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RESEARCH ARTICLE

Corporate Criminal Liability for Corruption Offences in Indonesian Criminal Justice System

Endi Arofa, Ahsan Yunus, Andi Sofyan, Anwar Borahima
Graduate School of Hasanuddin University, Indonesia.

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Corresponding Author

Endi Arofa

Abstract

Corporations are legally deemed to be single entities, distinct and separate from all the individuals who compose them. Corporate liability for crime has appeared on the agenda in many jurisdictions as an international issues. Courts are not necessarily well equipped to supervise corporate activities and the organization may already be subject to extensive regulation by government bodies. There is no need for a court to get involved in overseeing changes in an organization's safety practices, for example, the settlement of corruption cases based on Indonesian Criminal Code. Therefore, the section requires the court to consider whether another body would be more suitable to supervise the organization. The role of the responsibility criminal against corporations in Indonesia starting from the inception of the emergency law No. 7 Year 1955 regarding Economic Crime, then followed by some of the last is on the Law No. 8 Year 2010 regarding Prevention and Eradication of the Money Laundering. In the framework of the renewal of national criminal law and the draft law on the criminal law (criminal code) systematically have set the criminal liability of corporations, whether incorporated corporation law and corporation who is not a legal entity. Although there have been laws governing corporate crime responsibility about but are still have problems in its application. It can be seen from the lack of a corporate criminal sentenced by the court.

INTRODUCTION

In modern legal systems, complex provisions regulate the structure of corporations, defining the nature and role of governing bodies, and the powers and obligations of those who take part in corporate operations. Depending upon the size and nature of the corporation, its structure may be complicated, multi-layered, centralized or decentralized, and organized somewhat hierarchically. There may be different models of organization and different chains of command or control.

The complexity of the corporate structure raises difficult issues over the allocation of responsibility for the consequences of unlawful behavior by individuals acting on the corporation's behalf. This is particularly true when the corporation and its shareholders materially benefit from the criminal conduct. In the criminal law context, all modern systems share the basic assumption that criminal responsibility should be placed on the individuals who commit a crime in the corporation's interest.

The great ideological divide in modern systems concerns whether criminal law applies to the corporation itself. In some systems criminal law controls the criminality of both individuals and the corporate entity itself. Other systems restrict criminal law to punishing only the criminal acts of individuals. Where corporate liability is recognized, the rules vary in defining the circumstances under which it may be imposed.

In a world of multi-national corporations and business arrangements that cross borders, we may expect the laws regulating corporations to converge. But a surprisingly wide gap persists among developed nations in the mechanisms available to combat corporate criminality. Modern systems that reject corporate criminal liability dismiss the notion that some corporations have more potential to cause harm than individuals. These systems do not accept that these organizations are criminogenic entities. Consequently, they fail to recognize the need to counteract these organizational offenders through criminal law.

Systems rejecting corporate criminal liability are usually justified not by policy analysis but, rather, by formal doctrinal theory. The fiction theory and the later humanity principle arrive at similar theoretical conclusions for the continued validity of the dogma "societas delinquere non potest. Consequently, Community law has made efforts on corporate crime by filing a class action lawsuit or legal standing through the civil suit or claim to judicial administration felt unsatisfactory.

Aside from being extraordinary crime, corruption is also classified as "white-collar crime" because of the perpetrators are mostly people who have an influence in power. In fact, if done criminal then deterrent effects is assessed to be more effective. The reason: First, the criminal liability has a stronger protection procedures. Second, the criminal law enforced by law enforcement officials more power and resources than the plaintiff (Civil Code). Third, criminal penalties provide stigma and slur to the perpetrators. Fourth, criminal law has a role to deliver the message to the community about the perpetrators. One form of crime that can be committed by a corporation is the crime of corruption. This criminal offence carries a very adverse impact for the nation and country, so counter-measures should be done both in preventive and repressive basis.

According to Indonesia Corruption Watch (ICW) stated that corruption cases in Indonesia is still dominated by the bureaucracy. Based on the monitoring reports on the verdict corruption ICW first half of 2010, there were 119 corruption cases were prosecuted by the number of 183 defendants. ICW's researcher, Donald Fariz, detailing that of 119 corruption cases, 103 cases with 66 defendants on trial in the General Court, while 16 cases with 17 defendants on trial in the Corruption Court.

The Attorney General has announced that PT. Indosat, Tbk. (**"Indosat"**) and its subsidiary, PT. Indosat Mega Media (**"IM2"**), are suspects of corruption, suggesting that an arrangement was made between the two companies to profit from Indosat's single 3G frequency license. Investigations allege that an agreement was struck for IM2 to provide internet services using Indosat's 3G frequency. Access to 3G mobile broadband frequencies is highly regulated, and is licensed by the government through competitive (and expensive) auctions. Although it may be Indosat's subsidiary, IM2 is not authorized to utilize its 3G frequency, as it never participated in any such licensing process.

