

Ideal Corporate Criminal Responsibility In Realizing Good Corporate Governance

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Abstract

Good corporate governance (GCG) is one of company's success factor to grow and make long term profit, as well as winning global business competition. In practice, many corporations have not implemented GCG properly and are vulnerable to being involved in corporate crimes. The presence of Supreme Court Regulation (PERMA) No. 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations is an effort to encourage the implementation of GCG by corporations, strengthen law enforcement and legal certainty to enhance implementation of corporate criminal liability. This study aims to examine the ideal corporate criminal liability in realizing Good Corporate Governance. This study is a normative legal study using the Approach method, namely the Law Approach and the Case Approach. The results of the study show that as a country that adheres to civil law, Indonesia implements a two-tier board system that clearly separates the supervisory function by the supervisory board (commissioners) and the executive function (Board of Directors) by the management board. The implementation of GCG is closely related to the implementation of corporate criminal liability. PERMA No. 13 of 2016 is expected to strengthen law enforcement and provide legal certainty related to the implementation of corporate criminal liability so as to encourage corporations to implement GCG or good governance. Good Law Governance and Rule of Law are needed, with the executive body of government that is fairly and independently responsible in implementing the law.

I. Introduction

The corporate criminal liability concept has become the concern and discussion of legal experts and business people. This is related to the many criminal offenses involving corporations in the corporate environment with the motive of corporate interests or profits. Criminal acts can be characterized by the existence of losses incurred and give rise to criminal liability for these losses (Hyman, 1979). From this concept, corporate responsibility arises from corporate actions that cause harm to people or other parties. Corporate criminalization policies have been implemented in many countries. This relates to the number of criminal offenses committed by corporations and the magnitude of the impact of losses caused by these actions even exceeding criminal offenses committed by natural persons (Marbun, 2019).

In Indonesia, the concept of criminal liability of corporations has been regulated and enforced since 1955 through Law Number 7 of 1955 concerning Investigation, Prosecution and Trial of Economic Crimes. The enactment of the law prompted the introduction of further legislative provisions designed to regulate the concept of corporate criminal liability. Conversely, while this concept is addressed in numerous legislative acts, no procedural law presently exists that provides the formal or procedural framework for prosecuting corporate offenders. Consequently, a legal vacuum exists, rendering it uncommon for corporations to be held criminally liable.

The issuance of Supreme Court Regulation (PERMA) No. 13 of 2016 on the handling of criminal cases by corporations (PERMA Korporasi) in late 2016 has filled the legal vacuum and provided guidelines for the handling of corporate criminal cases. The aim of this regulation is to improve the quality, effectiveness, and optimization of corporate criminal case handling. Business actors have responded differently to the issuance of this regulation. Some view it positively, hoping it will enhance legal certainty, justice, and good corporate governance. However, others are concerned that PERMA No. 13 of 2016 may criminalize corporations or turn non-criminal acts into criminal offenses. Therefore, it is important to educate and inform the public, especially business people, that not all corporations will face criminal liability. The target of PERMA application is to take action against corporations with poor governance or bad corporate governance.

The Supreme Court through Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Crimes by Corporations (Perma) has provided guidelines to judges in assessing corporate guilt, namely based on

(Article 4 paragraph (2)):

- a) The corporation may benefit or gain from a criminal offense or criminal offense committed for the benefit of the corporation;
- b) The corporation enables a criminal offense to occur: or
- c) The corporation does not take the necessary steps for prevention, prevention of greater impact and ensuring compliance with applicable laws and regulations to avoid the occurrence of crime.

In regard to Article 4, Paragraph (2), Letter c, the doctrine of corporate criminal liability is referred to as Reactive Corporate Fault (RCF). In accordance with this doctrine, a corporation may only evade liability if it can demonstrate that it has established sufficient procedures to prevent any criminal acts perpetrated by its personnel or organs. The rationale behind this doctrine is that corporations must adhere to the principles of good corporate governance (GCG) in all aspects of their operations, including behavior, policies, regulations, and training for personnel, both within and outside of the corporation. It would be beneficial to undertake a study on the topic of corporate criminal liability by Reactive Corporate Fault in order to ascertain the extent to which GCG is being implemented in Indonesia.

The concept of good corporate governance is a crucial element in a company's ability to flourish and achieve long-term profitability while also succeeding in the global business landscape. Good corporate governance can be defined as a system (input, process, output) and a set of rules that regulate the relationship between various parties (stakeholders), particularly in the relationship between shareholders, directors, and/or for the common interest and achievement of corporate goals. The management of such relationships is intended to prevent significant errors in corporate strategy and to ensure that any errors that do occur can be corrected by the state. The purpose of applying corporate criminal liability is to create legal certainty and justice for corporations in law enforcement, as well as to realize good corporate governance. There are five indicators of corporations that implement good corporate governance. Two of these are corporations that implement integrity and ethical behavior, and corporations that implement disclosure and transparency(hukumonline.com).

