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Proof of Mens Rea and Actus Reus of Corporate as a Corruption Criminal Actor in Restoration of Criminal Law in Indonesia

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Abstract--*Proving mens rea and actus reus corporations as corruptors is not an easy matter, considering that corporations are legal entities. Mens rea is a difficult element to prove from a corporation that is considered to have committed a crime because the corporation can only carry out actions through the organs of directors. When the perpetrator's actions are said to have fulfilled the formulation of offense (actus reus), then the investigator only needs to see whether the perpetrator has mens rea for the act so that criminal liability can be requested. This study uses interviews and data collection from speakers. The results of the study concluded that the way of proving a corporation in a criminal act of corruption is based on the dichotomy of the legal status between the corporation and the management of the corporation. Proof is done by dividing qualitatively about mens rea and actus reus owned by corporations with corporate management in criminal acts of corruption. The Ius contituendum in corruption is related to the renewal of the criminal law system in Indonesia, which can be done by updating the criminal procedure law which regulates the separation of legal liability between the corporation and the management of the corporation. The application of technical rules regarding the proof of mens rea and actus reus between the corporation and the management of the corporation under the law is considered to be contrary to the protection of the rights / obligations of legal subjects.*

Key words--*Mens Rea, Actus Reus, Corporate.*

I. INTRODUCTION

Corruption crimes committed by corporations are essentially recognized by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes (hereinafter referred to as the Corruption Law). Corruption criminal acts carried out by corporations is a rapidly developing phenomenon at present, these crimes are carried out in various modes to violate applicable legal provisions with the aim of benefiting the corporation. Corporations are regulated as legal subjects in corruption in Article 1 number 1 and Article 1 number 3 of the Law on the Eradication of Corruption, which has provided an opportunity for law enforcers to impose criminal liability on corporations in corruption cases. Although there has been much debate about the placement of corporations as subjects of crime, the Corruption Act has put corporations as legal subjects together with humans. This is done as a reaction to the collusion between political power and economic power which in fact is increasingly detrimental to the country's economy [1].

Corporations as legal subjects are a concept that developed later in criminal law. Initially, criminal law did not recognize the position of the corporation as a legal subject. Only humans are deemed able to commit a crime and are held to account for criminal liability. Therefore, the types of sentences provided by conventional

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criminal law are colored by corporations, such as capital punishment and imprisonment, all of which are projected for humans [2].

As an entity that is totally different from humans, corporate withdrawal as a subject of criminal law is hindered by the limited thinking that corporations can be held accountable for the occurrence of a criminal offense. Very few postulates appear to respond to this issue. The question raised to dismiss this possibility is always related to the party that will be held accountable if the corporation is deemed to have the ability to commit a criminal offense [3].

Corruption crimes committed by corporations appear to be only at the stage of assigning criminal liability to the management of the corporation, the application of corporations as subjects of criminal law prosecuted and convicted by the criminal law is rarely applied by law enforcement. Penalties imposed on corporations are only in the form of criminal fines that have less deterrent effect than capital punishment or imprisonment and the difficulty of proving corporate "mistakes" as part of the element against the law rather than proving the wrongs of individuals resulting in the defendant being acquitted [4].

Meanwhile, the practice of the process of proving and assigning responsibility to corporations is difficult, so it is very difficult to distinguish between criminal liability to corporations or to corporate management, bearing in mind that corporations and corporate administrators are different legal entity entities in corporate criminal acts. As a result of the legal status of the corporation as a legal entity that cannot act without the will of the corporate management.

The Criminal Code (KUHP) still adheres to the adage which states that a legal entity cannot be convicted for the following reasons: [5].

1. The corporation has no desire to do evil (*mens rea*);
2. The corporation is not an individual even though the corporation can carry out various legal actions that are usually carried out by individuals personally.
3. The corporation has no awareness and no actual body.
4. Corporations cannot be held liable because if there is a crime committed by the directors of a corporation then it is definitely an act outside the Articles of Association of the corporation concerned, therefore the Directors, both individually or jointly with other Directors must be responsible but not corporation that must be responsible.

