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Corporate Accountability In Crime of Licensing By Law Number 10 of 1998 On Banking

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Abstract: Corporate development as development actors increasingly play an important role in people's lives. Therefore doubts in the past to place the corporation as a subject of criminal law to commit criminal acts and accountable in criminal law, has now shifted. The doctrine of *non potest delinquere university* (the corporation may commit a criminal offense) began to be abandoned by accepting corporate responsibility as a maker of criminal offenses in addition to the natural man. Determination of corporate responsibility as a maker of criminal offenses in the criminal law seems to have become demands of the times who could not be ignored to improve the state's responsibility to manage our increasingly complex society, as it appears in the manuscript draft Penal Code which have reached the stage of receiving and formulating the corporation as subject follow criminal and criminally responsible. Polemics appear along espoused corporate responsibility in criminal law. For that planning must include planning and enforcement aimed at providing legal protection for people against lawlessness and crime. Also keep in mind that the development of society and modernization brings great influence in the makeup of the community was included in the law. This research use method approach of law *(statute approach)* and the conceptual approach *(conceptual approach).*Approach legislation *(statute approach)* that solve the solution of the question by relying on the provisions of the legislation and regulations relevant conceptual approach *(conceptual approach)* that solves the answers to the formulation of the problem posed by referring to the concept of legal principles relevant.

Keywords: corporate, accountability, criminal act of licensing.

1. INTRODUCTION

Indonesia as a developing country to catch up, especially focused on the development of economic sectors, is implementing a variety of simplifying the arrangements relating to the development in order to achieve the aspired objectives. Changes and order or regularity is the twin goals of the communities that are building. Therefore, if the changes he would do with a regular and orderly, the law is a means that can not be ignored in the development process.[1]

Within the scope of development in essence a social change planning, development of the law has become a necessity that is not inevitable even if the planning in the field of

[1]Mochtar Kusumaatmadja. *Masyarakat dan Pembinaan Hukum Nasional Suatu Uraian tentang Landasan Pikiran, Pola dan Mekanisme Pembaharuan Hukum di Indonesia.* Binacipta, Bandung, 1976, h. 13.

economics is an aspect that stands out, so that the results of development that can really achieve their dreams, because the law can Reliance is a framework to support the efforts being made to build up the community, both physically and spiritually.[2] Development in the field of law is intended to ensure that people can enjoy the rule of law and protection of the law on justice and truth.

Richard Lange says there are two main problem in criminal law reform. First, the necessity to harmonize criminal law with empirical science. That is, in criminal law reform must consider the real needs of the community. Second, the criminal law should be updated as the level of progress.[3] The requirement to renew the criminal law caused by the development of criminality which is closely related to changes and developments in Indonesian society as a whole which is undergoing a process of modernization.[4]

Criminal law reform in Indonesia are faced with the issue of criminalization as a manifestation of the dynamics of criminal law in the context of the changes taking place in society. If connected with criminal politics, criminalization process is a policy in the fight against crime by means of penal as an alternative, in addition to intensified efforts to non penal.

Policy non-criminal crime can be done through activities or procedures within the scope of administrative law, among others, through a licensing system that is good and effective. In this case the use of consent should always be associated with the scope of the law of government that is as a means of controlling society, the means of public participation, and legal protection for the community.

Talking about the licensing system should always be viewed as an approval permit notion of government by legislation to deviate from the provisions of the legislation.[5] By giving the government permission to allow persons applying to perform certain actions were actually banned, this involves the favor to act in the public interest requires supervision. Thus the government uses as a means of judicial permission to drive the behavior of the citizens.[6]

Permit is an administrative decision issued by the Board / Administrative Officer used by the applicant as to the legitimacy of the activities that are prohibited as a means for the

[2]Satjipto Rahardjo, *Hukum, Masyarakat dan Pembangunan*, Alumni, Bandung, 1980, h. 5.

[3]Sudarto, *Suatu Pembaharuan dalam Sistem Hukum Pidana Indonesia*, dalam Beberapa Guru Besar Berbicara tentang Hukum dan Pendidikan Hukum, Binacipta, Bandung, 1981, h. 64.

[4]Muladi, Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, Alumni, Bandung, 1984, h. 84.

[5]JBJM ten Berge dan NM Spelt, 1983, *Pengantar Hukum Perizinan*, Cet 1, Yurudika, Surabaya, h. 2.