In the Regulation of the Minister of BUMN No. PER-01/MBU/2011, Article 1 concerning the Implementation of Good Corporate Governance Practices in State-Owned Enterprises, the concept of GCG is defined as the set of principles that underlie a process and mechanism for managing a company based on laws and regulations and business ethics. In essence, the primary focus of corporate governance is to safeguard the interests of shareholders and stakeholders. This is in alignment with the GCG principles outlined in Per-01/MBU/2011 Article 3, which encompass transparency, independence, accountability, responsibility, and fairness. The optimal implementation of GCG principles yields direct benefits for the company, including increased productivity and business efficiency,

augmented operational capabilities, and enhanced accountability to the public. In conclusion, GCG is a crucial element in the minimization of corrupt practices, collusion, nepotism, and conflicts of interest, which are currently the most sensitive issues in society (Kurniawan, 2021).

Therefore, if corporations want to avoid criminal liability, they should use the principle of “good corporate governance”. This is because it can accommodate criminal liability other than humans (person), namely corporations (recht person) (Suhariyanto, 2018). According to Article 8 paragraph (2) of the Reglement op de Burgerlijke Rechtsvordering, what is meant by corporatie is something that can be equated with “person”, namely “rechtspersoon.” According to Rahardjo, a corporation is “an entity that is created consisting of a corpus, which is its physical structure and into which the law includes an animus element that makes the entity have a personality. Because this entity is a legal creation, then except for its creation, its death is determined by law (Kristian, 2013).

Law-abiding corporations are also expected to encourage corporations to make preventive efforts by carrying out good corporate governance. Based on the background that has been described, the author is motivated to examine in more depth the ideal corporate criminal liability in realizing Good Corporate Governance.

2. Research Method

The research method in this study is Normative Juridical, which is a legal research method that involves examining library materials or secondary data as the basis for analysis. This research is conducted by tracing the regulations and literature relevant to the issues studied. The approaches used include the statute approach and the case approach. The statutory approach prioritizes legal materials in the form of laws and regulations as the main reference in the research. Meanwhile, the case approach seeks to build legal arguments based on concrete cases that occur in the field, which are closely related to the legal issues under study. This research is descriptive, which means it uses problem-solving procedures by describing or describing the current state of the subject or object of research (such as individuals, institutions, or society), based on existing facts. Descriptive research aims to provide an objective representation of the symptoms contained in the problem under investigation.

3. Results and Discussion

Corporate Governance Implementation

The concept of corporate governance (GCG) is a critical factor in a company's ability to achieve long-term growth and profitability while competing effectively in the

global marketplace. GCG is a system comprising inputs, processes, and outputs, as well as a set of rules that regulate the relationship between various parties, particularly in the narrow sense of the relationship between shareholders, directors, and directors for the common benefit of achieving corporate goals. GCG is the system through which the aforementioned relationships are managed and significant errors in corporate strategy are prevented. In the event that errors do occur, the system ensures that they can be corrected by the state. There are five GCG principles that can be used as business guidelines: transparency, accountability, responsibility, independence, and fairness(Wulandari, 2015).

Good governance can be defined as the implementation of effective and ethical leadership within a political system, in accordance with the established rules and regulations. The term "governance" encompasses a vast array of domains, including the political, economic, and social spheres. It extends from the initial stages of policy formulation and decision-making to the subsequent phases of implementation and supervision. The term "political governance" is used to describe the process of formulating policy. Economic governance can be defined as the process of making decisions in the economic field with the objective of improving welfare, equity, reducing poverty, and enhancing the quality of life. In terms of administrative governance, it is imperative that the organizers of each field and stage of government adhere to the highest standards of transparency, efficiency, and effectiveness. The governance principles published by the Organisation for Economic Co-operation and Development (OECD) encompass the following areas(Donald, 2004):

- a. The legal foundation is a crucial element in ensuring the effective implementation of good corporate governance. It serves as the foundation for an effective corporate governance framework. The Organisation for Economic Co-operation and Development (OECD) asserts that for a government to effectively implement the principles of good corporate governance in their country, they must establish a robust legal foundation. In the absence of a robust legal framework, the primary objective of good corporate governance—namely, the protection of the rights and interests of shareholders and other stakeholders—is challenging to achieve. These legal foundations include the establishment of
 - 1) Law on limited liability companies (corporate laws),
 - 2) Labor laws,
 - 3) Law on bank credit,
 - 4) Provisions on financial accounting standards and auditing standards,
 - 5) Terms and procedures for listing company shares on the stock exchange
- b. In formulating legislation or other legal instruments pertaining to the implementation of sound corporate governance principles, it is recommended that governments engage in communication and consultation with local business enterprises. Moreover, it is recommended that governments of countries that have adopted the principles of good corporate governance should monitor the extent to which these principles are being applied in the business sector of their

respective countries.