II. METHOD

This study uses normative legal research or library research and empirical legal research. The approach used is the statute approach and the case approach. Sources of legal materials consist of primary, secondary and tertiary legal materials. The method of gathering legal material consists of literature study and field studies. Data analysis model used by researchers is an interactive model of analysis, the process of analyzing using 3 (three) components, namely systematic analysis, doctrinal analysis and historical analysis.

This research was conducted descriptively analytically, which provides as accurately as possible the facts available, both in the form of secondary data on primary legal materials, such as the Criminal Code (KUHP), Law No. 8 of 1981 concerning Criminal Procedure (KUHAP), Law Number 20 of 2001 concerning

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Amendment to Law Number 31 of 1999 concerning Eradication of Corruption, Regulation of the Supreme Court (Perma) Number 13 of 2016 concerning Procedures for Handling Criminal Acts by Corporations, Decision Number 01 / Criminal .Sus / 2013 / PN.Jkt.Pst. Decision Number 81 / Pid.Sus / Tipikor / 2018 / PN.Jkt.Pst, Decision Number 812 / Pid.Sus / 2010 / PN.Bjm and Decision Number 04 / PID.SUS / 2011 / PT.BJM, secondary data secondary material in the form of expert opinions, research results, work from the legal community and tertiary legal materials in the form of data relating to research. This research is expected to provide a clear and comprehensive picture of matters relating to the proof of mens rea and actus reus corporations as perpetrators of criminal acts of corruption in the renewal of Criminal Law in Indonesia.

III. RESULTS AND DISCUSSION

Mens Rea and Actus Reus Corporations in Corruption

Basically, a criminal act is built based on 2 (two) important elements, namely the objective or physical elements, namely *actus reus* (acts that violate criminal law) and subjective or mental elements, namely *mens rea* (the inner attitude of the perpetrators when committing criminal acts). In criminal law enforcement procedures, there are two opinions about which one should be seen first, *actus reus* or *mens rea*? In general, in an investigation, the investigator will automatically see the *actus reus*, because this must first be seen and used as a basis for further examination, rather than *mens rea* (mental attitude), because it is not physical in nature that is not always seen at the investigation stage. Even in the case of being caught red-handed, *mens rea is* still important to prove in the next stage.

Mens rea becomes an important element in determining the accountability of the perpetrators of criminal acts. *Mens rea* can be identified with the teaching of error. *The role* in a criminal act of corruption must be proven in court if the individual perpetrators, whereas if the culprit is a corporation or a non-human legal subject, *mens rea* can be proven in court or does not need to be proven at all in accordance with the choice of doctrine used.

Mens rea in criminal acts of corruption in which corruption will always exist, because the crime of corruption must be done on the basis of accident. Whatever the intention, if the actions cause consequences, such as: detrimental to the country's finances and / or enriching themselves illegally, then it is called corruption. It should be remembered that after the Constitutional Court ruling 25 / PUU-XIV / 2016, corruption is material offense. So that element of self-enrichment and financial harm n egara have to prove the case, so that the corruption offense, EAM another, when compared with the above illustration murder offense or other ordinary crime. The responsibility is *strict liability*. Whatever the *mens rea*, if it is proven that the *actus reus* has the effect referred to in the anti-corruption law, then the perpetrators can be convicted. Here, the element *actus reus*: the element of *mens rea* is 100: 0. The case of corruption is not determined by *mens rea* but *actus reus* which fulfills the Act of Corruption in a formal manner, and sufficient evidence to prove the effect that is prohibited by the Act (material offense) does occur.

The application of *mens rea* has a flexible and casuistic nature, where *mens rea* will meet its final place, namely: in the courtroom where it (*mens rea*) will be proven. As *actus reus* will also be examined whether it is true against criminal law or not. For corruption cases, the researcher is of the opinion that *strict liability* is

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appropriate as a form of accountability, so the element of mens rea becomes irrelevant in the examination procedure, especially if it is then used as a basis for not continuing the examination of corruption.