[6]*Ibid*, h. 2.

government to supervise certain activities that are prohibited to deter bad circumstances.[7] This is in contrast with the understanding dispensation which is exempt from the ban as a general rule that the gift is closely related to the particular circumstances.[8]

Based on the notion permission, permission goal is instrumental in controlling the activity of the community by influencing the people to want to follow the ways recommended in order to achieve a goal.[9] In accordance with many types of permits issued by the government, in addition to controlling the activity of each society has a function or motive permission form:[10]

1. The desire to direct certain activities, such as building permits;
2. Preventing environmental hazards, such as environmental permits;
3. The desire to protect certain objects, such as logging licenses;
4. Wanted to divide the little things, such as residential permits;
5. Briefing by selecting people and / or activities, which the board must meet certain requirements, such as a drivers license.

The scope of administrative law includes means for controlling society, the means of public participation, legal protection and norms for the conduct of government.[11] Based on the scope of the administrative law, the primary purpose of licensing is for guidance, regulation, control and supervision over the activities of utilization of space, the use of natural resources, goods, infrastructure, facilities or certain facilities in order to protect the public interest. On the basis of these objectives the government's involvement is a must for direct controls through law enforcement efforts so that people can be protected and not harmed from the various impacts.

In an effort to support the improvement of the implementation of development in Indonesia, banking institutions has been progressing to fluctuate along with the progress and political developments in Indonesia and international economic development and in line with society's demands will increase banking services are resilient and healthy. This then gives a strategic role to banking institutions in the development in Indonesia because of the bank as a means to harmonize and balance each element of the trilogy of development, economic growth and national stability as defined in Article 4 of Law No. 10 of 1998 on the Banking.

Besides, the bank's main functions are set out in Article 1 (2) of Law No. 10 of 1998 specifies that the bank is "business entity that collects funds from the public to distribute to the

[7] Philipus Mandiri Hadjon, 1995, Pengantar Hukum Administrasi Indonesia, Gajah Mada University Press, 1995 (selanjutnya disingkat Philipus Mandiri Hadjon I), h. 138.

[8] *Ibid*, h. 28.

[9] JBJM ten Berge dan NM Spelt, *Op.Cit.*, h. 5.

[10] *Ibid*, h. 4.

[11] Philipus Mandiri Hadjon I, *Op.Cit.*, h. 28.

public back in order to improve the standard of living of the people". Collecting funds from the public and channel them back efficiently and effectively, based on the principle of economic democracy in order to improve the distribution of development and its results. This arrangement gives directions to the Bank to submit to the principles applicable to the relationship depositors with the Bank as well as the doctrines prevailing in the banking sector in order to ensure legal certainty and legal protection for depositors, as well as a penal settlement practice activities collecting funds from the people who do not obtain permission from the Head of Bank Indonesia or called in banking regulation as banking criminal acts in the field of licensing.

Legislation in the banking sector that seeks to accompany the development of cases of criminal acts of the banking industry, providing the possibility to demand legal subjects other than people *(persoon)* as it has not been regulated in the Criminal Code. He opened the possibility to sue the corporation and hold it accountable under criminal law, particularly Law No. 10 of 1998 amendments to the Law No. 7 of 1992 concerning Banking is based on reason, that the profits of corporations and losses suffered by the community has been tremendous. Another reason put forward is to only do criminal prosecution against corporate officials did not do a thing without any prosecution as a form of corporate responsibility for criminal acts that he did, probably would not guarantee corporation to stop the criminal act.

Network global economy raises the ever-expanding demands and dependency relationships between countries, and the corporation is present in the center as a vital means of fulfilling the public. Undeniably the corporation to develop as one of the backbone of the world economy, but in the next trip corporations tend to perform acts contrary to the laws in order to maintain its presence in the global competition with the aim of obtaining a profit as possible. The motive is then pushed corporations to compete unfairly leading to legal action, especially concerning corporate crime. As a result of corporate actions that are contrary to the law of nations are required to minimize or prevent the effects of the crime using the instruments of criminal law.

At first the corporation is subject known only in civil law. What is called the corporation is actually a creation of law, namely by pointing to the existence of a body to be given status as a legal subject, in addition to the subject of natural law in human form *(naturlijk persoon).* Thus, the legal entity is considered unable to conduct legal *proceedings.*[12]

[12]Rudi Prasetyo, *Perkembangan korporasi dalam proses modernisasi dan penyimpangan penyimpangannya*, makalah disampaikan pada *Seminar Nasional Kejahatan Korporasi*, FH UNDIP, 23-24 Nopember 1989, h. 2.

