

Implementing “Legal Reality Model” Into Indonesia Corporate Criminal Liability

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Abstract- The contemporary Indonesian criminal legal system is largely influenced by the period of Dutch colonization. Indonesia Criminal Code (1919) based on Dutch Criminal Code (1889), until now Indonesia still not change this code. In the other hand, Dutch Criminal Code in 1976 receive update in perspective of Corporate Criminal Liability. Dutch Criminal Code classify, offence committed by corporation can be prosecute and punish to corporation itself and them who have instructed the offence, as well as on them who have actually given guidance to forbidden action. Although Dutch Criminal Code already had change in Corporate Liability Concept, Indonesia Criminal Code still used outdated concept without corporate liability concept. Indonesia had several existing cases on the corporate criminal liability are expected to positively influence the development of a corporate criminal liability doctrine in the Indonesian criminal legal system. However, the decisions of these cases often create more perplexing question about how Corporate Criminal Liability system in Indonesia. Through process of legislation and jurisprudence, Dutch Criminal System shaping new model in Corporate Criminal Liability.

Keyword- *Legal Reality Model, Corporate Liability, Jurisprudence, Corporate Action.*

I. INTRODUCTION

KUHP does not recognize corporations as subject to criminal law. There is no explanation about corporation in KUHP [1]. The KUHP only recognizes human beings as natural person (*natuurlijk person*) as able to commit a criminal act related to a corporation. This is an influence from the principle of *non-potent delinquere universality*, which means that corporations cannot commit criminal acts and *non-potent societatis delinquere*, which means corporations cannot be convicted of the Indonesian Criminal Code applicable in Indonesia. Article 59 of the KUHP states that liability will be duly borne by the corporation’s management so made to present in court behalf of and in the name of the corporation. Article 59 of the Criminal Code (KUHP) contains "In cases where the violation is determined criminal against the management, members of the governing body or commissioners, commissioners, members of the governing body or commissioner who apparently did not interfere in violating not convicted. The contents of this Article are in accordance with Article 51 *Wetboek van Strafrecht* (W.v.S) of the Netherlands prior to amendment [2].

Along with the current development, the position of the corporation as the subject of criminal law in Indonesia began to be recognized through supporting theories and

changing social conditions. The Indonesia criminal legal system has developed its own approach in addressing corporate criminal liability by recognizing corporations as the subject of criminal punishment in various special Laws outside the KUHP for instance, Emergency Law Number 7/Drt/1955 concerning the Investigation, Prosecution, and Trial for Economic Crimes, The Law Number 32 Year 2009 concerning Environmental Protection and Management, The Law number 31 Year 1999 jo The Law Number 20 Year 2001 concerning the Eradication of Corruption, and others law which recognizing corporation as the subject criminal punishment.

The development of criminal law in Indonesia shows that the KUHP draft (2015 version) recognizes corporation as the subject in criminal punishment in Article number 47. Corporations which can be the subject of criminal punishment are then defined in the draft. Based on article 15 Emergency Law Number 7/Drt/1955 concerning the Investigation, Prosecution, and Trial for Economic Crimes it is known that the definition of corporation as subject of criminal punishment is different with the definition on civil law where corporation is identic with legal person. Because of that, before elaborating the research question it will begin with elaboration about the explanation of corporation.

Industrial modernization has given an opportunity for corporations to fulfill the high demand of the good and services from customers, which can generate huge profit for the corporations. Moreover, in the globalization era the growing interconnectedness among countries around the world also give opportunity for corporations to gain immense profit. The activities of corporations have evolved from containment within the national scope, to multinational reach. The development of corporations’ activities has positively impacted on society by producing products and services for people’s daily life, creating a lot of job opportunity, and by being the main actor in the research and development of modern technology in all aspect of life. Furthermore, through corporate social responsibility programs, many corporations share their profits to help society and this has positively impacted society.

Apart from the positive influence of corporations on society, the negatives of the activities of corporations have emerged. As business entities, corporations are

established with the primary objective to achieve the greatest profit for corporations or the owners of the corporations. Instead of following good corporate governance to gain profit, some corporations use gain profit illegally and cause a loss for society. In general, the methods corporations employ to gain illegal profit are close to their business activities, such as fraud, environment-related cases, consumer crime, etc. In the U.S, the 2001 Enron Case is an example of how corporate fraud caused a big loss to society, especially for the investors. Enron was an American energy company based in Houston, Texas. In 2001, the Enron accounting scandal broke out because Enron was hiding debt and losses to the public. That scandal created chaos in the stock market and the investors lost billions of dollars. In December 2001, Enron filed for bankruptcy protection and made 5,600 people unemployed [3].

An example of an environment-related case committed in the sphere of corporations is the Bhopal Case. Bhopal is a city located in Central India. In December 1984, a dangerous gas leaked from a chemical factory owned by the Union Carbide Limited which is a corporation and was partly-owned by US-based Union Carbide Corporation. The leaked gas caused 2000 deaths directly after the incident and another 200.000 to 300.000 people were injured [4]. That incident is considered as the world's worst industrial accident [5].