Mens rea in criminal acts of corruption will always be taken to the next stage, the prosecution and trial of the court. In this case, not finding *mens rea* in a corruption case does not result in the cessation of prosecution. Prosecution will fail if no 2 (two) or more pieces of evidence are found during the investigation. In this case the researcher believes that:

a. *Mens rea* has never been required to appear visible from the beginning of the examination of corruption criminal cases, so that the absence of *mens rea* as an excuse for not continuing the case investigation is inappropriate. It is still very possible that *mens rea will* only appear in court hearings.
b. The reason for not proceeding with the case is if there are not found 2 minimum evidences, there are no 2 minimal witnesses, so / and the case is not a criminal offense. This focuses on *actus reus* which must be a criminal offense. *Mens rea* once again, can be proven at court hearings.
c. Regarding detention, the basis of detention is not the presence or absence of *mens rea*, but there are investigators concerns that the suspect will hide evidence, escape, repeat the crime. It will be up to the investigator to detain it, as long as it does not interfere with the course of the examination of the case and the reason is acceptable. It is important for investigators to state clearly the reasons for detaining / not detaining suspects, so they are not questioned later.

The *mens rea* doctrine is based on *maxim actus nonfacit reum nisi mensit rea*, which means "An act does not result in someone guilty unless the person's mind is evil". In the crime of *mens rea* element is absolutely necessary. The concept of *"actus reus"* is not only about an act, but includes a broader understanding, namely [6]:

a. The conduct or behavior of the conductor of the accused
b. The results or consequences of the act
c. Circumstances contained in or contained in the formulation of the crime, for example in a murder event are mentioned "the soul of another person". Therefore, in the textbook it is often mentioned that *actus reus* consists of all elements contained in criminal or criminal events, except those relating to the defendant's mental state or attitude. "

Corporations in the form of legal entities that are considered as legal subjects are legally formal must be separated or distinguished from the management of the corporation itself, because the corporation in the form of a legal entity with the management of the corporation is two different legal subjects. Therefore, the burden of responsibility must be divided descriptively about who should be charged with criminal responsibility, so that in accordance with the objectives of the law itself philosophically, namely: justice, legal certainty and legal usefulness.

In contrast to corporations that are considered as associations or associations of people or legal entities that have the same goal, assigning the burden of criminal responsibility for corrupt acts must be carried out jointly and severally between each of the corporate management. Each corporate management is considered to have the same goals and interests to carry out activities / activities within a corporation, except management who is not involved in a criminal act of corruption can prove otherwise that, as part of the management of the

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corporation they are not involved in a criminal act of corruption that has been committed by some other corporate management.

Corporate recognition as a criminal law subject as a party considered to be able to commit a criminal offense and criminal liability may have been held has been ongoing since 1635. Corporate recognition as a criminal law subject began when the British legal system recognized that corporations could be criminally responsible, but only limited to misdemeanor [7].

Based on this, related to corporations as criminal law subjects such as in the US and Britain as Anglo Saxon countries, where corporations as criminal law subjects came into being in 1909 and the application of doctrine identification theory rests on the assumption that all legal and illegal actions are conducted by high level managers or directors identified as corporate actions [8].

Considering that in the beginning corporations were very difficult to be held accountable, because of the many obstacles in determining the forms and actions of corporations that are to blame in the concept of criminal law. The problem of the absence of physical form. As stated by William William that: corporation has "no soul to be damned, no body to be kicked" and corporation cannot be ostracized because "they have no soul"[9]. This is a reflection of the perception of criminal law that the deed does not make a man guilty unless his mind be guilty. However, this perception did not last long because there have been many systems in various countries, the court has begun to place the essence of the human element into a corporate arrangement that benefits the corporation through the actions of human intermediaries, it is certain that, if the company can benefit from the expertise of their human elements, they must also bear the burden arising from the crimes committed by these humans, not only on the basis that they act for the company (which links vicarious liability), but they act as a company .

Along with this, now the corporation can be held accountable. Where there are several reasons that can be used as a basis for corporate justification, criminal liability can be held, including the profits obtained by the corporation and the losses suffered by the community can be so large, that it will not be possible if the corporation is only subject to civil sanctions, [10] and corporations are the main actors in the world economy, so the presence of criminal law is considered the most effective method for influencing the actions of rational corporate actors [11]. On the other hand, the existence of corporate actions through its agents on the one hand often causes huge losses in the community, so the presence of criminal sanctions is expected to be able to prevent it from repeating its actions [12].