In terms of corporate defined as a combination of people in the legal association to act together as a separate legal subject or a personification. Understanding the corporation as the law is also found in Black's Law Dictionary as:

> *An entity (usually a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issues of stock and exist indefinitely, a group or a a succession of persons established in accordance with legal rules or juristic into that has legal personality distinct from the natural persons who make it up, exist that it constitution Gives it.*[13]

The corporation as a legal entity creation, which consists of a *"corpus"*, the physical structure and legal thereto incorporating elements of *"animus"*, which makes a legal entity that has a personality, because it is a creation of law corporations death is also determined by[14]*law.* The corporation is also regarded as a legal subject *(Natuurlijk persoon)* besides humans *(rechts persoon),* thus the inherent logical consequence is the corporation can perform legal acts and legally accountable for his actions.

2. LICENSING BANKING ACTIVITIES IMPLICATIONS CRIME

2.1. Permissions Settings Bank Establishment

Licensing law is part of administrative law containing measures such as the establishment of a government that is used by the government decision as a means of control over the behavior of citizens. Against the relationship, then the applicable provisions of administrative law also applies to the licensing law, because the licensing law is part of administrative law.

In general, the system consists of the prohibition permission, consent is the basis of exceptions and provisions relating to permits. The permit system has three main parts called the juridical aspects of the licensing system, namely:

1. Prohibition

   Prohibition is the basis for determination of approval or permission set by the government as an instrument of judicial preventive character as *preventive* instrumental.[15] Permission is an instrument commonly used in administrative law, which are intended to affect the citizens in order to follow the recommended way to achieve

[13]Garner Bryan A, *Black's Law Dictionary,* Seventh edition, West publishing CO, St.Paul, Minim, Amerika Serikat 1999, h. 341.

[14]Satjipto Rahardjo, *Ilmu Hukum,* Alumni, Bandung, 1986, h. 10.

[15]*Ibid*, h. 126

concrete objectives. Thus the principle inherent in administrative law also underlies licensing law, one of these principles is the principle of state of law.[16] Grounded in the principle of state of law, then any ban that became the basis for setting permissions must be set in legislation, it is a realization of the principle of legality.[17] In addition to the implementation of the principle of the rule of law in the implementation of government action in the form of permission determination also must realize the principle of legality which include: authority, substance and procedures, so that the government's authority in assigning permissions to be set in the legislation. Basically prohibition in the license a limitation of the rights of man, therefore, any ban should be set out in legislation approved by the people's representatives

2. Permits

   Permits an approval from the government to the norm of the ban, therefore, permission must be set in terms of the government's decision not rule , since the licenses contain a norm-setting is not the norm setting. As the implementation of the principle of legal certainty, the permit must contain a description as clear as possible about the content of the permissions granted. Fill in the dictum set permissions, because the dictum is at the core of the decision which contain the consequences arising from the decision.

   Permission is one form of an administrative decision that created the law, this means that permission to form a particular legal relationship. In this legal relationship created by the government's rights and certain obligations to those who are entitled.

3. Provisions

   Provisions are the terms on which the government gives permission. Facts show that many licenses are attributed to the terms that are closely related to the function of the licensing system as an instrument of control of the government. Basic licensing requirements can be:

   1. Obligations linked to the practice of administrative law permits in order to achieve the desired objectives.
   2. The restrictions in the permit which gives the possibility to practically restrict the actions allowed. Restrictions established by designating boundaries in time, place or in any other way.

[16]Philipus Mandiri Hadjon, *Perlindungan Hukum Bagi Rakyat*, PT Bina Ilmu, 1987 (selanjutnya disingkat Philipus Mandiri Hadjon II), h. 76.

[17]Moeljatno, *Azas-azas Hukum Pidana*, Rineksa Cipta, Jakarta, 1993 (selanjutnya disingkat Moeljatno II), h. 139.

3. By setting the terms, certain legal consequences suspended from the onset of an event in the future that is uncertain.

Bank as an entity that has the business activities of the community to collect funds and channel them back to the community in its various forms, is certainly in need of requirements in carrying out its business activities. It's very important to protect the interests of the community, especially towards customers and their savings.

Law No. 7 of 1992 as amended by Law No. 10 of 1998 regulates the licensing to conduct business under the provisions of Article 16 paragraph (1), (2), (3).

In the provision of Article 16 paragraph (1) of the Banking Act contained the sense that the activities of collecting funds from the public by anyone basically an activity that needs to be monitored, given in the activities related to the public interest that the funds deposited on the parties to collect funds. In connection with that in Article 16 (1) confirmed that the activities of collecting funds from the public in the form of deposits can only be done by a party who has obtained a license as a commercial bank or as a Rural Bank, or any other form of banking institutions with activities to raise funds of society, that is a good Islamic Banking Islamic Banking, Financing Unit Sharia or Sharia as has been stipulated in Law No. 21 of 2008 concerning Islamic Banking.