- 1) The rights of shareholders and key ownership functions; shareholders have certain rights. The OECD suggests that these rights be protected, both legally and by individual companies
 - 2) Fair treatment of shareholders; the company shall ensure fair treatment of all shareholders of the company, including minority shareholders and foreign shareholders. Holders of the same type of shares (e.g. ordinary shares) must be guaranteed the same treatment. In terms of the fair treatment, before the shares are traded on the stock exchange, every investor has the right to obtain information about the rights and protections of the shares they will buy.
 - 3) The role of stakeholders in corporate governance; The OECD also recommends the protection of the rights and interests of non-shareholder members of the stakeholders. This is because the success of the company's business operations is determined by the cooperation of stakeholder members, including shareholders, employees, customer creditors, and suppliers of services, raw materials, and auxiliary materials.
 - 4) Another principle of good corporate governance that the OECD socializes to member countries and non-member countries is the transparent disclosure of corporate information. According to the OECD, the Board of Directors of the company must report to shareholders accurately, transparently and in a timely manner, matters relating to financial condition, changes in ownership, business performance and other important matters that may affect the survival of the company.
 - 5) The responsibilities of the Board; The responsibilities of the board, the organization of the board or Board of Directors in many countries consists of two layers. In Indonesia, the first layer is called the board of commissioners, while the second layer is called the board of directors. The first layer of the Board of Directors functions as a director and supervisor of the company's business operations and the performance of the board of directors. While the main function of the second tier of the Board of Directors is to manage the company's assets, debts and day-to-day business activities. The Board of Directors is responsible for the compliance of the companies they manage with applicable laws or legal provisions, including taxation, labor, competition, credit, environmental laws in more detail the functions and responsibilities of the Board of Directors within the framework of corporate governance.
- c. The potential for significant legal issues at the corporate level underscores the importance of adhering to the principles of good corporate governance, which entails compliance with applicable laws and regulations in all business activities. The Criminal Code is based on the principle of legality, which does not regulate the criminal responsibility of corporations. Article 1, paragraph 1 of the Criminal Code states: "No act (feit) can be punished, other than based on the strength of the provisions of the criminal legislation that precedes it." In other words, "no

offense, no punishment without regulations that threaten punishment first" (Nullum delictum, noella poena sine praevia lega poenali). This principle of statutory construction, known as nullum delictum, noella poena sine praevia lega poenali, is a fundamental tenet of criminal law. It establishes that no individual or entity can be subjected to criminal punishment unless a specific criminal statute exists that expressly threatens such punishment. Consequently, corporations cannot be criminally punished. The regulation of corporate criminal offenses is actually accommodated in several laws, including, but not limited to:

- 1) Law No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of Corruption;
- 2) Law No. 8 of 2010 on the Prevention and Eradication of the Crime of Money Laundering;
- 3) Law No. 8 of 1999 on Consumer Protection;
- 4) Law No. 11 of 2008 on Electronic Information and Transactions

Meanwhile, Law No. 40/2007 on Limited Liability Companies (hereinafter in this study referred to as the Limited Liability Company Law) also does not specifically regulate criminal provisions by corporations, although there are two articles in the Limited Liability Company Law that imply the existence of criminal provisions for corporations, namely Article 74 and Article 155. Article 74 regulates Corporate Social Responsibility, which is the commitment of corporations or businesses to contribute to sustainable economic development by taking into account corporate social responsibility and emphasizing on the balance between attention to economic, social and environmental aspects. Article 155 which contains provisions regarding the responsibility of the board of directors and/or board of commissioners for their errors and omissions does not reduce the provisions stipulated in the Law on Criminal Law. Meanwhile, Limited Liability Companies have three organs, each of which has different rights and obligations, namely;

- a) Board of Directors, which is an organ authorized and fully responsible for the management of the company for the benefit of the company, in accordance with the aims and objectives of the company and representing the company, both inside and outside the court in accordance with the provisions of the articles of association. The Board of Directors carries out its management functions with management principles, both general and specific, so that the corporation can run smoothly in accordance with the planned targets. The Board of Directors may delegate some management functions to employees. In carrying out their work, each employee is equipped with authority and therefore also attached or followed by responsibility, so that the smaller the authority the smaller the responsibility and vice versa. The failure of a business does not lie with the employees, but lies at the top of its leadership because the one who has the greatest authority is the top manager.
- b) The Board of Commissioners, a corporate organ tasked with conducting general and/or specific supervision in accordance with the articles of association and

advising the board of directors. The BOC has a fiduciary duty to act in the best interests of the company and avoid all forms of personal conflict of interest. The appointment and dismissal, duties and authorities, as well as the rights and obligations of the Board of Commissioners and other matters relating to the Board of Commissioners are regulated in the company's Articles of Association as well as other provisions based on business governance best practices.

