

ASKING FOR THE CORPORATE CRIMINAL LIABILITY IN ENVIRONMENTAL CRIME AND THE PRACTICE OF JUSTICE IN INDONESIA

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ABSTRACT

The Increasing number of corporate crimes in environmental crime indicates that implementation of criminal law in the sector of environment hasn't worked in an optimal way or in a right track. The implementation of environmental law to corporations still relates to the norm's behaviour which is combined with the governance structures of internal criminal law implementation. Law's practitioners and experts often argue that implementing criminal law to corporations is a mistake. In a simple way, it can be described that corporate crime as a conduct of corporation or employees who work for the corporation and agents who act on behalf of corporation is the conduct who could not be sanctioned in the practice of Environmental Law in Indonesia.

Keywords: corporate criminal liability

Introduction

In the initial development of the issue of criminal legal subject and criminal liability, it is universally acknowledged that the criminal legal subject is an individual (natural person). In the field of law, there was even a commonly accepted principle at the time, namely *universitas delinquere non potest* that means it is impossible that corporations conduct a criminal act. This is influenced by the view of Von Savigny stating that corporations or business entities as a legal subject are a legal fiction accepted in civil law but are not suitable to be transferred as so to criminal law (Jan Rammelink :2006). In criminal law, in order to be called a criminal act, a conduct must meet some requirements, i.e. both *actus reus* and *mens rea* are present and the principle *actus facit reum, nisi mens sit rea* applies. Therefore, it is only humans that can conduct a criminal act given that only humans make fault/have *mens rea* or evil mind or evil will.

Although at the time corporations or business entities were not yet recognized as a criminal legal subject, it does not mean that corporate crimes never happened. According to JE Sahetapy (Sahetapy; 1994) crimes by corporations or business entities are actually not a new thing; only the packaging, form, and realization that are novel. Crimes by corporations or business entities have occurred since more than three thousand years ago in 14th century BCE Egypt. In ancient times in Greece, business entity/corporate crimes also existed, for instance, the case of Alcmaendos who was trusted to build a temple with marbles, but instead he built it with cement covered with marbles. Such business entity/corporate crimes happen from time to time in Indonesia, including "environmental pollution cases in Buyat Bay" presumed to be caused by PT Newmont Minahasa Raya, "river pollution due to coal-mining activities" by PT Adaro Indonesia, "Lapindo's spurt of hot mud" due to the mining committed by PT Lapindo Berantas, "environmental pollution" committed by PT Jorong Barutama Greston and PT Indonesia Bulk Terminal.

In the study of criminology by Edwin H Sutherland (David O.F : 2005) corporate crime was also called "*white collar crime*" in 1939 and had given highly valuable contribution to the development of criminal law, especially related to the acknowledgement of corporation as criminal legal subject and corporate criminal liability.

Some international conventions have also regulated corporations or business entities as a criminal legal subject, namely *United Nations Convention Against Transnational Organized Crime (Palermo Convention 2000)* in Article 10 on *Liability of Legal Person*, *United Nations Convention Against Corruption 2003* Article 26 on *Liability of Legal Persons* and *International Convention for the Suppression of the Financing of Terrorism 1999* in Article 5 on *Liability of Legal Entity*.

Corporation as a legal subject not only operates its activities according to economic principle (seeking the highest amount of profit) but also has a duty to obey legal regulations in the field of economy used by government to realize people's prosperity and social justice. (Sonny Keraf: 1998)

Some roles expected from corporations in the process of modernization or development would be taking care of and watching over the preservation of natural resource and environmental potency (Hamzah H: 1996). Harmonizing environment with development is not an easy matter; it takes continual development which is environmentally minded. (M Suparmoko:1997).

The existence of pollution and/or environmental damages mostly occurs in the context of performing an economic attempt and frequently either a controller's or businessperson's attitude not doing an economic attempt or also often a controller's or businessperson's attitude ignoring obligations in environmental management. (Wahono B: 1998).

