

Sanctioning Corporation in Digital Age: The Indonesian Perspective

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Keywords: Corporate, Criminal Liability, Indonesian, Criminal Legal System, Modern Crimes.

Abstract: Nowadays, when manufacturing is going digital characterized by remarkable technologies such as the Internet of Things (IoT) and artificial intelligence, the corporations strengthen their position by dominating all aspects of human life. The growing interconnectedness among countries around the globe also gives opportunities for corporations to gain immense profit. The activities of corporations have evolved from containment within the national scope to multinational reach. Apart from the advantages of corporations to society, corporations can also create extensive damages to the society. The Facebook data breach scandal was the latest example from Indonesia about multinational corporations that could cause more than 1 million Indonesian Facebook users' private data illegally harvested by the third party. The question then emerges, whether criminal law regime can be used to deal with the misconduct of corporations especially in the digital era when crimes become more sophisticated, modern, complicated and also borderless. This paper discusses the way the criminal law regime can be used to deal with the misconduct of modern corporations from the Indonesian perspective. This paper argues that although the Indonesian criminal code has not recognized the criminal liability of corporations, the Indonesian criminal legal system has sufficient basis for sanctioning modern corporate crimes.

1 INTRODUCTION

The daily life of modern society cannot be separated from the involvement of corporations since corporations fulfill almost all aspects of society needs. Since the mechanization in the first revolution industry that began in Britain three centuries ago until the digital era in the fourth revolution industry nowadays, corporations always become important actors in business activities. Corporations do not only possess a considerable power in economic activities but also in political aspect. Many corporations such as Google and Shell have more significant annual revenue compared to Gross National Product (GDP) of an individual country (Business Insider, 2011). That condition can lead to unbalance position between corporations and countries which may lead to difficulty to sanction the misconduct of corporations. The economic activities of corporations on one side give benefit for society by supplying primary and secondary needs of society. On the other side, the severe threats by corporations' activities to the society are also real and more massive than crimes by natural persons. The Lapindo mud disaster in Indonesia can be an example of how the activities of a corporation

can give disadvantages to the society. The gas drilling activities of Lapindo, an oil company, located in Sidoarjo East Java Indonesia caused more than 1400 acres of land covered by mud, displaced more than 30 thousand people from their villages and caused more than 20 people to lose their life (new york times, 2015).

The fact that corporations activities can cause the harm to the society leads to a question about how to deal with the actions of corporations that harm the society and whether criminal sanction, instead of civil and administrative sanction, can be imposed on the corporations as moral condemnation for that conduct? The question of the possibility to impute criminal liability to corporations has created a separation among countries in the world into two sides that pro or against the criminal liability of corporations. In the Indonesian perspective, sanctioning corporations for their misconduct is necessary to protect the society from their illegal activities. Even though the Indonesian criminal code has not recognized corporations as its subject, several Special Laws open the possibility to sanction corporations for their misconducts. Based on all those facts, this paper aims to discuss how the Indonesian criminal law regime can

be used to deal with the misconduct of corporations in the high technology and borderless crime era.

2 MATERIALS AND METHODS

This paper uses statute and case approaches as primary sources in order to explain the question of the paper (Campbell, 1979). The statute approach will be used to explain the theoretical background of the recognition of corporations as criminal law subject since the original criminal law only recognizes persons in term of flesh and blood that can criminally liable. The statute approach will also be used to explain the system to establish the criminal liability of corporations among Indonesian Special Criminal Laws. Therefore, several Laws which recognize corporations as its criminal law subject will be used as the primary source to explain the Indonesian system to establish the criminal liability of corporations.

The case approach is essential as a tool to explain the implementation of the Laws recognizing the criminal liability of corporations in the perspective of the Indonesian courts, especially the view of the Indonesian Supreme Court toward corporate crimes. This paper uses several important final and binding cases to describe the implementation of the Laws toward corporations.

To answer this paper's question, it firstly elaborates the way the Laws outside criminal code regulate the criminal liability of corporations along with the problems faced by Indonesia. Several essential case laws will also be discussed to get a comprehensive understanding of the Indonesian system. Secondly, it discusses whether the contemporary Indonesian system in establishing the criminal liability of corporations can be used to deal with the high technology and borderless crime.

3 THE CRIMINAL LAW PRINCIPLE AND THE CRIMINAL LIABILITY OF CORPORATIONS

The fundamental principle of criminal responsibility originally only concerned about the liability of natural persons in term of the person in blood and flesh for their misconducts. For that reason, the criminal law then develops within the idea and moral stance of individualism which emphasizes the

moral worth of the individual (Wells, 1994). Since criminal sanctions are only for natural persons, to apply the criminal sanctions to corporations then leads to several theoretical questions. The First question is about to determine that a corporation has committed a criminal act (*actus reus*), since a criminal act requires a bodily movement from the perpetrator. Then the second question is about to establish the moral blameworthiness (*mens rea*) of corporations. A corporation is only a law creation entity based on legal fiction doctrine. This entity is established for certain aims based on their corporate charter (*ultra vires doctrine*). Committing a criminal offense is absolutely impossible in their corporate charter. Therefore, based on *ultra vires doctrine*, the corporations cannot commit criminal offenses because there are no laws or bylaws give them a legal foundation to commit a crime (Leigh, 1969). Only the natural persons within a corporation can commit a crime and corporation cannot be criminally liable for the misconduct of natural persons within its organization.