There are also other types of institutions which also perform activities of collecting funds from the public in the form of deposits or some sort of deposit, for example, carried out by the post office, pension funds, or insurance companies. The activities of these institutions are not covered as banking operations under the provisions of Article 16 (1) of the Law on Banking, but governed by a separate Act.

Article 16 (2)

In order to obtain a business license Commercial Bank and Rural Bank as referred to in paragraph (1), shall be met the requirements of at least about:

a. the organizational structure and governance;
b. capital;
c. ownership;
d. expertise in the field of Banking;
e. the feasibility of the work plan.

The provisions of Article 16 paragraph (2) can be noted that in the case of giving permission Commercial Bank and Rural Bank, Bank Indonesia in addition to the fulfillment of the requirements referred to in this paragraph, is also required to consider the level of fair

competition among banks, the saturation level number bank in a particular area, as well as the equitable distribution of national economic[18]development.

Article 16 (3)

requirements and procedures for the licensing of banks referred to in paragraph (2) shall be set by Bank Indonesia.

Under the provisions of Article 16 paragraph (1) and (2), relating to the provision of Article 16 (3) of the Law of Banking can be stated that the points stipulated by Bank Indonesia shall, among other things: [19]

1. Requirements to become a bank management, among others concerning expertise in banking and condition good.
2. Prohibition of family relationship between the management of banks.
3. The minimum paid-up capital for the establishment of a Commercial Bank and Rural Bank.
4. The maximum limit of ownership and stewardship.
5. Feasibility work plan.
6. Deadline permit the establishment of the bank.

Banking Act expressly distinguish legal form for Commercial Banks, the legal form for the Rural Bank to Bank Syariah legal form, and the legal form of representative offices and branches located overseas.

In Article 21 paragraph (1) of the Law of Banking Commercial Bank has three legal forms, ie limited liability companies, cooperatives and regional companies, for the Rural Bank provided for in Article 21 paragraph (2) legal form is a regional company, cooperatives, limited liability company , and other forms stipulated by government regulation. While the legal form of the Bank syariah is a limited liability company as provided for in Article 2 of Bank Indonesia Regulation Number 11/3 / PBI / 2009 on Islamic Banking. And the legal form of representative offices and branches domiciled abroad is follow the legal form of the head office as specified in Article 21 paragraph (3) of the Law of Banking.

The provisions of Article 22 paragraph (1) of the Law of Banking stated that the Commercial Banks may only be established by Indonesian citizens and / or legal entities

[18]Hermansyah, *Hukum Perbankan Nasional Indonesia*, Kencana Prenada Media Group, Jakarta, 2007, h. 26.

[19]*Ibid*.

Indonesia, an Indonesian citizen and / or Indonesian legal entities with foreign citizens and / or foreign legal entities on a partnership basis. Then Article 22 paragraph (2) determine that the provisions on establishment of the bank requirements that must be met as referred to in Article 22 paragraph (1) shall be determined by Bank Indonesia.

The provisions concerning the establishment of commercial banks in the above, are not applicable to the establishment of Rural Banks. For the establishment of Rural Banks apply the provisions of its own slightly different with the establishment of the Commercial Bank. According to article 23 of Law Banks, Rural Banks may only be established and owned by a citizen of Indonesia, Indonesian legal entity wholly owned by Indonesian citizens, local governments, or may have shared the three.

More different provisions regarding the establishment of Islamic Bank, the establishment of Islamic banks in the provisions of Article 16 (1) of Bank Indonesia Regulation Number 11/3 / PBI / 2009 states that in addition can be established by an Indonesian citizen and / or Indonesian legal entity; Indonesian citizens and / or Indonesian legal entities with foreign citizens and / or foreign legal entities partnership, Bank Syariah can be owned by local governments. Furthermore, the provisions of Article 16 paragraph (2) of Bank Indonesia Regulation Number 11/3 / PBI / 2009 contained provisions ownership by foreign citizens and / or foreign legal entities referred to in paragraph (1) letter b shall not exceed 99% of paid up capital Bank.