Pollution and/or environmental destruction¹ keep increasing from time to time as the increase of industrial activities. Therefore, environment ultimately needs to get legal protection. Criminal law could contribute towards environmental legal protection; (Alvi Syahrin: 2002). However, we need to contemplate the limitations inherently attached to the application of such criminal law such as principle of legality and principle of error (Alvi S: 2002)

According to Barda Nawawi Arief, to create a criminal liability, it should take a clear shot for who can take the responsibility for; meaning that it must be ascertained who is accused as a perpetrator of a certain criminal act. This problem closely relates to criminal legal subject generally formulated by the legislators responsible for the alleged crime. After the perpetrator being determined, the next step is about how the criminal liability proceeds. (Muladi and Dwidja: 1991).

To determine who is criminally liable among the corporate managers or business entities, it would take an investigation towards AMDAL (environmental impact analysis) documents, licenses and working structure inside the job positions inside corporations involved. Such investigation of those documents would produce data, information and facts about negative impact affected by the business activities and how far the monitoring and controlling are performed to restrain the impact. Based on those documents, it could be recognized what authorities and duties that the legal entities' managers or corporations are having in term of observing, preventing and controlling negative impact of the companies' activities.

Discussion

1. Theory of Corporate Criminal Liability

In various literatures and legislations in Indonesia, other countries, and international law, it has been acknowledged that corporation is a criminal legal subject and liable towards criminal law. Because corporation cannot act as how human can act and corporation's acts are committed through human's acts, it takes theoretical argumentation to explain that those human's acts are corporation's acts or corporation is liable for the human's acts.

According to D.Schaffmer, corporation's position as criminal legal subject and bearer of liability's consequence can be classified into the three following development stages: (D.Schaffmeister:2003).

a. First Stage

The first stage is still influenced by the principle of *societas delinquere non potest*, so a criminal act happening in corporate environment is considered as committed by the corporation's manager. The corporation is not acknowledged as a criminal legal subject and not liable towards criminal law.

b. Second stage

In the second stage, corporation has been acknowledged as a criminal legal subject, acknowledged as perpetrator of wrongdoing, but is not yet liable as its manager.

c. Third stage

In the third stage, corporation is acknowledged as a criminal legal subject and liable towards criminal law.

In general, corporate criminal liability is based on the doctrine of *respondeat superior* which states that corporation itself cannot commit a wrongdoing. Only can the agents acting for and on behalf of the corporation commit wrongdoing; it is them acting for and on behalf of the corporation. Therefore, only can agents of corporation commit wrongdoing and be criminally liable. In some literatures, the doctrine of *respondeat superior* and the theory of *alter ego* result in three models of corporate criminal liability, namely *direct corporate criminal liability*, *strict liability*, and *vicarious liability* (Sue Titus R: 1995). According to theory of *respondeat superior*, corporation can be liable towards criminal law if the agent of corporation commits wrongdoing and is meant to produce profit for the corporation. This means that there are three aspects that must be fulfilled so that a corporation stands liable for its agent's act, namely: 1) the agent of such corporation commits wrongdoing; 2) the wrongdoing is committed in the scope of its authority; and 3) it is in the purpose of making the corporation's profit (Stanford H :2000). Meanwhile, according to theory of *alter ego*: "a corporation may be held liable for the criminal acts of an agent only if the offense was performed, authorized, or recklessly tolerated by the board of directors or a high managerial agent" (V.S Khana: 2000). It is the author's point of view that both theory of *respondeat superior* and *alter ego* could be used to implement the use of the principle of *vicarious liability* by determining criteria of corporate criminal liability for manager's or agent's act in accordance with criteria of criminal act.

Direct corporate liability or known as *identification theory* is one of the theories used as a justification for corporate criminal liability even though a corporation is not something that can stand by itself. According to this doctrine, a corporation can directly commit criminal act through the corporation itself. Thus, the act of "pejabat senior" (*senior officer*) is regarded or categorized as the corporation's act (Barda Nawawi: 2002). In this theory, to be convicted, it firstly must be identified. Criminal liability can only be imposed to corporation if such crime is committed by the person who is the "directing mind" of that corporation. This is in line with what is put forth by Richard Card, stating that: "the acts and state of mind of the person are the acts and state of mind of the corporation" (Muladi and Dwidja: 1991). According to Catherine Elliot and Frances Ouinn, according to the case *Tesco Supermakets v Nattrans*: "only individuals who had some power to control within the organization, including some direction over the activity with the offence is concerned, would fall within this doctrine" (Catherine E and Frances :2002). Hence, according to Clarks and Keating, such persons in the structure of the corporation should have important positions so their acts can be attributed as the company's. In this circumstance, both the individuals and the company may be held liable for the criminal acts (Catherine E and Frances: 2002)

