

Extensive Interpretation of Corporate Liability in the Crime of Illegal Fishing in Indonesia

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Abstract—Article 101 of Indonesian Law Number 31 Year 2004 concerning Fisheries states that if there is a crime as mentioned in some previous articles conducted by a certain corporation then prosecution and criminal sanction will be imposed on its directors and the fine amount for the corporation will be added by 1/3 (one third) higher than the sanctions. Given the limitations of the grammatical interpretation of Article 101, some fundamental questions arise: is it true that the Fisheries Act in Indonesia can not determine corporations as defendants of a fishery crime? Is it true that accusing the corporate director is identical to imposing a criminal act for the corporation itself? By using extensive interpretation, the author of this paper believes that corporations should be the legal entities within this norm. Criminal penalties should be charged to the corporate director who was in office at the time of the execution of the verdict. Meanwhile, against the director of the corporation who was in office when the crime occurred, he ought be subject to imprisonment in accordance with the maximum limit stipulated by law. In this context, the perpetrators of these crimes are individually liable and not charged to the next board of directors. Such an extensive interpretation is an innovation in legal reasoning and would be beneficial for law enforcement in Indonesia in the way to protect its interests as the largest archipelagic country in the Asia-Pacific region in addressing fisheries issues such as illegal fishing.

Keywords—*criminal law, corporate liability, fishery crime, illegal fishing, extensive interpretation.*

I. INTRODUCTION

Situated in the Asia-Pacific region, Indonesia is an archipelagic country that has very large marine assets, especially in the fisheries sector. Since the maritime regions in Indonesia are not well-monitored, illegal and unreported fishing cases have become a common sight and these crimes are no longer practiced by small-scale fishermen, but are carried out by large capital corporations [1].

Indonesia has tried to anticipate this by making a law on fisheries, namely Law number 31 of 2004, by opening up opportunities for corporations to become defendants of criminal cases in fisheries. In Article 101 of this law, there is the following statement: *"In the case of criminal acts as referred to in Article 84 paragraph (1), Article 85, Article 86, Article 87, Article 88, Article 89, Article 90, Article 91, Article 92, Article 93, Article 94, Article 95, and Article 96 are carried out by corporations, their criminal charges and sanctions are imposed on their directors and criminal penalties are charged are charged 1/3 (one third) heavier than the sanctions for the crime."* This paper will not discuss

all the articles mentioned above, but will only focus on a certain article which relates to the regulation of the corporation as a legal subject.

The formulation of Article 101 shows that there is enthusiasm from the legislators to drag corporations in cases of illegal fishing into the courtroom, but unfortunately, this article opens a gap in a variety of interpretations of how it must be given precise meaning. A number of challenging questions to be raised in this paper are: (1) who is the legal subject referred to the Article 101; is it a corporation or a corporate director?; (2) is it true that indicting corporate directors are identical to impose criminal acts on the corporation itself? Thus, the core question of this paper is about the possibility of optimally applying the principles of corporate liability in the context of criminal law according to the Fisheries Law in Indonesia. The answer to those questions will determine whether the Law on Fisheries actually allows criminalizing corporations, or vice versa, which provides them with opportunities for avoidance of criminal sanctions.

The analysis in this paper is useful to show the correct way of interpretation in order to respond to the unclear understanding of the text of the legislation. This condition is a common phenomenon in Indonesia lately, which is caused by the low quality of written law, including one of which is the lack of clarity in the formulation of the Fisheries Law which makes the Prosecutor's Office hesitant to bring the corporation to court as the subject of a criminal offense. While waiting for a better formulation in legislation, the role of law enforcement officers, especially judges, is very significant to overcome this weakness.

II. LITERATURE REVIEW

The core question of this paper is about the possibility of optimally applying the principles of corporate liability in the context of criminal law according to the Fisheries Law in Indonesia. There are two important concepts that need to be raised in the literature review, which are expected to give way to a deeper analysis of this issue. There are two important concepts that need to be raised in the literature review which are expected to give way to a deeper analysis of this issue. They are: (1) corporation as a legal subject and (2) interpretation obstacles in criminal law.