This means that criminal liability is imposed on the corporation if it is found that someone who has committed an unlawful act has a rational basis for believing that the corporate member who has the authority has authorized or authorized the commission of the crime. As a whole, the corporation is the party that must also be held responsible because it has done an unlawful act and not the person who has done the act is responsible, but the corporation in which the person works [13].

Associated with corporate responsibility, according to V.S. Khanna in his article titled "Corporate Liability Standards: When Should Corporation Be Criminal Liability?" It was stated that there are three conditions that must be met for the existence of corporate criminal liability, namely; an agent commits a crime;

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the crime committed is still within the scope of his work; and is done with the aim of benefiting the corporation [14].

Considering there are several doctrines that justify the corporation as a criminal law subject that is considered to be able to commit a crime and can be held criminally liable. Generally, corporate responsibility is based on the superior responded doctrine, a doctrine that states that the corporation itself cannot make mistakes. In this case only corporate agents act for and on behalf of the corporation. Therefore, only corporate agents can make mistakes [15].

Look at corporate recognition when the British legal system recognizes that corporations can be criminally responsible but only limited to minor crimes [16]. In contrast to the British legal system, in the United States, the existence of a corporation as a criminal law subject that is recognized as being able to commit a crime and can be held accountable for a criminal basis is only recognized for its existence in 1909 through a court decision [17].

This means that in common law countries that this relationship can be based on fiduciary duty theory. The fiduciary duty relationship is based on trust and confidentiality, which in this role includes, scrupulous, good faith, and candor. In understanding the fiduciary relationship, the common law recognizes that people who hold trust (fiduciary) naturally and have the potential to abuse their authority. Therefore the relationship of trust holders must be based on high standards [18].

According to the researcher there are at least 12 types of additional crimes that can be charged against corporations, including:

First, Payment of compensation losses. This type of punishment is actually long known in Indonesian law, especially in the context of civil law. Article 1365 Burgerlijk Wetboek (Book of Civil Law) states: "every act against the law, which brings harm to others, obliges people to a loss in publicizing the loss, to replace the loss". In criminal law, among others referred to in Article 75 of Law No. 26 of 2007 concerning Spatial Planning. Any person who suffers a loss due to a crime is regulated in several chapters of this Act that can claim civil compensation to the perpetrators of the crime. Request for compensation in civil proceedings is carried out in accordance with criminal procedure law.

The term compensation is also known in the criminal. Just look at KUHAP. Article 1 number 22 of Law no. 8 In 1981 stated compensation is the right of people to obtain compliance with their claims that the form of gifts in the form of money due to being arrested, detained, prosecuted or prosecuted without reasons that are by law or because of confusion about that person or person. the law is applied in accordance with the rules set out in the Criminal Procedure Code.

Second, Performing obligations that have been neglected. Companies that are proven to damage the environment are usually subject to sanctions in the form of repairing the destroyed environment. Or, if the company does not pay taxes, the judge can impose sanctions in the form of negligent tax payments.

Third, Funding job training. Job training is an overall activity to give, obtain, improve, and develop work competence, productivity discipline, attitude, and work ethics at the level of skills and expertise determined in accordance with the level and qualifications of the position or occupation. Article 12 paragraph (1) of Law No. 13 of 2003 concerning Manpower states that employers are responsible for the improvement or

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competence of their workers through job training. However, there is no qualification for criminal violations in the Manpower Act which imposes sanctions for funding job training.

Fourth, Corrections due to criminal acts. This type of crime is not entirely new because it has been alluded to in Law No. 32 of 2009 concerning Protection and Management of Environmental Life. What is mentioned in Article 119 of the Law is that agency business may be subject to additional criminal or action planning in the form of deprivation of profits from crime; closure of all or part of the place of business and / or activity; improvement due to a criminal offense; the obligation to do what is ignored without rights; and / or company placement under trusteeship for a maximum of three years.

Fifth, Confiscation of goods or profits derived from crime. Criminal rules of this kind have been regulated among others in Law No. 4 of 2009 concerning Mineral and Coal Mining. Article 164 the law is declared in addition to imprisonment and fines, perpetrators of crimes may be subject to (i) confiscation of goods used in criminal acts; (ii) profit grabbing comes from crime; and / or the obligation to pay costs incurred as a result of a crime.

