and law pertaining to businesses engaging in narcotics trafficking in Indonesia (Rowe, 2009).

According to Mandi Zahraa, normative research is a fresh, diligent, systematic inquiry or investigation of the factual data and/or theoretical concepts of the rules and principles of a particular legal issue in an attempt to discover, revise, or improve the relevant concepts, theories, principles and application (McCrudden, 2006). In addition, normative research can also be carried out on issues involving laws that overlap, laws that are in conflict with one another, and laws that are unclear or ambiguous.

According to Diantha, legalistic research can take a variety of approaches in the form of legal approach (*statute approach*), legal history (*historical approach*), case analysis (*case approach*), and comparison of law (*comparative approach*) (Rowe, 2009). However, this study only applies the statutory approach with the objective to analyze concepts and laws relating to the regulation of drug crimes, particularly those relating to corporate regulations as actors in Indonesian narcotics trafficking.

## 3. RESULTS AND DISCUSSION

### 3.1. Corporations as The Subject of Law

Corporate crime is sometimes referred to as organizational crime. The word "korporasi" (Indonesian) is etymologically translated from *corporatie* (Dutch), *corporation* (English), and *corporation* (German), which means a body or combine in one body, or in other words a body that is made into an entity, a body that is obtained by human actions as opposed to humanity that occur naturally. The term "corporation" is frequently used among criminal law experts to refer to what is common in other laws, particularly in the field of civil law, as a legal entity. In Dutch, it is referred to as *recht persoon* or as it is referred to in English, a legal entity or corporation (Budianto, 2012). In current development, however, corporations do not necessarily have to only be interpreted as legal entities, but also more broadly as an organized collection of people or assets, whether they are legal entities or not. Thus, besides being recognized as a company, a cooperative, or a foundation, it can also be a firm, a limited liability company without legal entity rights and partnerships, associations, and others (Muladi, 1995).

In the beginning, it was incredibly challenging to convict businesses of crimes. Due to the issue of physical form, it was difficult to identify the forms and behaviors of companies that were at fault in the concept of criminal law. As stated by G William,

corporations have *"no soul to be damned, no body to be kicked"* and corporations cannot be shunned because *"they have no soul"* (QC, 2008). This is a reflection of the adage in criminal law, namely *the deed does not make a man guilty unless his mind is guilty (Actus non facit reum, nisi mens sit rea)* (QC, 2008). However, this adage is gradually becoming irrelevant because courts in various countries have started to incorporate the human element into corporate arrangements which benefit the corporations through the conduct of human intermediaries. Therefore, it can be ascertained that if the corporation can benefit from the expertise of their human element, they will also be held accountable for the costs associated with the crimes that they commit on the grounds that they not only act for the company (vicarious liability), but they act as a company.

The inclusion of corporations as legal objects in criminal law are inextricably linked with social modernization. According to Satjipto Rahardjo, it is important to acknowledge that as the society becomes more modern, the more complex the social, economic and political systems contained therein. Then the demand for a formal life control system will become even greater. It is preferable to have arrangements that are more structured, explicit, and precise since social life cannot be allowed to continue under a lax set of rules. These methods may satisfy the needs of a society that is always evolving, but the issues they create are much more significant.

Only when corporations are enabled as a legal subject that they can be held criminally responsible. In the aspect of criminal law, the Criminal Code (KUHP) does not implicitly specify or assertively mention that businesses are criminally liable for crimes they commit. However, the legal justification is governed by particular laws or regulations outside of the Criminal Code, including but not limited to:

- a. Article 15 of Emergency Law Number 7 of 1955 about Investigation, Prosecution and Trial of Economic Crimes;
- b. Article 20 of Law Number 31 of 1999 Jo Number 20 of 2001 about the Eradication of Corruption Crimes;
- c. Articles 6,7 and 9 of Law Number 18 of 2010 about the Crime of Money Laundering;
- d. Article 13-16 of Law Number 21 of 2007 about the Eradication of the Human Trafficking Crimes;
- e. Article 70 of Law Number 5 of 1997 concerning Psychotropics;
- f. Article 130 Law Number 35 of 2009 concerning Narcotics;
- g. Articles 17 and 18 of Law Number 15 of 2003 concerning Terrorism;
- h. Law Number 40 of 2007 concerning Limited Liability Companies.