A. Corporation as A Legal Subject

The biggest problem is to ascertain whether a corporation can be positioned as a legal subject in criminal

law is how capable the corporation can be liable like a human being.

In textbooks, there are at least three groups of views on this subject [2]. First, a psychological view that states that only humans can think rationally and have a moral attitude. Therefore, outside of humans there is no possible legal subject that can be held accountable for actions that are considered irrational and immoral. This first understanding is in line with the classic principle that there is no mistake that can be directed to community organizations (*societas delinquere non potest*) [3]. Second, is the sociological view, which states that criminal law focuses more on action, not who the perpetrator is. That is, whether the action is a result of human work or not, it is not a determinant of whether or not the act was subject to criminal sanctions. The third view is the opposite of the two previous perspectives, which are referred to as 'counterfactuality' (*Kontrafaktisch*) [4],[5].

The last mentioned perspective believes that criminal law is a form of rational distribution of state power. But at the same time also recognizes critical restrictions [6]. Thus, according to this view, corporations can also be labeled as legal subjects in criminal law as long as there are reasonable arguments and the use of measurable power to make the corporation capable of being responsible. This view seems to be the most up-to-date and deserves to be used as a solution towards a more reasonable interpretation of the problems faced by the Indonesian Fisheries Law.

Positioning the corporation as a legal subject of criminal law, is nothing new in the criminal law system in Indonesia. It is quite interesting, that corporations that were first convicted did not occur in criminal cases related to economic or business activities. Criminal punishment against corporations was first carried out against terrorism cases [7]. Law Number 15 of 2003 on Terrorism also regulates matters that specifically state that a corporation that commits a crime of terrorism can be punished, because it is a legal subject. In Article 17 paragraph (1) of this law states that in the event that a criminal act of terrorism is carried out by or in the name of a corporation, criminal prosecution and imposition are carried out on the corporation and/or its management. The first case of implementing corporate punishment is a case of terrorism with the defendant Zarkasih [8], which is stated in the Decision of the South Jakarta District Court Number 2192/Pid.B/2007/PN.Jkt.Sl.

Although only one terrorist case was inflicted on the corporation, the punishment of the corporation for the case was relatively accepted by the Indonesian legal community without any opposition [9]. Ironically, this is not the case for economic and business crime. There are so many cases related to economic and business crimes committed by corporations, but there has never been a single court decision that deserves to be designated as a landmark, which places the corporation as a defendant and is imposed on criminal sanctions. These unsuccessful stories also occur in environmental cases [10],[11], which in some laws have included corporations as legal subjects, but practically these

corporations have not been successful in being subject to criminal sanctions. The same tendency seems to apply also to cases of illegal fishing.

B. Interpretation Obstacles in Criminal Law

At present there are several laws and regulations governing fisheries. The highest level of regulation is Law Number 31 of 2004 (as amended by Law Number 45 of 2009). This regulation does not provide its enforcement procedures, so the rules in this legal area must refer to the procedural law which generally follows the provisions of the Code of Criminal Procedure Law as enacted by Law No. 8 of 1981 [12].

The Supreme Court, through its regulation number 13 of 2016, considers that there are problems in criminal procedural law that make it difficult for the courts at the first level to process corporations as perpetrators of crimes. Article 4 paragraph (2) of this Supreme Court Regulation gives judges instructions on indicators for assessing corporate errors, including: (1) the corporation can obtain profits or benefits from the crime or the crime is committed for the interest of the corporation; (2) the corporation allows the occurrence of criminal acts; or (3) the corporation does not take any necessary to prevent the crime, or to prevent greater [bad] impacts and to ensure compliance with applicable legal provisions to avoid criminal acts.

This guidance from the Supreme Court is in accordance with what is usually interpreted as a corporate crime. This regulation is indeed aimed at the judges, even though the judges did not work alone in applying the instructions. The interpretation of judges is very much dependent on the interpretation made by the public prosecutors [13].

The provision in Article 4 of the Supreme Court Regulation shows the impression that as if a corporate behavior is different from the behavior of the directors or top managers of the company. In practice, this is not easily distinguished, especially in corporations that have not been public companies [14]. In these companies, personal property and company assets are sometimes not managed separately. The legality principle in criminal law has a narrow corridor for interpreters to maneuver. This rigidity makes text that is not clear and is avoided to be implemented.