Strict liability or *absolute liability* can be meant as a criminal act without requiring fault on the doer for one or more *actus reus* (Russel Heaton: 2006). *Strict liability* is liability without fault. It can be emphasized that in a criminal act for which strict liability can be imposed, it needs only a presumption of guilt or the doer's (the accused) knowledge to impose criminal liability on him or her. So, it disregards the *mens rea* as the essential element of strict liability is the *actus reus* (action) so the one that needs to

¹ Article 1 Section (14) EPM Law, "Environmental pollution is the unification or ingestion of living organisms, substances, energy, or other components into the environment by human activities so it exceeds the environmental quality determined".

be proven is the *actus reus* (action), not the *mens rea* (criminal intent) (Hanafi: 1997). Regarding *strict liability* in its relation to corporation, this thing can also be imposed with liability towards certain criminal act whose aspect of fault does not need to be proven (*mens rea*), which has been provided by legislations. The problem that needs to be paid attention for, regarding its application is if certain criminal act not requiring fault (*mens rea*) which has been settled by such legislations must be able to accommodate as much crime as committed by corporation in various aspects of life.

Vicarious Liability is based on the principle of “*employment principle*”, stating that employer is the main person responsible for his or her workers or employees. Therefore, here shows the principle “*the servant’s act is the master’s act in law*” or known as the principle “*the agency principle*” stating “*the company is liable for the wrongful acts of all its employees*”. (Barda Nawawi: 2002)

The principle of employment relationship under *vicarious liability* is called the principle of delegation, which means it is related to the authorization for a person to manage a business. The business owner runs the business directly, but he or she fully delegates a manager to take care of his or her corporation or business entity. If the manager commits an illegal act, the business owner (delegator) is liable for it.

This theory is just restricted to certain situation where the owner (corporation) only takes responsibility for the employees’ wrongdoing in the scope of their work (Clarkson: 1998). The rationality of the application of this theory is because the owner (corporation) has control and power over them and the profit that they gain directly becomes the owner’s (corporation) (Clarkson: 1998). The doctrine of *vicarious liability* can be only applied if it truly can be proven that there is a superior-inferior relationship between the owner (corporation) and the workers or employees committed the criminal act.

When a corporation or business entity is declared criminally liable for a criminal act in Indonesia, according to Mardjono Reksodiputro (1984), there are three possibilities for it as a criminal legal subject related to its criminal liability, namely:

- a. The manager of the corporation as the doer and the corporation as the liable party; (Robert H: 2001)
- b. The corporation or business entity as the doer and the manager as the liable party;
- c. The corporation or business entity as the doer and the liable party. (Hadiati K : 1993).

Therefore, under this liability it is still possible to prosecute and sentence individuals, including managers, aside from the corporation or business entity itself. Nevertheless, the role of humans or individuals is still significant and thus it is necessary that they are considered as a subject of prosecution by this viewpoint:

How do make corporations and other organizations comply? They have no arms, no legs, no conscience-if you cut them, they don’t bleed, you can’t find them enough to get their attention.... Individuals make a difference in corporations. They are not nameless and faceless. They can go to jail. We can go to get their attention.(G Arbuckle:1993).

Managers are individuals with a social position or power, at least in the scope of the company where they work. Therefore, while enjoying their social position, they need to also be given responsibility as expressed in the saying: “where social power exists, so does responsibility”. (Gunter H: 1994)

2. Asking For Corporate Criminal Liability in Environmental Crime and Judicial Practice in Indonesia.

Corporate criminal liability in environmental crime is regulated in Article 116 to 119 of Law No.32 of 2009 on Environmental Protection and Management (hereafter referred to as the EPM Law) in which corporate liability can be asked to business entities or corporations, corporation’s managers, both corporations and managers, and corporation’s workers.