The imposition of punishment on those who commit the crimes covered by the aforementioned regulation is done so on the basis of guilt (liability based on fault). This

is in accordance with the *nulla poena sine culpa* principle, which means that there is no crime without guilt. Applying this condition to corporations then becomes challenging. A corporation is considered to have no soul because it is a legal entity, so it cannot make mistakes. The *liability based on fault* doctrine cannot be applied to corporations as perpetrators. Nonetheless, it is theoretically possible to have deviations from the principle of error by using the doctrines of strict liability and vicarious liability. The consequence is that corporations as perpetrators of criminal acts are difficult to be punished.

The court decision by the Tangerang District Court Number 30/Pid.B/1990/PN/TNG dated 1 August 1990 concerning poisoned biscuits is an example of how corporations were not being convicted as perpetrators of criminal acts. The director of CV Gabisco was charged guilty as an individual and in his capacity as a Director. Meanwhile, in the Decision of the Supreme Court of the Republic of Indonesia Number 2239K/Pid.Sus/2012 concerning the case of PT. Asian Agri Group (AAG), the company was sentenced to a crime even though the Public Prosecutor did not prosecute the corporation. In both decisions, the perpetrators of criminal acts were directed towards individuals instead of legal entities or corporations.

### **3.2. Corporations as The Narcotics Traffickers in Indonesia**

Indonesian Law Number 35 of 2009 concerning Narcotics states that the use of narcotics is only permitted for health purposes and/or for the advancement of science and technology. According to this clause, narcotics are objects that may be used or exploited so long as the use or utilization is in the interests of advancing science and technology or health services, allowing the government to oversee or control the distribution of narcotics (Kiaking, 2017).

In general, the aforementioned law regulates several aspects, including the production, distribution, and consumption of the drugs. There are 38 articles in this law that regulate and ensnare perpetrators with various penalties based on their roles and criminal acts. For instance, Article 111 of this law governs that:

- (1) Any individual who cultivates, maintains, owns, stores, controls, or distributes Group I Narcotics in its plants form without authorization or in violation of the law faces between 4 (four) to 12 (twelve) years of imprisonment as well as a fine of at least IDR800,000,000 (eight hundred million rupiahs) and at most Rp. 8,000,000,000 (eight billion rupiahs);
- (2) In the event that the act of cultivating, maintaining, possessing, storing, controlling, or distributing Group I Narcotics in its plants form as referred to in paragraph (1) weighs more than 1 (one) kilogram or exceeds 5 (five) trees, the offender shall be punished with a life sentence or imprisonment between 5 (five)

to 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third) of it.

One class of narcotics that is widely circulated and consumed by the public is cannabis (marijuana). The cannabis plants grow erratically like grass and belong to the Group I Narcotics. They are easy to grow and thrive in tropical areas like Indonesia, and several areas in Sumatra have been known to produce the high quality ones. The locals also season their food with cannabis (Kiaking, 2017). Cannabis is now being grown in yards, plantations, flower pots, apartments, and other locations due to the way the cannabis plant is being misused in relation to the provisions of this Article.

The criminal acts according to Article 114 of Law Number 35 of 2009 states the following:

- (1) Any individual who sells, offers to sell, buys, receives, acts as an intermediary, exchanges, or surrenders Group I Narcotics without authorization or in violation of the law faces a life sentence or an imprisonment of between 5 (five) to 20 (twenty) years as well as a fine of at least IDR1,000,000,000 (one billion rupiahs) and at most Rp. 10,000,000,000 (ten billion rupiahs);
- (2) In the event that the act of selling, offering to sell, buying, receiving, acting as an intermediary, exchanging, or surrendering Group I Narcotics as referred to in paragraph (1) weighs more than 1 (one) kilogram or exceeds 5 (five) trees in its plant form, or more than 5 (five) grams in its non-plant form, the offender shall be punished with death sentence, a life sentence, or imprisonment between 6 (six) to 20 (twenty) years and a maximum fine as referred to in paragraph (1) plus 1/3 (one third) of it.