Whereas corruption cases have until now been focused on individuals, Indosat and IM2 themselves—corporations, both—were announced as corruption suspects on 3 January 2013, for alleged violations of Article 2 and / or Article 3 of Law No. 31 of 1999 regarding Eradication of Criminal Acts of Corruption (Corruption Law).

The Director of Investigations at the Deputy Attorney General's Office for Special Crimes has appointed an investigation team to look into the case, led by Fadil Zaumhana together with a team of 14 attorneys. The successful prosecution of PT. Giri Jaladhi Wana in the Sentra Antasari Market construction project remains the only corruption case yet to have applied criminal charges to a corporation. PT. Giri Jaladhi was sentenced to pay IDR 1.3 billion in fines, and was temporarily prohibited from business for 6 months.

Based on the case above it's clear that the giant companies not only have a wealth of such magnitude, but also has a social and political force so that the operation or activities of such companies greatly affect the life. Have proven that multinational corporations have run well against the government's political influence in the country and abroad in which the company operates.

THE OBJECTIVE OF RESEARCH

The objective of this paper is to understand the philosophical reasons of the corporation as a legal subject and corporate criminal liability for corruption offences in order to construct a new concept in the settlement of corruption cases.

METHOD OF RESEARCH

The type of research used in this paper is normative research also known as doctrinal research[1] by reviewing the settlement of corruption cases in Indonesian Crimnal Justice System. The data being used include secondary data consisting of primary law materials in the form of laws and regulations,[2] secondary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as journal articles related the Indonesian criminal law reform issues.

ANALYSIS AND DISCUSSION

The Philosophical Reasons of the Corporation as a Legal Entity in the Settlement of Corruption Cases

I

t is time to take a new look at the standard for criminal corporate liability. The theory that has evolved as cited by Weissmann[3] is simple and seemingly logical: a corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible.

At first the application of the criminal liability of corporations are facing a number of legal issues, especially regarding the principle of no criminal without errors (without should genstrap). So, the basic existence of a criminal offence is the basis of legality, while base can be crime the crime was making basic mistakes. This means that the makers of the crime are convicted if he only had a mistake in doing criminal acts. Or, someone just have an error when at the time of doing the crime, seen in terms of the community he can be condemned for his actions. Thus, the principle of no criminal wrongdoing is fundamental basis without the maker's accountability (offender) a criminal offence.

In Indonesia, one of the ways that Corporations also may be subject to criminal liability is by implementing the theory/principles "no criminal without error". However, according to the BILL of the Criminal Code, this exception only for certain criminal acts, not for all criminal acts. For certain criminal acts, perpetrated the crime makers have been able to have the fulfillment everybody is liable only because the elements of a criminal offence by his actions. Here, the element of fault or an inner attitude of the author of the crime in doing such deeds are no longer cared for. This principle is known as the principle of "strict liability" or (liability without fault).

Therefore, to request the criminal liability of corporations, of which represent it is the Board, then the criminal liability is taken over by the Board. This deviation is known by the term type liability or someone responsible for a criminal offence committed by another person. In the Bill KUH is said: "in terms of prescribed by law, every person can be held responsible for criminal acts committed by others". Because of the irregularities, then tried to this principle can only be applied in certain events and people replace them must be specified upon limitative laws.

Despite a long history of endowing certain organisations with separate legal personality, there has been an increasingly lively debate as to its theoretical basis. Particularly in relation to criminal law, with its reliance on moral fault, there is still a struggle between the nominalists and the realists, a struggle which affects the rules by which responsibility is attributed. Since, in the nominalist view, the corporation does not exist apart from its members, any blameworthiness or responsibility can only derive from the culpability of an individual employee. That still leaves to be decided whether the corporation will be responsible for all of its employees or only for some of them. For the realist, on the other hand, the corporation does represent something beyond the individuals comprising it and this opens up completely different avenues for attribution.

In the explanation of the Draft Penal Code it says: "the birth of this exception is the refinement and deepening of the moral basis of juridical regulative, namely in certain things one's responsibility is seen to be extended to acts of his subordinates who did the work or works for him or within the confines of his order". The principle of responsibility which is an exception to this is known as the principle of absolute responsibility or "type liability."

The term of "corporation" as a legal subject in Law No. 31 of 1999 was formulated in terms of each person who is a direct appointment to the subject Law. In Article 1 paragraph 3 of Law No. 31 of 1999 stipulates that every person is an individual or a corporation. While understanding the corporation dealt with separately in Article 1 paragraph 1 of Law No. 31 of 1999 which is a corporation or a group of persons and properties either a legal entity or non-legal entity.

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[1] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2005, pg. 35.

[2] Morris L. Cohen dan Kent C. Olson, *Legal Reserach in A Nutshell*, West Publishing Company, St. Paul Minnesota, pg. 1-3.

[3] *See*, Andrew Weissmann. "A New Approach To Corporate Criminal Liability". *American Criminal Law Review*, 44:1319-1341. An extended version of this article appeared in the Indiana Law Journal as *Rethinking Corporate Criminal Liability*, 82 IND. L. J. 411, 427 (2007).