Sixth, Fulfillment of customary obligations. Customary justice is still recognized among others in Law No. 21 of 2001 concerning Special Autonomy for the Province of Papua, and Law No. 6 of 2014 concerning Villages, as long as they involve traditional villages. Article 51 of the Special Autonomy Law of the Papua Province stipulates that judicial adat is peaceful justice in the customary environmental law which has the authority to examine and adjudicate civil customs disputes and criminal cases among members of the indigenous peoples concerned. The adat court is based on the provisions of the community's customary law, and the task of this court is to examine and adjudicate based on the community's customary law in question.

Seventh. Revocation of certain permits. In Law No. 28 of 2002 concerning Buildings, revocation of building permits, including administrative sanctions. Revocation of business licenses is often called Indonesian law.

Eighth, Permanent prohibition on taking the specified action. Prohibition of carrying out certain actions permanently can occur if the status of a corporate legal entity is revoked. Article 163 of Law No. 4 of 2009 concerning Mineral and Coal Mining states that in addition to criminal penalties, companies that commit criminal acts can have their business licenses revoked and / or revoked legal entity status. Article 142 paragraph (2) of the Law Company Limited states that in the event of a company liquidation, including as a result of a court ruling, 'the company cannot take legal action unless it is necessary to settle all company affairs in the context of liquidation'.

Ninth, Announcement of court decisions. Announcement of a judge's decision or court decision is called a form of sanction. For example, as referred to in Article 10 letter b of the Criminal Code which places the announcement of a judge's decision as one type of additional crime. Article 43 of the Criminal Code is added when a judge orders that a decision be announced by the Criminal Code or other laws, then the judge must determine how to carry out the order at the expense of the convicted person.

Tenth, Closure of all or part of business premises and / or company activities. This sanction, for example, is mentioned in Article 109 paragraph (6) of Law no. 18 of 2013 concerning the Prevention and Eradication of Forest Destruction. Companies that violate the prohibitions called this law can be sentenced to

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goods in the form of fines. In addition to these basic crimes, corporations may be subject to “additional crimes in the form of closing all or part of a company”.

Eleventh, Freezing of all or part of the company's business activities. The company's business activities can be frozen by the Government. The seventh to tenth criminal threats can also be seen in Law No. 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes. Article 7 paragraph (2) of this Law states that there are other sanctions other than fines that can be imposed on companies, namely: announcement of a judge's decision; freeze some or all of the corporation's business activities; revocation of business license; company dissolution and / or prohibition; confiscation of company assets for the state; and / or company takeovers by the state.

Twelfth, Dissolution of the company. Based on Article 142 of Law No. 40 of 2007 concerning Limited Liability Companies, companies can be dissolved in other cases based on the determination of the court and allow the company's business to be revoked so that the company requires liquidation.

Based above explanation the researcher also believes that the KPK as an interfaith institution has never made corporations the subject or suspect / accused of corruption. Though it is clear that Law No. 31 of 1999 concerning Eradication of Corruption Crimes Law No. 20 of 2001 (the Corruption Act) has provided instruments to ensnare corporations as perpetrators of corruption. Even though many company directors have been convicted, but so far the KPK has been constrained in formulating corporate responsibility as a criminal offender. The Corruption Eradication Commission and the Prosecutor's Office once tried to demand that corporations participate in paying state losses, but often failed because the judges considered that the corporation was not made a defendant in the indictment. There was only one case of corporate corruption that was successfully brought to trial including the case of PT. Indosat Mega Media (IM2), PT. Duta Graha Indah, Tbk. (PT. DGI) and PT. Giri Jaladhi Wana (PT. GJW).

Corruption Law Enforcement in *Ius Constitutum* and *Ius Contituendum* as Renewal of Indonesian Criminal Law

Law enforcement in corruption that involves corporations as perpetrators must be reviewed from various perspectives, so that the imposition of criminal law can be applied objectively in accordance with the qualitative value of the corrupt acts that have been committed. Corporations as perpetrators of crime have different characteristics from individuals as perpetrators of crime (especially corruption), because corporations have subjective characteristics that have an incision between legal entities as legal subjects and people as legal subjects.