- c) General Meeting of Shareholders (GMS), is an organ that has authority not granted to the board of directors or the board of commissioners within the limits specified in this Law and/or the articles of association. Shareholders give mandate to the Board of Directors to carry out management or manage the company and to the Board of Commissioners to supervise and provide advice in the implementation of the management of the company by the Board of Directors. Shareholders' interests are represented collectively in the GMS. GMS is held by the company annually and at any time based on the needs of the company or at the request of shareholders. GMS is organized by the company annually and at any time based on the needs of the company or at the request of shareholders.

In the view of Agustina and Prasetyo, the concept of a corporation is not merely contingent upon the division of its organs as delineated in the Limited Liability Company Law. This encompasses the Board of Directors, the Board of Commissioners, and the General Meeting of Shareholders (GMS). In the absence of a will (mind and will or alter ego), the three organs will effectively become inanimate objects. The responsibility for carrying out this will lies with the corporate management, who must do so in stages using a specific management system. Consequently, a corporate action is initiated by a specific intention, which is then operationalized by the board into an action that is beneficial to the corporation. The intention of the corporation to undertake a corporate action is set forth in the form of a company policy, namely;

- a) General Company Policy, in the form of the company's vision and mission, President Letter, Company Charter, and others.
- b) Company Specific Policies, in the form of Directors Decree, Standard Operation Procedure (SOP), Company Regulation and others.
- c) Company Strategic Policies, in the form of business plan, business continuity plan, strategic plan, etc.
- d) Other policies, both written and unwritten. The corporate will is carried out by the management starting from the Board of Directors to the ranks below the board of directors, through two mechanisms, namely
 - 1) Delegation of authority to act (authority delegation), through a direct subordinate system, whose division of duties is detailed in: Organizational Structure and Job Description,
 - 2) Granting Power of Attorney (Power of Attourney), both internally given to company officials/managers and externally given to other parties outside

company officials, such as legal consultants, service bureaus, and others (Agustina et al, 2018).

Furthermore, corporations in carrying out their business activities, based on the provisions of Article 15 letters a and b of Law Number 25 of 2007 concerning Capital Investment, Article 74 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, as well as Article 3 of Government Regulation Number 47 of 2012 concerning Social and Environmental Responsibility of Limited Liability Companies, corporations are legally obliged to implement GCG and CSR which includes the Triple Bottom Line (Profit, People, Planet), in order to realize sustainable development as specified in Article 3 letter i of Law Number 32 of 2009 concerning Environmental Protection and Management. This is based on the fact that GCG is the principle that underlies a process and mechanism of corporate management based on laws and regulations and business ethics. The implementation of GCG will improve corporate performance and long-term economic value for investors and stakeholders.

This development is characterized by management that is no longer dominantly for the benefit of shareholders, but also for the benefit of stakeholders, so that a balance emerges that is in line with GCG. This is also based on the provisions of Article 2 of Law Number 40 of 2007, business activities carried out by corporations must not conflict with the provisions of laws and regulations, and/or decency. According to Immanuel Kant, based on the Theory of Obligation, people may or should be presented based on the person's freedom which can then be called suprasensible. The person is presented purely according to humanity as physically independent and different from a modified person. This is what is commonly called a right, and will then lead to the obligation of that right (Sukarno, et.al, 2013).

Corporations (through the Board of Directors) are legally required to act by implementing GCG, which is the core of business ethics, in order to realize sustainable development, as specified in Article 3 letter i of Law Number 32 Year 2009. If based on statutory regulations the actions are otherwise, it is a condition for the enactment of forced action. Forced action does not necessarily have to be aimed at the obliged corporation, but can be aimed at other people related to the corporation, in a manner determined by the legal order, namely through sanctions as a form of corporate legal responsibility. In general, there are several characteristics inherent in good governance practices. First, good governance practices must provide space for parties outside state administrators to play an optimal role so as to enable synergy between them. Second, the practice of good governance contains values that make state and private organizers more effective in realizing people's welfare. Values such as efficiency, fairness, and responsiveness are important values. Third, the practice of good governance is a state practice that is clean and free from corruption and oriented towards the public interest.

In order to resolve offenses committed by a person, discretion and rights related to justice are required. Therefore, it is necessary to consider the following;

- a) The BOC is obliged to receive and ensure that complaints about violations of

the company's business ethics and code of conduct are processed in a reasonable and timely manner;

- b) Each company must develop regulations that guarantee protection for individuals who report violations of business ethics and the company's code of conduct. In its implementation, the Board of Commissioners may assign tasks to the committee in charge of overseeing GCG implementation.

In order for the implementation of GCG to be carried out properly, it needs to be carried out systematically and continuously. For this reason, a practical guideline is needed that can be used as a reference by companies in implementing GCG. To implement GCG, it is necessary to prepare GCG Guidelines that are specific to each company. The guidelines include various policies that at least include the following matters:

- a. Vision, mission and corporate values.
- b. Position and function of the GMS, Board of Commissioners, Board of Directors, Supporting Committees of the Board of Commissioners, and Internal Control;
- c. Policies to ensure the implementation of the effectiveness of the functions of each organ of the company;
- d. Policies to ensure accountability and effectiveness of internal controls and financial reports;
- e. Code of conduct based on agreed business ethics;
- f. Means of disclosing information to stakeholders (public disclosure);
- g. Policies to improve various company regulations in order to fulfill GCG principles.