The stipulation of Article 116 section (1) EPM Law provides that if criminal act is committed by, for, or on behalf of business entities, legal charge and legal sanction are faced to; (a) the business entities: and/or, (b) the person who gives instruction to commit the criminal act or the person who acts as the activity’s leader in such criminal act. Section (2) provides that if environmental criminal act is committed by the person based on working relationship or other relationship acting in the scope of the business entities, legal sanction is faced to the person who gives the instruction or the leader in such criminal act without considering such criminal act is committed collectively. Therefore, it can be seen as the following; (Alvi Syahrin; 2002).

- a. The stipulation of the Article provides that besides a person as an individual, environmental criminal act can be committed by business entities or corporations.
- b. The principle of corporate liability acknowledged as criminal legal subject in environmental criminal act, sanction and certain action will be imposed to;
 - Business entities or other organizations which are non-legal entities.
 - Those who give instruction to commit environmental criminal act.
 - Those who act as leaders in committing the criminal act
 - Both who give instruction and lead the criminal act.
- c. Corporate criminal liability is expanded to include activities done by the persons based on employment relation and other kinds of relation in corporate environment. Legal charge and sanction are faced to them who give instruction or who act as leaders without concerning the relationship between the two.
- d. The understanding of them acting as leaders is not restricted to as the leaders only in committing the environmental criminal act, but also in holding the responsibility for the occurrence of pollution and/or environmental destruction. For instance, there is a person working in a business entity or other organization committing an action such as dumping waste at an improper place or without any permission causing pollution and/or environmental damage, then the ones who is responsible is not only the person, but also the leader, even though the leader does not instruct and lead such wrongdoing.

Business entities or corporations are also considered liable for environmental criminal act if such act is committed by parties who have employment relation with the business entities or corporations and other kinds of relation with the business entities

or corporations acting in the scope of business activities of the business entities or corporations. Such employment relation is a relation between the businessperson/individual (owning the business entities) and the workers based on an employment contract. On the other hand, a business entity or corporation will be free from a criminal liability or considered innocent if the business entity or corporation can prove that it commits no crime; could be because the persons or parties committing the crime have no employment relation or other kinds of relation with the business entity or corporation, or such crime is committed by somebody outside the scope of the business or corporate activities.

According to Article 116 section (1) and (2) EPM Law, if an environmental criminal act is committed by, for and on behalf of the corporation, the ones who are liable are the following:

1. committed by the business entity;
2. committed for the business entity;
3. committed on behalf of the business entity;
4. committed by the business entity committed by the person based on employment relation acting in the scope of the business entity's activities;
5. committed by the business entity committed by the person based on other kinds of relation acting in the scope of the business entity's activities;
6. committed for the business entity committed by the person based on employment relation acting in the scope of the business entity's activities;
7. committed for the business entity committed by the person based on other kinds of relation acting in the scope of business entity's activities;
8. committed on behalf of the business entity committed by the person based on employment relation acting in the scope of the business entity's activities;
9. Committed on behalf of the business entity committed by the person based on other kinds of relation acting in the scope of the business entity's activities.

In the case of environmental criminal act, to ask for criminal liability to business entities or corporations, business entity's manager or business entity's together with the corporation, problem arises in the practice because in this case there is still a difficulty to prove the causality between problems in the business structure and the concrete behaviors or acts committed.

To avoid such difficulty in proving, it can be done by putting aside the capability of charging the criminal liability towards business entities or corporations and then by classifying the violation of business entities' or corporations' duties in performing surveillance and the non-existence of social function that the business entities or corporations should have.

Acquitting business entities or corporations as perpetrators of criminal act can be done by observing the authorities of such legal entities. Factually, business entities or corporations have authorities to manage/control and/or command the party committing the illegal conduct. If business entities or corporations, factually, barely/do not perform and/or endeavor policies or safety conduct in the attempt to prevent illegal conduct, it can be concluded that such business entities or corporations agree with such illegal conduct, so the business entities or corporations may be held liable for the circumstance.

In the attempt of performing environmental management, business entities or corporations have duties to create the following policies/steps:

1. Formulating policies in the sector of environment;
2. Formulating proper sequence/structure of organization and setting who is going to be in charge of performing such environmental policies;
3. Formulating internal instructions/regulations for any activities aggravating the environment;
4. Providing financial facilities or budgeting the cost of performing policies of environmental management.