The criminal provisions mentioned in Article 114 are more targeted at individuals who abuse narcotics for commercial gain, such as when they sell, offer, trade, or otherwise deal in Group I Narcotics. Criminal threats are established against these abusers in Article 127 of Law No. 35 of 2009, as follows:

- (1) Every abuser of:
  1. Group I Narcotics for oneself is punishable by a maximum of 4 (four) years in prison;
  2. Group II Narcotics for oneself is punishable by a maximum of 2 (two) years in prison;
  3. Group III Narcotics for oneself is punishable by a maximum of 1 (one) year in prison.
- (2) When making a decision for a case mentioned in paragraph (1), The Judge must consider the provisions referred to in Articles 54, 55, and 103.
- (3) In the event that the abuser mentioned in paragraph (1) is found guilty of abusing the narcotics or becoming a victim of the abuse, they must go through both medical and social rehabilitation.

There exist several roles in narcotics abuse that contribute to the offense of the crime. For example, there are parties that procure and distribute, and there are also those who are only users or connoisseurs of these illicit goods. However, the definition of "narcotics/ psychotropics dealers" in the Narcotics and Psychotropics Law is not explicitly clear. The simplified definition would be the people who carry out activities of distribution and delivery of narcotics/ psychotropics. The notion of these "dealers" can also broadly refer to those who sell, buy to resell, transport, store, control, provide, or trade the goods.

The subject of "dealers" in Indonesian law is regulated in the Narcotics Law Articles 111 to 125, as well as in the Psychotropics Law Article 59 paragraph (1) points a and c, Article 60 paragraph (1) points b and c, paragraph (2), (3), (4), (5), Article 61, and Article 63 paragraph (1) point a. However, the formulation of criminal sanctions for "dealers" and "users" in this study is substantially emphasized on the violations of the Narcotics Law and the Psychotropic Law. Cherif Bossouni stated that there are 3 types of crime prevention policies, namely formulative/legislative policies, applicative/judicial policies and administrative/executional policies. Formulative policies are those that are strategically designed to prevent crime so that any mistakes in making legislative policies will affect judicial policies (Bossouni, 1978).

Furthermore, the term "users" of narcotics refers to people who intentionally consume substances or drugs derived from plants, whether synthetic or semi-synthetic, which can cause a change in the user's consciousness, loss of taste, a reduction or elimination of pain, and dependency or addiction. All types of these narcotics are differentiated into several categories as stated in the Narcotics/Psychotropics Law.

The subject of "users" in Indonesian law is regulated in the Narcotics Law Articles 116, 121, 126, 127, 128, and 134, as well as in the Psychotropics Law Articles 36 to 41, Article 59 paragraph (1) points a and b, and Article 62. The juridical implications of Article 4 point d, Article 54, and Article 127 of the Narcotics Law is used to determine whether the user is a victim or the abuser, which is the narcotics users as perpetrators of criminal acts and at the same time as victims.

As for "drug dealers," they are classified as perpetrators (daders) in legal terminology, whereas "users" can be classified as "perpetrators" and/or "victims." As victims, "users" of drugs are citizens that need to be protected and respected for their rights, both in the legal process and in the health and social aspects.

The Indonesian Law Number 35 of 2009 also covers regulations regarding corporations as perpetrators of drug trafficking by involving or employing businesses or legal entities to abuse narcotics. The involvement of corporations as perpetrators of narcotics distribution can be observed in Article 130 of the Narcotics Law which stipulates that:

- (1) In the case of criminal acts referred to in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article

121, Article 122, Article 123, Article 124, Article 125, Article 126, and Article 129 conducted by the corporation, other than imprisonment and fines against its leaders, the corporation may be charged in the form of fines by a weighting of 3 (three) times as referred to in the Articles.

- (2) In addition to criminal fines as referred to in paragraph (1), the corporation may be subject to additional penalties in the form of revocation of business licenses and/or revocation of legal status.

Corporate involvement in narcotics trafficking and abuse can be the base for sentencing towards the perpetrators, including but not limited to:

1. Article 70 explains that in the case of criminal acts referred to in Articles 60, 61, 62, 63, and 64 conducted by the corporation, then other than being prosecuted, the corporation is subject to paying fines as much as twice the fines applicable for the crime and may be subject to additional penalties in the form of revocation of business licenses.
2. Article 71 states that whoever conspires or agrees to commit, carry out, assist, order, participate in, recommend, or organize a crime as referred to in Articles 60, 61, 62, or Article 63, will be punished as conspiracy, plus one-third of the sentence applicable to that crime.
3. Article 72 states that if the psychotropic crime is committed through a child under 18 (eighteen) years old and is not married or through a person under guardianship, or if it is committed within two years since the end of him serving the whole or part of the prison sentence, the charge is added by one-third of the criminal offense applicable to the crime.