In order for the implementation of GCG to run effectively, it requires the participation of all parties in the company. For this reason, the following stages are required:

- a. Build understanding, awareness and commitment of all company organs and all employees, spearheaded by the Controlling Shareholders, Board of Commissioners and Board of Directors, to implement GCG;
- b. Conducting a review of the company's conditions related to the implementation of GCG and the necessary improvement actions;
- c. Develop programs and guidelines for GCG implementation (manual building);
- d. Internalizing the implementation of GCG so as to build a sense of ownership from all parties in the company, as well as an understanding of the application of GCG guidelines in daily activities;
- e. Conducting self-assessment or using the services of an independent external party to ensure the implementation of GCG on an ongoing basis. This assessment should be conducted annually and the results reported to shareholders at the GMS and to the public in the annual report.

Principle-based laws are generally supported by detailed guidelines for practice. Drafting regulations that contain detailed requirements can make market participants have a tendency to look for loopholes that can be violated. This will certainly divert attention from the need to comply with the policies implemented to simply comply with the content of the regulations. In practice, the principle-based laws approach can lead to a country not needing a set of Corporate Governance principles because the content of the principles has been covered in the legislation.

The existence of law is of great theoretical and paradigmatic significance in guaranteeing the stability of company management. In other words, the objective is to ensure that good company management is able to establish a condition of order, certainty, and justice in business activities through the use of legal instruments. The ethical dimension of law is manifest in its objective to achieve justice, or justitia, which may be defined as the provision of justice. The implementation of legal arrangements is intended to ensure the presence of order, certainty, and justice within the context of business activities. Furthermore, legal arrangements indicate that business activities must be conducted in accordance with a positive legal order that encompasses established norms. The implementation of good corporate governance cannot be achieved through a purely moral or voluntary approach, such as the adoption of a code of ethics, without due consideration of its legal implications and integration within a formal legal framework. This signifies that the legal apparatus serves as a pivotal instrument in the administration of appraisal service business activities. Therefore, through legal arrangements that are contextual and responsive to the evolving dynamics of business activities, a corporate governance structure that aligns with the needs of the business community will emerge and flourish. The implementation of corporate law norms is also aligned with the advantages that laws and regulations possess in comparison to other norms, as asserted by Rahardjo. He states that "the level of predictability is high," and that "laws and regulations are always required to determine with certainty in advance what is expected of members of the community." The legal principle of non-retroactivity provides assurance that such advantages can be implemented with careful consideration (Rahardjo, 1996).

These principles are expected to bring the provisions of corporate law in Indonesia in the future will have high predictability and guarantee legal certainty and justice, so that the development of corporate law has comprehensive applicability and the implementation of GCG in the Company can be juridically orderly. Currently there is business uncertainty or unfair business competition is a reality, along with the global development of the paradigm of GCG principles, it is necessary to have laws and regulations governing these activities that are established normatively and empirically. It is intended that each party, both Directors and Commissioners, needs to secure the company's investment and assets. The Board of Directors must have an internal system and supervision, which includes finance, operations, risk management and compliance. Meanwhile, the Commissioners guard against mismanagement and abuse of authority by the Directors and executive officers of the

company. The Company Law determines that the organ of a limited liability company (PT) that is obliged to hold a GMS is the board of directors. This is emphasized in Article 79 paragraph (1) of the Company Law which is formulated, "The Board of Directors shall organize the annual GMS as referred to in Article 78 paragraph (2) and other GMS as referred to in Article 78 paragraph (4) by preceding the invitation of the GMS". This arrangement is part of the realization of GCG. This occurs if there is a harmonious relationship between organs in the PT (in this case the PT is a corporate). The relationship between the organs of the PT, GMS, board of directors, and board of commissioners, is a company management system that reflects a synergistic relationship between management, shareholders, creditors, government, suppliers, and other stakeholders. To illustrate how important GCG is, Mas Ahmad Daniri emphasized that GCG is one of the keys to a company's success in growing profitably.

In general, Good Corporate Governance (GCG) is required to maintain the survival of the company through a management system based on the principles of transparency, accountability, responsibility, independence and fairness. As part of the company's commitment to implementing GCG, several companies have established GCG Committees, one of which is formed by the Commissioner. Broadly speaking, the duties of this committee are to provide recommendations to the Board of Commissioners regarding policies and programs to accelerate the implementation of GCG and to oversee the effectiveness of GCG implementation by the Board of Directors and its staff so that the interests of stakeholders can be protected and the creation of checks and balances mechanisms in all activities.