However, the criminal law development among countries around the globe shows a different perspective. Nowadays, there are many countries which already recognize corporations as the criminal law subject in their criminal legal system. Criminal law can be seen as an instrument or symbol or ideology to achieve a purpose or to make a moral statement of specific conduct (Wells, 1994). Criminal sanction represents a statement of moral or values relate to the conception of the society. For a country which already recognizes the criminal liability of corporations, it can also mean that their society already believes that corporations deserve to be criminally sanctioned for their misconduct similar to natural persons. Since a corporation cannot commit misconduct by itself and also has no mental state, the act and intention of a corporation are formless. Therefore, to establish the corporate blameworthiness of a corporation, the attribution of the conduct and intention of the natural person to the corporation are important bases in the development of corporate criminal liability.

4 INDONESIAN LAWS RELATED TO THE CRIMINAL LIABILITY OF CORPORATIONS

In the middle of pros and cons on the possibility to establish the criminal liability of corporations,

Indonesia has recognized the criminal liability of corporations since the early day of Indonesia as an independent country. However, Indonesia started to recognize the criminal liability of corporations in a specific crime outside the Indonesian criminal code (KUHP) in 1951. Until now, this country still preserves its approach to sanction corporations by recognizing corporations within the Laws outside the general criminal law both in the KUHP and in the Indonesian criminal procedural code (KUHAP). To some extent, that approach has created problems. The fact that both the general substantive criminal law code (KUHP) and the general criminal procedural law code (KUHAP) regulate nothing about corporations, law enforcers should have a comprehensive understanding about all different systems of the criminal liability of corporations among the Special Laws. Furthermore, as a system, there is a gap between the special Laws (*lex specialis*) and the general criminal Law (*lex generalis*). The Special Laws cannot refer to both KUHP and KUHAP when those Special Laws do not stipulate certain issues related to corporations.

Until now there are more than 120 Laws outside the KUHP which recognize corporations as their subject (Priyatno, 2017). In general, there is no uniform system among those Laws in establishing the criminal liability of corporations. The system of corporate criminal liability in Indonesia based on the Laws can be categorized into three different categories i.e. (Reksodiputro, 1989):

1. the Laws which do not recognize corporations as a law subject, therefore corporations cannot be held criminally liable and become the subject of punishment;
2. the Laws which recognize criminal acts by corporations, but it is only the natural person within the corporations who can be held criminally liable on behalf of the corporation;
3. the Laws which recognize that a corporation is criminally liable and the subject of criminal punishment.

The KUHP is the example of a law in the first category which has not recognized corporations as criminal law subject in its stipulation. The example for the second category is the stipulation on Banking Law. Article 46 Paragraph 2 Banking Law regulates that a corporation could commit a crime in unlicensed collecting fund from the public, but based on that article the prosecution and the punishment could only be imposed to the natural person, in this case to those who order such activities, or those who are responsible for the management of these acts, or against both parties. Lastly, The Law Number 31

Year 1999 as amended by The Law Number 20 Year 2001 on Eradication of the Criminal Act of Corruption (Anti-Corruption Law) and The Law Number 8 Year 2010 concerning the Prevention and Combating of Money Laundering (Anti-Money Laundering Law) are the examples of several special criminal Laws outside the KUHP which stipulate criminal liability of corporations based on the third category. Anti-Money Laundering Law, for example, does not only stipulate the way corporation can be considered to commit a crime and be held criminally liable, but also stipulates on punishment for corporations. On the other hand, Anti-Corruption Law also stipulates similar aspects to Anti Money Laundering Law, but both Laws do not stipulate what if the corporation fails to pay the fine.

5 ESTABLISHING THE CRIMINAL LIABILITY OF CORPORATIONS IN INDONESIAN COURTS

The massive development in establishing the criminal liability of the corporation in Indonesia has just begun in the last ten years. Before that, it was difficult to find cases which directly related to corporations as the defendants (Sjahdeni, 2006). Apart from that difficulty, in several cases that are already final and binding, the law enforcers try to deal with the problems caused by the gap between the criminal code and Special Laws. The example is the way the court adjusted the form of the bill of indictment for the corporation. Based on the KUHAP, the bill of indictment should contain the full name, place of birth, age or date of birth, gender, nationality, address, religion, and occupation of the defendant. If the bill of indictment does not satisfy those requirements, based on the Article 143 (3) *jo.* Article 197 (2) KUHAP, the bill of indictment shall be void. When corporations become the defendant, it is impossible to satisfy all those requirements. Corporations cannot theoretically meet requirements such as religion and gender. Therefore, the court decided that the bill of indictment for corporations does not need to mention the gender and religion. In PT Giri Jaladhi Wana Case (PT GJW case), the defendant filed an objection based on a reason that the requirement was not met. However, the court decided to dismiss the objection from the defendant.