2.2. Licensing the criminalization of

Society, science and technology continues to evolve and the consequences of some of the matters governed by the laws of criminal law in the course of further needs to be adjusted, because it is not in line with the development in question. Moreover, there have been changes in the values and attitudes of citizens called the legal system, the legal structure, legal culture and legal substance. The value changes led to a number of acts that had not been sentenced to a disgraceful and despicable and should be convicted.[20]

The opinions above provide a reflection state criminal law in our country that is in need of renewal with the issue of criminalization as a manifestation of the dynamics of criminal law in the context of the changes taking place in society. Because of that crime prevention policies with the criminal law needs to be done by means of an integral approach between penal policy and non penal.[21] Integral approach between the policy of penal and non penal gives the

[20]Wolfgang Friedman, *Filsafat Hukum*, dikutip dalam Hamzah Hatrik, *Op.Cit*., h. 3.
[21]Muladi dan Barda Nawawi Arief, *Op.Cit*, h. 158-160.

sense that efforts are rational in crime prevention not only by means of criminal law, but it can also be done through the efforts of non-criminal, such as improving the function of licensing in any business establishment bank and in each issuing bank products , Through intensify and streamline the expected nonpenal means crime prevention can be optimized.

Violations of licensing requirements as referred birth to a law enforcement from the point of criminal law administration*(Administrative pena l* law).Law enforcement is a legal breakthrough made by lawmakers to address the violations in the case of noncompliance with licensing requirements that are required by law. However, enforcement of criminal law in the administration of the Banking Act has been turned into a purely criminal law enforcement where criminal sanctions were imposed no longer be ultimum remedium, but its turned into primum remedium.

Article 46 paragraph (1) of the Law of Banking includes provisions:

> *Anyone collecting funds from the public in the form of deposits without a business license from the Head of Bank Indonesia as referred to in Article 16, punishable by imprisonment of at least five (5) years and a maximum of 15 (fifteen) years and a fine of at least Rp 10,000,000,000.00 (ten billion rupiah) and at most Rp 200,000,000,000.00 (two hundred billion rupiah).*

The formulation of Article 46 of the Banking Law clearly states that the activities of collecting funds without the permission of the Chairman of Bank Indonesia is illegal (without rights and against the law). Furthermore, corporate accountability for the activities referred to, in addition to the offender may be subject to additional penalty of revocation of licenses as provided for in Article 16 of the Banking Law.

Article 16 (1):

> *Each party conducting collecting funds from the public in the form of deposits shall first obtain a license as a commercial bank or Rural Bank of Chairman of Bank Indonesia, unless the activities of collecting funds from the public shall be prescribed by law of its own.*

Sanctioning mechanism provided by the Law of Banking against violators of bank licensing provisions indicate an important role in the enforcement of penal provisions permitting the establishment of banks, either directly as a means of repressive or indirectly for the purpose as a means of prevention. This is a consequence of the implementation of *penalization* in the scope of permissions that changes the administrative sanctions be criminal sanctions for administrative sanctions violate the public interest.

3. CORPORATE ACCOUNTABILITY IN CRIME IN THE FIELD OF BANKING LICENSE

3.1. In the Criminal Justice System in Indonesia

in the field of corporate criminal law accepted and recognized as a legal subject to committing criminal offenses and can also be criminally. In the development of criminal law in Indonesia, there are three systems of corporate responsibility as a subject of a criminal act, among other things: [22]

1. Corporate Executive Board as a maker, then responsible.
2. The corporation as a maker, and administrators who are responsible.
3. The corporation as a maker and responsible.

Correlated with the development of the concept of the corporation as a subject of a crime, it can be argued that in the general provisions of the Criminal Code used until now, Indonesia still has that an offense can only be done by a human. While fictional legal entities *(rechts persoon)*which influenced the thought **Von Savigny** is famous theory of fiction *(fiction theory)* not recognized in criminal law.[23]

Establishment of the Criminal Code that embrace this system looks among others, from the wording of Article 59 of the Criminal Code which reads as follows:

> *In cases where due to a violation specified offense to the board, members of the governing body, or commissioners, the management, board members, or commissioner who did not intervene foul, not convicted.*

Penal Code do not subscribe to the view that the corporation may be charged of criminal liability, the corporation can not own an act which constitutes a criminal act and not have mental aggregates *(das sollen),* but who committed the act is the management corporations in committing such crimes based on the attitude of inner good particular in the form of negligence or intentional misconduct, then the board of the corporation that must bear criminal responsibility for acts he did even if they were committed to and on behalf of the corporation which he leads.