In the previous description, it has been stated that the counterfactual approach has the closest possible to impose corporate liability in criminal law. This raises a classic debate between the two functions of the principle of legality, namely between the instrumental function that there is not any criminal action which is not prosecuted and a protective function which states that there is no punishment except on the basis of written law [15].

The legality principle applied in Indonesia carries out the second function more than the first. This tendency can be observed in the implementation of the principle of opportunity. On the basis of preference on this principle of protection, the prohibition on the application of criminal law based on analogy becomes very important to take into

account. As an alternative to the application of analogy, judges in Indonesia, as well as in the Netherlands, use grammatical interpretation, historical interpretation of the law, systematic interpretation, and teleological interpretation. The results will open two possibilities, namely the interpretation extends or narrows down, which is commonly called restrictive interpretation and extensive interpretation [16]. In the description below it will be shown that at least through three important interpretations, namely grammatical, systematic, and teleological interpretations, it can be understood correctly that the Fisheries Law is indeed very possible to apply corporate liability in criminal law.

III. METHODOLOGY

This paper fully applies analytical methods that are very widely used in legal discipline, which is called a normative method. This method places the text as the object of study and then the interpretation of the authoritative text is performed while sticking to the typical reasoning model of dogmatic jurisprudence. In this model, the text will be reviewed according to legal language and related to similar texts in the Fisheries Law.

IV. RESULT AND DISCUSSION

In the theory of legislation, every formulation of norms in legislation has a target of the norms, namely the legal subject. In general, the legal subject in criminal law is a human being or a natural person [17]. This view shows that criminal law in Indonesia is still very strongly influenced by a psychological perspective [18].

Such a psychological view is tried to be breached at this time. Article 1 point 14 of the Fisheries Law states that a person is an individual or corporation. That is, the Fisheries Law has committed to make the corporation a legal subject. There is no doubt about that. Corporations are defined as a group of people and/or wealth that is organized both as a legal entity and not a legal entity. The philosophy of establishing criminal sanctions in the Fisheries Law, especially is to eradicate the practice of illegal fishing in Indonesian fisheries management areas. Obviously, illegal fishing practices of high-class companies are not carried out by individuals, but rather are organized under a corporation, both legal entities and not legal entities [19].

Departing from this philosophy, it is impossible to state that the Fisheries Law does not make corporations the subject of norms. Article 101 must be read in order to give more severe sanctions to the perpetrators. Criminals who want to be regulated are corporations, not corporate directors. Of course, the corporation may be unable to operate without the directors in it, so the criminal liability must be addressed to the corporation's management. In other words, the directors here carry out this wicked burden on behalf of the corporation, not on personal behalf. Therefore, it could happen. The corporate director at the time the crime occurred in the past is different from the corporate director at the time the case was prosecuted in court.

In the context of Article 101 of the Fisheries Law, it is not an issue related to the change in management because anyone who is a key person is a representative of the corporation. This is clearly distinct if the perpetrators are not corporations, but individuals.

The form of criminal sanctions as a manifestation of criminal responsibility for corporations is different in characteristics from criminal sanctions for individuals. Corporations may not be liable to imprisonment. Unlike the case with corporate directors who are individuals. As a consequence of this, Article 101 must be read as a single interpretation of the articles that are appointed, which are the primary norms in those articles. For example, Article 84 paragraph (1). In this provision, it is stated that every person who intentionally in the Republic of Indonesia fisheries management area conducts fishing and/or fish cultivation using chemicals, ingredients biological, explosives, tools and/or methods, and/or buildings that can harm and/or endanger the sustainability of fish resources and/or the environment as referred to in Article 8 paragraph (1), shall be punished with a maximum imprisonment of 6 (six) year and a maximum fine of Rp1,200,000,000.00 (one billion two hundred million rupiahs).

The formulation of Article 84 paragraph (1) is actually a repetition of Article 8 paragraph (1). If we want to criminalize the corporation for violating Article 84 paragraph (1), the norm structure of Article 8 paragraph (1) and Article 84 paragraph (1) must be read as a single interpretation with the norm structure of Article 101.