If, towards the above duties, business entities or corporations do not function well, this can be the reason to assume that the business entities or corporations lack of effort or lack of hard work in preventing (the possibilities) of illegal conducts.

Business entities or corporations, in doing its action, must be through humans possessing the authorities to do such act on behalf of the business entity or corporation. This is because the humans themselves doing acts for the business entities or corporations. Therefore, criminal liability towards business entities or corporations for criminal act committed by such person can be imposed if it meets all the following aspects or conditions (Sutan R: 2007).

1. The criminal act (both in the form of *commission* and *ommission*) is committed or instructed by the corporate personnel who in the structure of corporate organization has a position as directing mind of the corporation, which is a personnel having the position to decide corporation's policies or having the valid authority to perform or not perform a conduct that is binding the corporation without having to get approval from the superiors.
Corporations' liability can only be applied in term of criminal act if;
 - a. Done by the managers; those who according to the articles of association formally operate the management of the corporation, and/or
 - b. Done by those who according to the corporation's articles of association are not managers, but officially have the authority to conduct acts that legally bind the corporation based on;
 - A designation by the managers to hold a position with an authority to take action autonomously within the scope of the duties and obligations attached to the position to be able to conduct a corporation-binding legal act, or
 - A granting of power by the managers as specified in Section (1), to conduct acts that legally bind the corporation.
 - c. Instructed by those mentioned in paragraph "a" and "b" to run or operate the management of the corporation.
2. The criminal act is committed in the scope of corporation's intention and purpose. This activity is *intra vires* activity which means an activity suitable with intention and purpose provided in the articles of association.
3. The criminal act is committed by the businessperson or by the instruction of who gives instruction in the scope of his or her task in the corporation. This means that if the criminal act does not relate to the doer's task or the instructor's

task inside the corporation –hence, the personnel has no authority to commit an act binding the corporation, the corporation has no obligation to take on the criminal liability.

4. The criminal act is committed with an intention to give benefit to the corporation. The benefit can be in the form of financial or non-financial profit or can deduct financial or non-financial loss for the corporation.
5. The doer or the instructor has no justifying or absolving reason to be freed from the criminal liability.

For the criminal act requiring the aspect of action (*actus reus*) and the aspect of criminal intent (*mens rea*), those two aspects (*actus reus* and *mens rea*) do not only have to be in one person. This means that the person who commits *actus reus* does not have to have *mens rea* which is a basis of such *actus reus*, provided that the person who commits *actus reus* is carrying out somebody else's instruction or order who has the directing mind to desire the conduct of such *mens rea* performed by the person who is instructed. By the combination between *actus reus* committed by the doer not having *mens rea* (not having wrong directing mind) and *mens rea* possessed by the person who instructs or orders *actus reus*, in aggregate, the aspects were met (*actus reus* and *mens rea*) for imposing criminal liability towards corporation. This opens a possibility that the *actus reus* doer commits his act just basing on the directing mind of doing his superior's instruction without knowing the real background of the criminal act committed. Therefore, such person does not have to bear the burden of the criminal liability over *actus reus* committed by him or her because he or she does not possess *mens rea* required. Nevertheless, the corporation remains liable for such criminal act committed because this meets the requirement of *actus reus* and *mens rea* as the aggregation of some doers.

3. Asking for Corporate Criminal Liability In Corporate Prosecution and Criminalization and The Practice in Court

The recognition of business entities or corporations as criminal legal subjects and criminal perpetrators and corporate criminal liability in EPM Law, as a matter of fact, carries implication towards its prosecution and criminalization in judicial practice.

Until today, it is hard to find judicial verdict placing corporations or business entities as the accused and the convict in a matter of graft, money laundry, human trafficking. However, in a matter of environmental criminal act, the author has found some cases of criminal act of environmental pollution and destruction.