Not so with the criminal laws outside the Criminal Code. According to the laws outside the Criminal Code or also called the laws governing special criminal offense, other than humans corporation is also recognized as a subject of criminal law, so that the corporation may

[22]hat-trick Hamzah, *op.cit.*, P. 30.
[23] Ibid.

be charged for whom there is a criminal. It can be seen with the issuance of Law No. 7 / Drt / 1955 on Investigation, Prosecution and Courts Economy Crime, Law No. 23 of 1997 on Environmental Management, Law No. 5 of 1999 on Prohibition of Monopolistic and Unhealthy Competition, Law No. 8 of 1999 on Consumer Protection, Law No. 5 of 1997 on Psychotropic Substances, Law No. 22 Year 1997 on Narcotics, Law number 20 of 2001 Amendment to Law No. 31 of 1999 on Corruption, Law No. 15 2002 on Money Laundering.

Within the scope of the principle of individual criminal responsibility, **Sudarto** asserted that in addition to the ability of responsible, guilt *(Schuld)* and illegally *(wederechtelijk)* as a condition for the imposition of criminal, is society by the manufacturer. Thus, the concept of criminal responsibility, in the sense makers, there are several requirements that must be met, namely: 1. There is a criminal offense committed by the manufacturer; 2. There is an element in the form of intentional fault or negligence; 3. There is a maker who is able to be responsible; and 4. No excuses.[24]

Some legal experts do not agree to such corporate accountability system on the grounds that the corporation does not qualify as a subject that can be criminally, even though this system has been adopted in the Netherlands since 1976. One of them, **van Bemmelen**,he said that many were not approved formulation of accountability corporation as a maker of criminal offenses in the criminal Code Book I of the Netherlands. The reasons put forward revolves around the following points: [25]

1. *Deliberate and the only fault on the natural persona;*
2. *The behavior of the material as a condition to some kind of offense, can only by natural persona;*
3. *Criminal and deprivation can not be charged to the corporation;*
4. *Charges and convictions against the corporation to the detriment of those who are not guilty;*
5. *In practice it would be difficult to determine whether only administrators or corporations who are charged and convicted, or both should be prosecuted or convicted.*

Accountability system that recognizes corporations as makers and administrators responsible characterized by the recognition that arise in the formulation of legislation that a criminal act may be done by union or business entity, but the responsibility for the burden of the

[24]*Ibid*,p. 12
[25]*Ibid*,p. 32.

corporate board. Gradually switch criminal responsibility of members of the management to those who ordered or neglect lead ban if the corporation as real.

Accountability system into three, namely that recognizes corporations as a maker and responsible is the beginning of the direct responsibility of the corporation. In this system opens the possibility of demanding corporations and hold it accountable under criminal law.

In accountability system to three, there has been a shift in the view, that corporations can be as creators, in addition to the natural man *(Natuurlijk persoon).* So the rejection of corporate criminal prosecution based on the doctrine of *non potest delinquere university* has experienced a change by accepting the concept of functional kepelakuan *(functioneel* daderschap).[26]

As corporations increasingly large role in the economy, the subject of corporate governance as a crime in positive criminal law we experienced a lot of progress, growing recognition as the maker of corporate criminal liability as stipulated in the legislation outside the Criminal Code. The tendency of corporate offenders in achieving the purpose of profits as much as possible at this time has become a reality in society.[27] Therefore, recognition of corporate responsibility as a subject of a criminal act naturally formulated in the Indonesian Penal Code which will come. Fits the purpose and function of the law and criminal law, namely as a means of social protection *(social defense)* in order to achieve the main objectives in the form of social welfare.

3.2. Forms of Accountability Corporations

Article 46 paragraph (1) Banking Act contains the following provisions:

> *Whoever collects funds from the public in the form of deposits without a business license from the Head of Bank Indonesia as referred to in Article 16, punishable by imprisonment of at least five (5) years and a maximum of 15 (fifteen) years and a fine of at least Rp 10,000,000,000.00 (ten billion rupiah) and at most Rp 200,000,000,000.00 (two hundred billion rupiah).*

Whereas Article 46 paragraph (2) Banking Act gives provisions that:

> *In the case of the activities referred to in paragraph (1) shall be conducted by legal entities in the form of a limited liability company, association, foundation or a*

[26]Muladi, *functionalizing the Criminal Law in Crimes Committed by the*Corporation.National Seminar Papers Corporate Crime. Faculty of Law, University of Diponegoro. November 23 to 24. Semarang, h. 85.

[27]H. Setiyono, Corporate Crime (Viktimologis Analysis and Corporate Accountability in Indonesia's Criminal Law), Bayumedia Publishing, Malang, 2005, p. 16.

cooperative, the prosecution of the bodies referred to do well against those who gave the order committing such crimes or act as a leader in the act or to both.

It can be concluded that Article 46 paragraph (1) and (2) Banking Act contains provisions that can be accounted for in a criminal act banking licenses are individuals and corporations. The individual in this case is any person who commits the criminal act for on behalf of their own interests.