Table 1. the Handling of Corruption report by Corporate as Legal Subjects

No.	Legal Institution	The Amount of Corporate as Legal Subjects
1.	Corruption Eradication Commission (KPK)	None
2.	Attorney General of Republic Indonesia	1 Case

Source: Primary data (edited), 2015.

The meaning of corporation as a legal entity, actually originated from the idea that the legal entity are holders of rights and obligations. However, the growing global economy as an international issue as described on the Table 1 above, it turns out the strict sense of the law on the subject shifted. In fact not only the individual or individuals who are able to have their rights and obligations, but there are also other parties who have rights and obligations of the corporation. As described in Article 1 paragraph 1 of Law No. 31 of 1999 that the corporation is a legal entity or group of persons or property that is not a legal entity.

Corporation Developments as a Legal Entity in Various Countries[4]

United Kingdom

Since the decision in 1842, the corporation as a whole can only be accounted for criminal acts that do not require mens rea. In this case, there are three (3) criminal acts in the Common Law System which does not require mens rea, namely: Public Nuisance, Criminal Libel, and Contempt of Court. Additional categories that do not require mens rea is a criminal offense of absolute liability.

In UK, the general principle for determining corporate error is "the directing mind principle". Within the framework of this principle, an action and inner attitude of senior officials of the corporation that has a directing mind can be regarded as an act of corporate and inner attitude. It is meaning that the inner attitude is identified as a corporation and as such corporations can be directly and did not based on vicariuos liability, thus applied is the identification theory.

United States of America

Legal arrangements contained in the USA is to expand the concept of the corporation liability which covers mens rea offences. Any act committed by an employee acting within the framework of his work can be considered as a corporate action that is applied is the concept of vicarious liability. There is also the term "statutory liability of officers" when such offenses occur with the consent or cooperation or due to the negligence of a manager, director or other official equal, so that these people and corporations accountable under criminal law.

Canada

The court's decision in Canada stated that the concept of "directing minds" can occur ditingkatan lower in the corporation. There is a tendency that in future cases "the directing minds" only applied in relation to the "higher levels of authority". In this case, the factor that determines the difference must be attributed to the capacity of employees to make decisions within the framework of corporate policies, is more than just give the effect of these policies within the framework of an operational base, without proving the existence of mens rea. Distinguished in this regard that in the case of "strict liability" defendant was given a chance to prove their "due deligence" while in "absolute liability" This opportunity does not exist.

Australia

After applying the concept of "vicarious liability" until 1955, then held a renewal Australian criminal law and criminal accountability of corporate basing on a test basis against "the corporate culture". Benefits of corporate culture is a more direct approach and realistic to prove fault. Formulation include directing corporate culture, encourage, tolerate or carry the corporation towards disobedience to the law or the corporation failed to create or maintain the corporate culture. Self-defense on the basis of "due deligence" to prevent acts or permit is of paramount consideration.

[4] Muladi. (2003). *Pengkajian Hukum Tentang Asas-Asas Pidana Indonesia Dalam Perkembangan Masyarakat Masa Kini dan Mendatang*, Jakarta: National Law Development Agency, Ministry of Justice and Human Rights, pg 174

Germany

German's authority has developed a structure of administrative sanctions, which include the setting of corporate criminal liability. What is called "*Ordnungswidrigkeiten*" managed by the administrative body on the basis of "*Ordnungswidrigkeitengesetz*" which allows the imposition of criminal punishment on corporations. Another debatable thing in this cases is regarding organized absence of responsibility and the problem of limited criminal prosecution as well as the principle of "*ne bis in idem*".

Corporate Criminal Liability

As commonly known that both the general principle of criminal law and legal doctrine, the subject of criminal law can be held accountable if the subject of the law have committed act and the actions committed a criminal act (prohibited) as well as the acts referred to, do with the element of fault (intentional). The terms of intentional can be interpreted as a deliberate conscious and deliberate purpose consciously possibility.

In demand accountability to the corporation, then that should be noted is that the corporation in fulfilling their rights and obligations or legal act performed by the board of the corporation. Thus, the first step that must be considered in this regard is the need to look at the relationship between the perpetrator (board) with the corporation. Further, refutation of the corporate board. If the board acts carried out in order to meet its obligations, then the act is still in the core business of the corporation and act in order to meet corporate goals, then when the caretaker was convicted by itself, a corporation can be held criminal liability for criminal acts committed by the board.

CONCLUSION

The philosophical reasons of the corporation as a legal entity in the settlement of corruption cases, actually originated from the idea that the legal entity are holders of rights and obligations. Corporation can be held liability in a case of corruption under the provisions of Article 20 of Law No. 31 of 1999 regarding Corruption Eradication which in essence is the embodiment of the doctrine of criminal responsibility in the form of vicariuos liability. As it turns out in practice, however, it has certain weaknesses, particularly on the form of punishment against the corporation, which until now applies only limited main criminal fines.

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