As a form of the board of directors' responsibility in applying the principle of transparency, the board of directors is fully responsible for the truth and accuracy of all data and information available to the public and shareholders or third parties by agreement, namely regarding matters relating to financial performance, liabilities, share ownership and corporate governance issues. The principle of transparency emphasizes that disclosure should be applied in every aspect of the company that relates to the interests of the public or shareholders. Transparency in Good Corporate Governance is a form of open company management, disclosure of facts is made accurately and in a timely manner to stakeholders. The responsibilities of the board of directors in accordance with Article 97 paragraph (1), (2) and (3) of the Limited Liability Company Law No. 40 of 2007 are:

- 1) The Board of Directors is responsible for the management of the company for the benefit of the company and in accordance with the purposes and objectives of the company.
- 2) The management of the company by each member of the board of directors shall be carried out in good faith and with full responsibility.
- 3) Each member of the board of directors is personally liable for all losses if the company is guilty or negligent in carrying out its duties.

The implementation of GCG in Indonesia represents a potential solution to fostering a conducive business environment and mitigating the risk of corporate

scandals. In practice, the implementation of GCG has not yet reached its full potential. It appears that GCG is still perceived as a mere slogan, an aspiration, or an unattainable ideal. It is important to note that not all state-owned or private companies, particularly public companies, have fully implemented GCG principles. This is due to the fact that the GCG Guidelines are merely recommendations, and that the GCG provisions have yet to be fully incorporated into laws and regulations that possess binding legal force. A considerable number of companies are reluctant to implement GCG in its entirety.

Corporate Criminal Liability in the Implementation of GCG

The lack of robust implementation of GCG in Indonesia is closely associated with the effectiveness of law enforcement. The efficacy of law enforcement plays a pivotal role in the actualization of GCG. The Indonesian legal system is perceived to lack comprehensive protection and to be lacking in impartiality, failing to meet the expectations of the public in this regard. There are at least two factors that contribute to the heightened severity of corporate governance issues in Indonesia relative to other countries. Firstly, the mechanism for monitoring companies by the market is still relatively weak. Secondly, the prevalence of corruption in Indonesia is particularly pervasive. In light of the growing significance of GCG, governments and business associations in a range of countries, including both industrialized and developing nations, have initiated efforts to enhance the GCG framework. This is with a view to boosting shareholder value over the long term, while still taking into account the interests of key stakeholders, such as investors, employees, and the wider community. In order to provide an ideal point of comparison, the implementation of GCG in two countries will be considered: the United States and the United Kingdom.

A) Good Corporate Governance in the United States

The typical American company is mostly managed under the direction of a board of directors. The level of involvement of the board in the day-to-day management of the business is determined by the size and complexity of the company itself. In practice, most directors, namely directors who come from outside the company, cannot directly manage the company's business. As a result, it is the managers who manage the company's business, and the board's role is limited to providing oversight in the affairs of the company (Brown H.L, 2001).

The impetus for reform in the area of corporate governance can be traced back to the Securities and Exchange Commission (SEC). In addition, the SEC undertook a review of several regulations pertaining to the governance of corporations. This study is referred to as the "Corporate Governance Proceeding" in early 1977. Subsequently, on September 4, 1980, the SEC's Division of Corporate Finance issued the Staff Report on Corporate Accountability. This report examines the subject of corporate governance from the perspectives of various key stakeholders, including shareholder participants, institutional investors, boards of directors, and regulatory authorities. It is reasonable to assume that the staff would generally concur that the board of

commissioners represents the focal point of activities and efforts to enhance corporate accountability. Furthermore, the staff should be able to provide insights into how the power and independence of the board of directors can be achieved.

The SEC recommends the establishment of an audit committee in public companies in accordance with the relevant regulations. Furthermore, the SEC has incorporated the stipulations set forth in the FCPA (the Foreign Corrupt Practices Act of 1977) pertaining to accounting and financial controls, with the objective of further reinforcing the autonomy of the audit committee. The staff characterizes the audit committee as a group within the board of directors with the responsibility of ensuring that the company's financial statements have been subjected to an adequate and independent audit. In addition to the regulations set forth by the SEC, the American Law Institute (ALI) has also formulated a set of recommendations pertaining to the principles of corporate governance. The recommendations set forth by the ALI are not themselves laws, but rather serve as guidelines for corporate governance principles, offering recommendations for potential legislation. The rules set forth by the ALI do not encompass the entirety of corporate law; rather, they pertain to a select set of topics. These include the purpose and conduct of a company's business, its corporate structure, the duty of care, the duty of fair dealing, the role of directors and shareholders in controlling transactions and tender offers, and legal remedies. The ALI report is comprised of two volumes. Volume I comprises a comprehensive examination of corporate governance principles, with a particular focus on the company's objectives and actions, its structural elements, including the roles and responsibilities of directors and officers, the concept of the duty of care and the Business Judgement Rule, the duty of fair dealing, and the role of directors and shareholders in controlling transactions and tender offers.