Criminal accountability as it is known in the Criminal Code. Individual accountability can be traced from the drafting history of the provisions of Article 59 of the Criminal Code, especially on the way in formulating offense always begins with the phrase *hij*die,whoever. In connection with that, **Doelder,** professor at the Department of Criminal Law and Criminology, Erasmus University Rotterdam, The Netherlands that the Penal Code that had existed since 1886 and was written with the idea that only the person (natural persons) who may be subject to criminal liability.[28]

The view is in line with Jonkers Doelder citing High Court's decision dated August 5, 1925 wrote that according to the principles of our criminal law (Netherlands, pen.) Agencies can not legally commit the offense.[29] The reason is that our criminal law based on the teachings of personal error that is directed only to the person of the (people), so that the criminal provisions regarding any subject has a personality trait, especially criminal independence. Likewise, the penalty, because, according to the criminal system of the Dutch East Indies, the corporation can not be sentenced to a fine, because people were sentenced to fines may choose to undergo imprisonment in addition to paying a fine substitute. According to Jonkers, although the corporation can not be held in criminal law, but in fact corporations often committed the

crime,while the essence of the criminal act committed by a corporation is that the criminal act was committed one or several people for and on behalf of the corporation. Article 46 paragraph (2) of the Banking Act states that the prosecution of criminal acts in the field of licensing banks conducted by the corporation to do good to those who gave the order committing such crimes or act as a leader in the act or to both. This article gives mean that any individual who perform maintenance tasks on corporate interests in accordance with what has been outlined in the articles of association must bear responsibility corporate establishments criminal offense committed by the corporation.

[28]Jonkers, Criminal Law Handbook for the Indies, Bina Literacy, Jakarta, 1987, 289-290.
[29]Ibid.

The corporation is a legal entity consisting essentially of assortment. However, in subsequent discussions of the corporation is a legal entity writer will just peel the responsibility of corporations limited liability, because it is seen as limited company which has the principal differences regarding criminal responsibility when compared to other legal entities.

In running PT. representatives and maintenance tasks handed over to the Board of Directors. The Board of Directors is authorized to conduct external legal acts for and on behalf of PT. External legal acts Directors can be classified into the act performs management*(dadenvan*beheren)and performs ownership deeds or deeds run mastery*(dadenvan*beschikking).[30]

There are two legal acts of external directors is an act performs ownership and control *(daden van* beschikking) as expressly set forth in Law Company Limited and the Standard Model Articles of Association of PT as a legal act which must first be approved by the GMS or commissioners or board of directors meeting. Both kinds of external legal act in question is, (1) transfer, or as security, all or most of the assets of PT, and (2) to borrow or lend money on behalf of PT.

In performing its duties of directors are not only bound to what is explicitly included in the purpose and activities of the company's business, but he can also take the initiative in order to realize the interests of the company to perform acts that support and facilitate their duties as long as this initiative does not conflict with its articles , However, if in the future it is known that all actions performed directors causes damage to a third party, in this case should be responsible not directors, but the company itself. In other words referred to in Article 46 paragraph (2) Banking Act as those who gave the orders committing such crimes or act as a leader in the act, can only be held responsible for a criminal offense committed by the corporation if the actions undertaken in accordance with the articles of association of PT.

Non corporate legal entity made up of three kinds: *Maatschap*,Firm and Guild Commanditaire or so-called CV. All three have a systematic character and accountability bebeda varied. But in this case the discussion will be limited only to the firm accountability and CV, because it is seen there will be no difference quite crucial on accountability Firma, CV and Maatschap.

[30]Rudy Prasetya, *Position Independent Company Limited Accompanied by According to Law No. 1 of*1995,cet. II, Citra Aditya Bakti, Bndung, 1996, p. 210-214.

Firma is a form of communion set out in Chapter II of Part One Book I of the Commercial code as referred to in Article 16 KUHD. This form of the *common law* is called the"Partnership". [31]

For a firm liability issues under Article 18 KUHD which states,*"eachpartner is responsible to bear the responsibility for any engagement wholly*communion".It is not even limited to the assets of allies who gathered in the company, but also includes the personal property that is outside the fellowship. The accountability arrangements actually just a matter of systematic accountability of civil aspect. But in this discussion will be developed through a systematic comparative study by comparing the accountability of civil aspects of the accountability of the criminal aspect. Where in the criminal law only recognizes the principle of *personal criminal* responsibility,or the responsibility of the individual.