The following is the analysis of Verdict of The Supreme Court in the case of criminal act in the sector of environment by PT Dongwoo Environmental Indonesia describing the implication of theory of corporate criminal liability in the practice of criminal justice. In The Supreme Court's Verdict No.862K/Pid.Sus/2010 of 7 April 2011, Panel of Judges had sentenced to criminal fine over PT Dongwoo Environmental Indonesia represented by Kim Yong Woo of Rp.650.000.000,- because legally and clearly proven guilty of committing continual illegal conduct of environmental pollution. In its verdict, Panel of Judges clearly stated that the accused was the corporation, namely the accused PT Dongwoo Environmental Indonesia which in its operation was certainly represented by its manager who in this case was Kim Young Woo as the CEO, because a corporation can only operate through its bodies. Therefore, the sentence was in the form of criminal fine which was an accurate sentence suitable with a corporation's characteristic. Yet, the punishment as the replacement of fine sentenced by the Panel of Judges in the form of six-month imprisonment is not really accurate imposed to a corporation because the imprisonment or incarceration is one kind of punishment intended for persons and cannot be imposed to corporations. Besides the primary punishment in the form of fine, the Panel of Judges also sentenced to additional punishment fit to the corporation's characteristic which was in the form of the seizure of profit of the illegal conduct and the closing of PT Dongwoo Environmental Indonesia.

In the practice, the verdict of the punishment as the replacement of fine is a problem faced by the judge while deciding the punishment as the replacement of fine for corporation because the legal apparatus that can be used by the judge is in the form of imprisonment directive for the corporation in the EPM Law.

So, the question would be: if the punishment in the form of fine had not happen, would Kim Young Woo as the CEO representing PT Dongwoo Environmental Indonesia have been in jail? This would also arise another problem because the one receiving the punishment would not be a corporation which was PT Dongwoo Environmental Indonesia but Kim Young Woo who was also convicted guilty in the Verdict of Bekasi High Court No.457/Pid.B/2008/PN.Bks of 16 Desember 2008 and connected with the Verdict of West Java High Court No. 157/Pid/2009/PT.Bdg of 11 Mei 2009, namely: committing the illegal conduct of giving instruction to conduct environmental pollution and was sentenced to six months in prison and the fine of Rp.100.000.000,- subsidiary to three-month imprisonment.

The verdict of the imprisonment of Kim Young Woo in the Verdict of Bekasi High Court No 457/Pid.B/2008/PN.Bks of 16 Desember 2008 and connected with the Verdict of West Java High Court No.157/Pid/2009/PT. Bdg of 11 Mei 2009 is one of the considerations of the Panel of Judges of The Supreme Court to annul the Verdict of Bandung High Court No.456/Pid/2009/PT.Bdg of 3 Desember 2009 enhancing the Verdict of Bekasi High Court No.458/Pid.B/2008/PN.Bks. The Panel of Judges adjudicated the accused PT Dongwoo Environmental Indonesia represented by Kim Young Woo as validly and legitimately guilty of committing environmental illegal conduct of Rp 325.000.000,- and if the fine was not paid, it will be replaced with six-month imprisonment. Such Bekasi High Court's Verdict had then been enhanced by Bandung High Court.

The Panel of Judges of The Supreme Court regarded that *Judex Facti* had wrongly applied the law which by mistake and inaccurately had given the sanction towards the accused according to the provision of Article 45 Law No. 23 of 1997 on EPM threatening with a heavier criminal sanction i.e. the addition of one-third if the criminal act is committed by or on behalf of legal entity, company, partnership, foundation or other organizations. The conduct of Kim Young Woo which was "illegally in purpose committing an act of environmental pollution continually" committed when in the position of CEO of PT Dongwoo Environmental operating in the sector of Management of B3 waste.

The reasoning is it is impossible for Kim Young Woo to undergo two-time punishment; for himself and for representing the corporation or PT Dongwoo Environmental Indonesia. This would emerge the injustice because a person should go through a punishment not convicted to him. Thus, the implication of the acknowledgement of corporation as criminal legal subject or subject of criminal act and corporate criminal liability is the practice of prosecution and criminalization towards corporation fit to corporate characteristic. Therefore, in the law, it is strictly stated that corporations can be criminally liable. This must be accompanied with the arrangement of corporate criminalization's directive and the prosecution and criminalization must be suitable with corporate

characteristic unless the legal politic is not willing to criminally prosecute and condemn the corporations like the EPM Law which the criminal liability is only imposed to the corporations' functional managers.

Conclusion

The acknowledgement of corporate criminal liability as the criminal legal subject or the subject of criminal act and corporately liable, according to criminal law based on theories of corporate criminal act and corporate liability has an implication towards the prosecution and criminalization of the corporation.

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