Article 101 may not be construed as contradictory to Article 8 paragraph (1) and Article 84 paragraph (1). If, if there are those who interpret these two articles as having contradictions, then there is always a legal principle to settle such conflicts. Because Article 101 appears chronologically later than Article 8 and Article 84, this means that the latter article is always given greater power by law than the earlier articles. Article 101 juncto 8 paragraph (1) and Article 84 paragraph (1), if it is read as a whole, it can be structured as follows [20]:

1. Norm subject: each corporation (which in this case is represented by its board of directors);
2. Norm operator: prohibited;
3. Norm object: fishing and/or fish cultivation;
4. Norm condition: intentionally; in the Republic of Indonesia fisheries management area; by using chemicals, biological materials, explosives, tools and/or methods, and/or buildings; which can harm and/or endanger the sustainability of fish resources and/or the environment.
5. Secondary norms for this article are: imprisonment for a maximum of 6 (six) years and a maximum fine of Rp1,200,000,000.00 (one billion two hundred million rupiahs).

Because the corporation cannot be charged with imprisonment, the criminal variant for the corporation is a fine, which is most of Rp. 1,200,000,000.00 (one billion two

hundred million rupiahs). Please note that the keywords that are important messages from Article 101 are the determination of "criminal penalties plus 1/3 (one third) of the crime imposed." That is, Article 101 is an article that contains provisions on criminal penalties. It is true that the conjunction used in Article 101 is the word "and" not "and/or" so that it is impressed that the secondary norms inherent in this corporate criminal act must be cumulative, cannot be an alternative. For adherents of the philosophy of legism, the conclusion is that there can be no corporation that can be subject to such cumulative crime. In order to be cumulative, it was the corporate management who was sentenced to imprisonment and fine. The act of imposing criminal sanctions on these officials is identical to the criminal imposition of corporations. This way of thinking is called *pars pro toto* (punishing one person means punishing a group of people), which is not commonly applied in criminal law [21].

The way of reasoning as stated above is very inappropriate because the consequences will eliminate the existence of Article 101. The meaning in such a way is enough to rely solely on Article 84 paragraphs (1) without the need for Article 101. On the other hand, efforts to ensnare corporations as fisheries criminals, which so far seem to be unreachable by law, are a moral message contained in the enactment of the Fisheries Law. The current Indonesian Government policy is also directed to this goal. The removal of the existence of Article 101 clearly damages the philosophical value of the Fisheries Law. So, Article 101 must be maintained by means of giving it an expanded meaning, which is commonly known as extensive interpretation.

The Attorney General's Office as a state apparatus that carries out the Government's legal policy in law enforcement is supposed to be able to accentuate this extensive style of interpretation. The prosecutors must dare to sue the corporation by basing its prosecution on Article 101 of the Fisheries Law in conjunction with the articles describing its primary norm. In interpreting Article 101 of the Fisheries Law, in the indictment, the Prosecutor's Office must state that the norm target of this article is the corporation, which in this case is *ex-officio* represented by its top manager(s).

The fine for the corporation will be charged to the directors who pay it on behalf of the company. The directors are those who are serving as the *ex-officio* top manager at the time of execution of the decision that has been final and binding. As for company directors who were in the board of management at the time when the crime was committed, these persons can be sentenced to prison in accordance with the maximum limit set by law. In this context, the responsible persons are those who individually or collectively really committed the crime.

V. CONCLUSION

It is concluded that Article 101 of the Fisheries Law in Indonesia expressly states that corporations are legal subjects in criminal law. Prosecution and punishment against corporations are not the same as the actions against its directors as individual legal subjects. With extensive interpretation, it can be stated that any corporation that

commits a crime against the Fisheries Law is a legal entity that can be subject to corporate liability in criminal law.

It is hoped that in the near future there will be strategic steps taken by the Prosecutor to carry out this prosecution by giving extensive interpretation regarding the meaning of Article 101. If the panel of judges responds this by issuing a court decision sharing the same vision on such an interpretation, a new and good legal precedent will be created.

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