B) Good Governance in the England

The UK's corporate governance regulatory efforts were made by issuing the Cadbury report, which was the first study on corporate governance. Over the years, a number of reports have been issued by the UK to improve governance practices, including The Greenbury Report which focused on transparency in director remuneration, The Hampel Report issued in June 1998 which later became The Combined Code, The Trunbull Report issued in September 1999 which examined the company's approach to internal control, and most recently The Higgs Report issued in January 2003. The Combined Code is a combination of the Cadbury and the Greenbury Codes of Best Practices. The Hampel Committee divided the Combined Code into two parts, namely: The initial section encompasses the tenets of effective governance. The second part reiterates the principles set forth in the initial section while additionally furnishing detailed provisions regarding the optimal practices associated with each principle. The provisions regarding best practices are also based on the Cadbury and Greenbury Codes, as well as recommendations from the Hampel Committee. The Combined Code stipulates that the non-executive board of directors should comprise approximately one and a half directors. The majority of the non-executive directors must be free from

any relationship with the company or management that could potentially compromise their ability to make independent decisions.

Despite the United States and England both adopting a common law system with the same fundamental basis, namely a one-tier board system, there is a notable distinction in the regulation of corporate roles. In British companies, the positions of Chairman and CEO are typically distinct, or referred to as a one-tier board (no duality), with a clear delineation between the two functions. In England, the preferred Chairman is one who is impartial, wise, modest, has good relations with all company management, and is calm. This reflects a value system or culture that is distinctively British. In the United States, the majority of companies adopt a one-tier board with CEO duality, whereby the roles of CEO and Chairman are held by the same individual. This indicates that the company does not distinctly separate the roles of Chairman and CEO (Chief Executive Officer) in order to allow both roles to be held by a single individual. Approximately 80% of large corporations in the United States adhere to a one-tier board structure, whereby the roles of Chairman and CEO are combined. This is in line with the preference of the American public for a "single supreme commander" to lead their companies. The performance of CEOs in American companies is heavily influenced by the culture of individualism. This leads to the belief among Americans that the achievements of the company are determined by individual leaders alone, rather than by a group. In a contemporary American corporation, the Chief Executive Officer (CEO) bears responsibility for the company's future.

In contrast to the civil law system of Indonesia, corporations in this country implement a two-tier board system. In a two-tier board system, the supervisory function is distinctly separated from the executive function by the supervisory board (commissioners) and the management board, respectively. The supervisory board is elected by shareholders, and in some cases, also by employees. Subsequently, the supervisory board is responsible for electing members of the management board and ensuring their accountability to the company's objectives and government regulations. In a two-tier system, the functions of management and supervision are separated. In contrast to the typical single-board system, this system is structured around two distinct organs. The separation of the supervisory board and the management board serves to enhance the independence of non-executive directors and confer upon them the authority to act as a supervisory institution for company managers.

The implementation of GCG can be effectively achieved through the establishment of legal frameworks that provide clarity and assurance regarding the application of corporate criminal liability. It is anticipated that the enactment of PERMA No. 13 of 2016 will reinforce law enforcement and address deficiencies in the regulatory framework governing the processing of corporate criminal cases. At present, PPERMA No. 13 of 2016 serves as a guideline for the processing of criminal cases pertaining to corporate law. Consequently, this Corporate PERMA directly encourages the enhancement of the quality,

effectiveness, and optimization of the handling of corporate criminal cases. The necessity of incorporating corporations into the domain of criminal law, and the criteria for imposing criminal liability on such entities, have emerged as subjects of debate among criminal law scholars at both national and international levels.

Criminal provisions for corporations have been regulated in many laws but their implementation is still weak, so PERMA No. 13 of 2016 is expected to strengthen its implementation, especially regarding corporate criminal liability. The objective of the issuance of PERMA is to take action against corporations with poor governance, and to build a system for handling corporate crimes and (so that) corporations create SOPs (Standard Operating Procedures), so as to avoid corrupt behavior. Furthermore, the objectives of implementing corporate criminal liability include creating legal certainty and justice for corporations in law enforcement, as well as realizing good corporate governance. The presence of PERMA can encourage the urgency of implementing good GCG so that corporations can avoid criminal liability. The six principles of compliance, or compliance plan, which can be utilized as a reference for standard operating procedures (SOPs) for corporations to circumvent corrupt practices, as postulated by Prof. Surya, are as follows:(Jaya, 2023)

1. Proportional procedures. Making corporate policies on risk determination including financial and commercial control, auditing, spending, transparency of financial transactions, openness of information, and enforcement of discipline and sanctions.
2. Leadership commitment. Commitment is needed from corporate leaders regarding zero tolerance for errors in any form.
3. Periodic risk management. Periodic risk management based on the state's commitment to effectively prevent corruption, financial risks including the industrial and infrastructure sectors, risks in the financial transaction sector, business risks, and business relationship risks.
4. Feasibility test. Corporations conduct strict feasibility tests on every personnel accepted or who will occupy a position.
5. Transparency. Corporations must be sure that the corporation has taken preventive measures against criminal acts that can be committed by the corporation.
6. Monitoring. Corporations conduct studies on performance and take firm action against every violation

The objective of PERMA No. 13 of 2016 is to provide legal certainty in order to safeguard the corporation from both business competition and criminalisation. PERMA establishes the criteria for determining the criminal liability of corporations, which serves as a reference for judges in evaluating corporate missteps. This is in accordance with Article 4, which outlines the circumstances under which corporations may be held criminally responsible. These include:

- a. The corporation stands to gain from the commission of the crime.
- b. The crime is committed for the benefit of the corporation.
- c. The corporation allows the crime to occur.