In essence the civil law system set up, that all the engagements made by one of the allies, will be binding on other allies without exception. From *esensial* above was taken a conclusion that an ally in conducting a legal legal relationship with a third party is expected to get approval from other allies. Good agreement in the form of written or tacit approval. This brings the consequence, that if the third party legal relations arising violation of the rules of criminal law, the other ally considered to know and approve the actions taken by the allies. Allied perform legal relationship with a third party in this case will be referred to as a principal material *(pleger).* As for the other allies who will be called to participate do *(medepleger),* and the firm in question could be referred to as the manufacturer *(dader)* based on the concept of criminal law.

So the problem that arises is what if a legal relationship that is carried by one of the allies with the third party, a violation of the rules of criminal law, for example: Person A do a signing of procurement contracts for goods and services by the government, which later occurred corruptive behavior that performed by the A and causing losses to the state.

In the civil law system if arises damages against third parties as a result of a legal relationship with one of the allies of the other allies who will participate responsible. this also applies to criminal liability as stated above, that if one partner acts contrary to the rule of law, especially criminal law, the other ally considered knows and approves, for that they have to participate responsibly. And firmapun will take responsibility if the allies to act for and on behalf of the firm, as well as providing benefits for the firm as a result of corruptive actions he did.

[31]Harold F. Lusk, *Business*Law,Richard D. Irwin, Homewood, Illinois, 1966, p. 444. Quoted in Rudy Prasetya, *Maatschap, Firm and Guild*Commanditaire,PT. Citra Aditya Bakti, Bandung, 2004, p. 1.

Actually, according to the classical view, CV is a special form of the firm, or in other words, the firm is a common form of CV. It therefore makes sense if the firm or regulated CV together under a single title in the Commercial code (Part Two Book I KUHD). The layout of the CV specificity than the firm is the only firm known for one kind of allies, that all allies responsible bear personal responsibility for the engagement-engagement wholly communion. on the contrary, in the CV are two groups of allies, the ally active and passive allies.

When active is given the authority to run the whole activity of the CV and passive allies do not need to know what action or measures taken by an active ally. Thus the passive ally limited liability that have been issued as a capital in the CV. If the active allies are acting for and on behalf of CV without any violation of the statute, then the CV will also be responsible. While passive allies do not need responsibility, unless the passive allies have known actions taken by active allies and also benefit from the corruptive behavior.

4. CONCLUSION

The foundation of the juridical responsibility of corporations in criminal activities in the banking license under Article 46 paragraph (1) and (2) of Law No. 10 of 1998. Regarding licensing arrangements Commercial Bank, Rural Bank and Bank Syariah arranged in a separate regulation, Regulation Bank Indonesia Number 11/1 / PBI / 2009 concerning Commercial Bank, Bank Indonesia Regulation No. 8/26 / PBI / 2006 concerning Rural Banks, Bank Indonesia Regulation Number 13/3 / PBI / 2009 on Islamic Banks. Sanctioning mechanism provided by the Law of Banking against violators of bank licensing provisions indicate an important role in the enforcement of penal provisions permitting the establishment of banks, either directly as a means of repressive or indirectly for the purpose as a means of prevention. This is a consequence of the implementation of *penalization* in the scope of permissions that changes the administrative sanctions be criminal sanctions for administrative sanctions violate the public interest.

Systematics corporate responsibility we can not equate with natural personal accountability. Because, basically, there are fundamental differences that each difference is unlikely to be equated, which among others, the material acts and errors. However, because the reality of the community showed that losses and harm caused by the acts of a very large corporation, both losses physical, economic and social costs, incurred also thought to account for the corporation in criminal cases. In addition, to examine the corporate culture of Indonesia today, and given the scarcity of the corporation can be punished, then there are ways and means

to bring corporate responsibility to social protection, namely improving the function of criminal law by defining the corporation as a subject of a criminal act.

In performing its duties those who gave the orders committing such crimes or act as a leader in the act is not only tied to what is expressly stated in the purpose and activities of corporate business, but he can also take the initiative in order to realize the interests of the corporation to perform acts that support and facilitate the duties provided that such initiatives do not conflict with the bylaws. However, if in the future it is known that all actions performed directors causes damage to a third party, in this case should be responsible not those who gave the orders committing such crimes or act as a leader in the act, but the company itself. This is a manifestation of the adoption of the doctrine of *vicarious liability* against corporate responsibility in the crime of licensing in the field of banking.

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[1]H. Setiyono, Kejahatan Korporasi (Analisis Viktimologis dan Pertanggungjawaban Korporasi dalam Hukum Pidana Indonesia), Bayumedia Publishing, Malang, 2005, h. 16.

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