Law enforcement against corruption committed by corporations has been regulated in technical regulations in Indonesia, such as: the existence of Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Criminal Acts by Corporations and Regulation of Attorney General Number Per-028 / A / JA / 10/2014 which regulates the Handling of Criminal Cases with Corporate Legal Subjects to divide and separate the criminal responsibility that is charged to the corporate administrators who commit criminal acts of corruption. This illustrates the existence of a similar paradigm that requires the separation of criminal responsibility between corporations and corporate management as different legal subjects, even though corporations that commit criminal acts of corruption are not in the form of legal entities.

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Law enforcement in a criminal act of corruption must be carried out in accordance with the criminal act committed, because criminal punishment must be given in principle to every perpetrator who commits a crime and cannot be given to people who are around the perpetrators of the crime. This can also be interpreted that, the imposition of criminal liability can only be borne by the corporation and / or the management of the corporation which have indeed been proven to have committed a criminal act of corruption.

Law enforcement in order to give criminal liability burden to corporations undergoing a transformation of legal status, such as: merging, consolidation, separation and dissolution of corporations, then criminal liability for corrupt acts must continue to be upheld. This is in accordance with Articles 7 and 8 of the Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations.

Considering the nature of the Corporation as a legal subject in the form of an *artificial person*, Article 5 of Perma 13/2016 regulates that in the event that one or more of the Corporate Management cease, or dies does not result in the loss of a corporate liability. Therefore, Article 23 of Perma 13/2016 also stipulates that Judges can impose a criminal act against a Corporation or Management, or Corporation and Management, both alternatively and cumulatively. The application of corporate liability, while sanctions or laws that can be imposed on the Corporation according to the guidelines outlined in Article 25 paragraph (1) Perma 13/2016 are the principal and / or additional crimes. The principal crime that can be imposed on a Corporation is a criminal fine. Whereas additional crimes imposed on Corporations in accordance with other laws and regulations, namely Article 10 of the Criminal Code and other types of criminal provisions that are spread in other laws as *lex specialis* of the Criminal Code which is *legi generali*.

In relation to *ius constitutum* and *ius contituendum* in corruption, it is related to the renewal of the criminal law system in Indonesia. Of course, criminal law must be responsive in order to cope with various crimes committed by corporations by placing them as legal subjects in criminal law that can be accounted for so as to provide a deterrent effect. It must be recognized that the punishment of the corporation's management as referred to in Article 59 of the Criminal Code is not sufficient to make repression of criminal acts committed by the corporation.

Whereas in Law No.40 of 2007 concerning Limited Liability Companies (PT) regulates the liability of individuals and companies. This means that the researcher agrees that the legal entity or not a legal body, if in the corporation there are people who act not on behalf of the corporation not included in Article 52 of this RKUHP. But if it acts in the name of corporate policy, then it becomes the responsibility of the corporation and the punishment is directed at the corporation. Of course, in this case there should be uniformity in the implementation of law enforcement related to cases such as those raised by researchers including PT. IM2, PT. DGI and PT. GJW. Wherein the current corporate criminal procedure law uses Perma 13/2016, and for legal certainty it is better that Perma 13/2016 becomes a law.

IV. CONCLUSION

The method of proving a corporation in a criminal act of corruption is based on the dichotomy of the legal status between the corporation and the management of the corporation. Proof is done by dividing qualitatively about *mens rea* and *actus reus* owned by corporations with corporate management in criminal acts of corruption. Legal liability is only borne by the corporation without involving the management of the

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corporation as long as the management of the corporation does not fulfill the element of *mens rea* in the criminal act of corruption. The separation of *actus reus* between corporations and corporate management is intended to provide objective accountability in accordance with the philosophical objectives of law.

The *Ius contituendum* in corruption is related to the renewal of the criminal law system in Indonesia, which can be done by updating the criminal procedure law which regulates the separation of legal liability between the corporation and the management of the corporation. The application of technical rules regarding the proof of *mens rea* and *actus reus* between the corporation and the management of the corporation under the law is considered to be contrary to the protection of the rights / obligations of legal subjects. Applying the concept of *Corporate Crime Liability Adjustment* in criminal procedural law is considered a strategic step in the renewal of Indonesia's *Ius contituendum* law.

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