The regulation of the error marker should provide legal certainty for corporations in determining their actions so that they are not subject to corporate criminal liability. However, some business actors consider that there are still unclear limitations regarding the preventive measures that must be taken so that corporations can be considered to have fulfilled the provisions of the law and can avoid corporate criminal liability. The ambiguity surrounding these limitations remains a topic of contention.

Additionally, it is notable that the sanctions imposed on legal entities in PERMA No. 13 of 2016 are limited to fines, and that there is a dearth of regulatory guidance concerning supplementary sanctions or disciplinary actions. In essence, financial penalties represent the primary disciplinary measure imposed upon corporations that engage in criminal activities. Nevertheless, supplementary sanctions and disciplinary actions are delineated in numerous other legislative instruments. The additional sanctions include the revocation of business licenses, the revocation of legal entity status, the confiscation of profits, the partial or complete closure of the company, the imposition of improvements due to criminal acts, and the placing of the company under guardianship for up to three years. In practice, the implementation of these sanctions remains ineffective due to a lack of clear and detailed regulations governing their implementation. Notwithstanding the persisting deficiencies in legal certainty as set forth in PERMA No. 13 of 2016, corporations are obliged to implement three principal measures to circumvent corporate errors and avoid corporate criminal liability. These include the implementation of good corporate governance, comprising corporate commitment, corporate structure, governance processes, and positive governance outcomes; the implementation of risk management; and the implementation of compliance with regulations.

4. Conclusion

In Indonesia, a civil law jurisdiction, corporations implement a two-tier board system. In a two-tier board system, the supervisory function is distinctly delineated from the executive function. The supervisory function is vested in a supervisory board, comprising commissioners, while the executive function is entrusted to a management board. In a two-tier system, the managerial and supervisory functions are separated. In order to facilitate the implementation of GCG principles, the regulations pertaining to PTs delineate the roles and responsibilities of commissioners, directors, and shareholders. In light of the principles of good business management, the regulation of the responsibilities of each organ in the PT will have an impact on the design of the authority and responsibility set forth in the Articles of Association. In order to prevent directors from exceeding their authority, their actions are subject to supervision by the board of commissioners. This supervision is limited by the GMS, which serves as the company's owner through the provisions set forth in the UUPT, the Capital Market Law (in the case of public companies), and the Articles of Association of the relevant company. It is anticipated that the

issuance of PERMA No. 13 of 2016 will reinforce the enforcement of legislation and provide legal certainty with regard to the implementation of corporate criminal liability. This is with a view to encouraging corporations to implement GCG, or good governance. The PERMA has established the parameters for determining whether a corporation is subject to criminal liability, taking into account the limits of corporate error. Furthermore, the PERMA establishes prophylactic measures to preclude corporations from evading criminal liability by means of mergers, amalgamation, or dissolution.

In general, Regulation No. 13 of 2016 has addressed the regulatory gap and provided greater legal certainty in the application of corporate criminal liability. Nevertheless, there are still deficiencies in terms of limitations regarding compliance and implementation of GCG, as well as the application of more effective sanctions. In light of the aforementioned discussion, it is recommended that corporations implement comprehensive good corporate governance. The establishment of good governance and the supremacy of law are essential prerequisites for the achievement of a robust and sustainable economy, as well as stability and legal certainty. The establishment of Good Law Governance and the Rule of Law is essential, accompanied by the creation of a government executive body that is capable of acting fairly and independently in the implementation of the law. Good law governance provides legal certainty by regulating the procedures for preventing and punishing corporations that implement legal procedures and accountability.

Recommendation

As a concrete step, the Faculty of National Security of the Indonesian Defense University is advised to take strategic and integrated actions to improve legal support in the interests of national defense. The proposed steps include:

1. **Emergency Law Program:** The Faculty of National Security can initiate this program to strengthen the legal sector in emergency situations. Graduates of this program are expected to become legal experts in emergency situations who are able to make significant contributions to national defense and security.
2. **Special Training for HR and Lecturers:** Periodic training is needed for teaching staff and human resources at the Faculty of National Security, especially those related to law, to expand knowledge and readiness in facing various situations that require law enforcement in the national security sector.

More solid policy support along with increased personnel and infrastructure competency will strengthen Indonesia's national security and ensure the country's readiness to respond to increasingly complex threat dynamics

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