Based on the aforementioned provisions, it follows logically that different penalties are imposed for "users" and "dealers" under the normative formulation of the Narcotics/ Psychotropics Law. It is perfectly reasonable and logical to impose more severe penalties on criminals who operate as narcotic "dealers" commensurate with the level of their actions. According to the Narcotics Law, the "dealers" are subject to imprisonment, fine payment, and up to the maximum penalty which is the death penalty.

Corporations engaged in the abuse and trafficking of narcotics face harsher penalties. A fine of between IDR1,000,000 (one million rupiahs) and IDR10,000,000,000 (ten billion rupiahs) may be imposed on someone who distributes and abuses drugs. However, corporations that distribute narcotics illegally may face fines that are up to 3 (three) times as much as those imposed on individuals.

In the aspect of criminal law policy, secondary penalties is regulated in detail in Law Number 35 of 2009 concerning Narcotics, as follows (Susanti, 2018):

1. Sanctions implemented are in the form of criminal sanctions and action sanctions (*maatregel*);

2. Criminal sanctions include primary punishments in the form of the death penalty, life imprisonment, imprisonment with a set term, confinement, fines, and additional punishment in the form of revocation of certain rights to corporations i.e. revocation of business licenses and/or revocation of legal status.
3. Action sanctions (*maatregel*) include medical and social rehabilitation, as well as deportation and a ban on re-entering Indonesia for foreign nationals who commit crimes, after serving criminal sanctions.

On the other hand, dismantling the practice of psychotropics trafficking is challenging even though Law No. 5 of 1997 specifically regulates criminal conspiracy. There are several modus operandi found where dealers (business owners such as pharmacies, drug depots and clinics, or other types of businesses) and consumers cooperate so that the drugs classified as psychotropic can easily and freely be sold to the public. Article 71 of the Psychotropics Law stipulates that this conspiracy is limited to conspiring or agreeing to commit, assist, order, co-perpetrate, encourage, or organize a criminal act as referred to in Article 60, Article 61, Article 62, or Article 63.

According to the Psychotropics Law Article 72, a conspiracy involving a child who is not yet an adult is still punishable with the same severity as one involving an adult; specifically, the penalty is increased by one third of the sentence that is applicable to Articles 60 to 63. In addition to stipulating the principal punishment, the Psychotropics Law also regulates additional penalties. However, not all perpetrators in the field of psychotropics can be subject to additional penalties, because they are only aimed at corporations and foreigners.

Corporations that commit these crimes face not only the primary penalty, which is a fine of twice the amount based on Articles 60, 61, 62, 63, and 64, but also additional punishment based on Article 70, which is the revocation of business licenses and other legal actions against the company's management (Sasangka, 2003). Therefore, in addition to the corporation itself, individuals acting as administrators of business entities may also be subject to criminal liability.

#### 4. CONCLUSIONS

Indonesian Law No. 35 of 2009 about Narcotics contains provisions that control both the illegal production and distribution of narcotics as well as the abuse. The illegal narcotics production, distribution, and circulation can also be done by corporations ("corporate crime"), in addition to being carried out by individuals. Corporate crime is defined as a crime that involves or makes use of a company, such as a Limited Liability Company (PT), to abuse narcotics. Smaller businesses like pharmacies, hospitals, and health clinics may also be involved in the distribution of narcotics through corporations. Corporations that engage in narcotics trafficking may be subject to prosecution under

Article 130 of Law Number 35 of 2009 concerning Narcotics and Articles 60 to 64 and Article 70 of Law Number 5 of 1997 about Psychotropics.

Corporations that distribute illegal narcotics can be sentenced using a variety of weighted criteria or types of punishment. In addition to the primary penalty, which is a fine of twice the amount under Articles 60, 61, 62, 63, and 64 of Law No. 5 of 1997 Concerning Psychotropics, corporations may also face additional penalties under Article 70, including the suspension of their license to conduct business and other legal actions against the management. Therefore, in addition to the corporation itself, individuals acting as administrators of business entities may also be subject to criminal liability.

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