There are several different views of the Indonesian courts in establishing the criminal liability of corporations. Firstly, in the *Dongwoo case* in

2010, the Court based its decision to sanction a corporation on several facts. The first was the fact that the misconduct was committed and commanded by a natural person, in this case, the director of the corporation. The second was the fact that the director as a natural person has found guilty of causing the environmental pollution in the earlier trial. This became a solid proof that the corporation could also be considered as the perpetrator in the misconduct. Then thirdly, the court also based its decision on the fact that the misconduct of the corporation was committed within the daily activity of the corporation and was related to the business core of the corporation. Therefore, the court decided that the corporation was considered intentionally committing the environmental pollution.

Secondly, in the PT GJW case. The fact that the director of the PT GJW had been found guilty for committing corruption crime in the previous case became a solid proof to decide that the corporation had also committed corruption because the director of the PT GJW was identified as the directing mind of the corporation. Then, to determine that the misconduct is committed within the sphere of the corporation, the court used *intra vires* doctrine. It means that the misconduct can be said committed within the scope of the corporation when the misconduct is in line with the activities of a corporation based on their articles of corporation. After that, the fact that the corporation got benefit from the misconduct also became the consideration of the court to sanction the corporation. In addition, the opinion of the criminal law expert in that case was also used by the court in its consideration of the decision. The expert stated that in order to establish the criminal liability of a corporation, several criteria should be met, i.e.:

1. The criminal offense is conducted or ordered by the corporate personnel either within the structure or outside the structure of the corporation who has the position as the directing mind of the corporation.
2. The criminal offense is committed in the framework of the objectives or purposes of the corporation.
3. The criminal offense is committed in accordance with the function of the perpetrator or the person who gives the order within the corporation.
4. The criminal offense is committed to give benefit to the corporation.
5. The perpetrator or the person who gives the order does not have ground for excuse or justification.

Thirdly, the Kalista Alam case. In this case, the court has different criteria in establishing the criminal

liability of a corporation. The court mentioned that the company must implement the prudential principle when running the business. The fact that the company used fire to open the land and failed to handle the land burning because of the limited equipment lead to the conviction of corporations.

6 CONCLUSION

After the discussion about how the Indonesia criminal legal system regulates and implements the system in establishing the criminal liability of corporations along with the problems surrounding it, this conclusion chapter will answer whether the contemporary Indonesian system in establishing the criminal liability of corporations can be used to deal with the high technology and borderless crime.

Even though the KUHP and the KUHAP have not recognized the criminal liability of corporations, most of Laws outside the criminal code have recognized corporations as criminal law subject to counteract the development of new crimes. Several Special Laws are enacted or amended to comply with the new shape of crimes which involve high technology and operate across countries. Several cases related to the criminal liability of corporations also demonstrate that the Indonesian courts apply the extensive and various criteria in establishing the criminal liability of corporations. Even though the Indonesian criminal code has not recognized the criminal liability of corporations, the Indonesian criminal legal system has sufficient basis for sanctioning modern corporate crimes.

REFERENCES

- Campbell, Enid, E.J. Glasson, Ann Lahore, 1979. *Legal research: Materials and Methods*, 2nd Edition. Sydney: Law Company Book Limited.
- Leigh, L.H., 1969. *The Criminal Liability of Corporations in English Law*, London.
- Muladi, Dwija Prijatno. 1991. *Pertanggungjawaban Pidana Korporasi*. Bandung: Sekolah Tinggi Bandung.
- Prijatno, Dwija et al., 2017, *Kebijakan Formulasi Sistem Pertanggungjawaban Pidana Korporasi Dalam Peraturan Perundangan-Undangan Khusus di Luar KUHP di Indonesia (Policy Formulation on Corporate Criminal Liability System in The Special Laws outside the KUHP in Indonesia)*. Jakarta, Sinar Grafika.
- Reksodiputro, Mardjono, 1989. 'Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Korporasi'. *Presentation Paper*, Semarang, FH UNDIP.

- Sjahdeini, Sutan Remy, 2006. *Pertanggungjawaban Pidana Korporasi*. Jakarta: Grafiti Pers.
- Wells, Celia, 1994. *Corporations and Criminal Responsibility*, Oxford: Clarendon Press.
- 9 years of muck mud and debate in java”, 22 September 2015, Accessed on 2 August 2018, <https://www.nytimes.com/2015/09/22/science/9-years-of-muck-mud-and-debate-in-java.html>.
- 25 US Mega Corporations: Where They Rank If They Were Countries”, Accessed 2 August 2018, <https://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6/?IR=T>
- The Indonesian Supreme Court Decision Number 862 K/Pid.Sus/2010.
- The Banjarmasin High Court Decision Number 04/Pid.Sus/PT.BJM
- The Supreme Court Decision Number 1554 K/Pid.Sus/2015.