II. FINDINGS AND DISCUSSION

1. *Being In Control of the Unlawful Conduct*

A person may in control of a violate action if in a circumstance that although they have authorization and should be take an action to prevent the violation but they don't take an action and realize the high risk of the violation. The person can be considered to have the knowledge of a substantial risk if they know that a similar violation is carried out by a legal entity. In addition to being able to sue corporations and people in control, prosecutors can still use classical methods to be able to prosecute individuals who have committed violations, if they fulfill all elements of offense [6].

In practice, Dutch prosecutors only prosecuting the corporation. Because of prosecuting the natural person or persons in control may be that prosecuting the corporation might lead to the bankruptcy and cause a loss of jobs. Or maybe the company has been dissolved so that it cannot be prosecuted. If the company has been dissolved, it is still possible to sue the person in control. In 2010 around 4500 corporations were prosecuted in the Netherlands and the penalty around 25 percent. The problem is about mens rea. Previously, only individuals could have an intentional or negligent. Jurisprudence has acknowledged that corporation can also act intentionally or negligently. However, there are different terms that use between corporation and individual. In corporations moffence do not refer to the psychological state of the human mind but

refers to an assessment of the behaviour or actions taken by the corporation.

Corporate intentions are considered as the intentions of individuals who have a relevant position in the corporation. If the general director knows that the violation has been committed but does not interfere. Then the intention or purpose of the Director is considered as the goal of the corporation. If someone who in control of a violation has power over the act, then the purpose of the person in control is also from the corporate goal.

Intent of a corporation is hard to imagine psychologically. But corporations are obviously able to make decisions. Certain organs, such as the board of directors or a manager/employee with power of attorney can have authorization to make decision for the corporation [6]. In practice, the main problem is not about the corporation cannot have the intention because this is certainly clear, but how to prove the intent of the corporation itself. In many cases, the problem is not because most corporation are prosecuted for minor violations, such as intentions or negligence but not the offense [7].

It is noteworthy that the criteria for criminal liability of a person in control of an offence committed by a corporation (Art. 51-2-(2) are less demanding than those for co-perpetratorship. For co-perpetratorship, time and place of the individual's conduct should be established; this is not a requirement under Art. 51-2-(2). Consequently, if it had been established that a corporation has committed an offence, it is easier for a prosecutor to prove that a person has been in control of that offence being committed by the corporation, than to prove that this person himself was a perpetrator or co-perpetrator of that offence [8].

Prosecutors will be more likely to adjudicate than to prosecute people who control criminal acts committed by corporations. If that person fulfills all elements of offense alone. In criminal offenses the violation of license requirement is different from the licenses usually given to corporation not to people who work in their context. In practice, Dutch prosecutors often prosecuting the corporation. Because of prosecuting the natural person or persons in control may be lead to bankruptcy or cause a loss of jobs.

In 2016, the Supreme Court emphasize the case regarding 'those in control of the unlawful conduct' in Art. 51-(2)-(2). The case was about a person who had been a head of the city coalition. He was punished for having been in control of the offence of submitting untruthful tax returns, committed by the cooperation. The Supreme Court, rejecting his counter. The summarize of the case: [9].

- 1) For determining whether a person is criminally liable for having been 'in control' of the unlawful conduct of a corporation, the first thing to be

established is that the corporation has committed a criminal offence, or has participated in committing it.

- 2) It is not a requirement for a person to be prosecuted for having been 'in control of the unlawful conduct' as meant in Art. 51-(2)-(2), that the corporation itself is also prosecuted or could also be prosecuted. (For instance in a case of forgery committed by a corporation, someone was prosecuted for having been 'in control' of that conduct; his defence was rejected).
- 3) A corporation may be considered to conduct criminal offence if the relevant action related with the corporation. The attribution depends on the concrete circumstances of the case, including the character of the conduct. An important point of the orientation is whether that action fitted in the 'sphere' of the corporation. If so, it can attributed to the corporation.
- 4) A certain conduct may be considered fitted in the 'sphere' of the corporation in one or more of the following circumstances:
 - The conduct was an act or omission of someone either because of their job or for other reasons was working for the legal entity.
 - The conduct fitted in the normal business or duty performance of the corporation
 - The conduct was beneficial to the business or duty performance of the corporation
 - The corporation was able to decide whether the conduct be done or not and the consequence of the conduct or the relation between the worker are acceptable from the corporation. Including the prevention of the action.
 - If 'intent' is an element of the offence so intent can be builded in several ways. Under certain circumstances, the intent of a natural person, for instance an employee may be related to the corporation. (For instance, in a case where the manager/employee with power of attorney of a corporation had made use of that power by intentionally forging documents for the benefits of that corporation, the corporation was considered to have intentionally forged those documents).
 - The perpetration of a criminal offence by a corporation so the criminal liability for having been 'in control' of the corporation's unlawful conduct comes up for discussion.
- 5) Expediency principle, in The Netherlands, the prosecutor is not obliged to prosecute every offence that comes to their knowledge, but they may on the basis of the expediency principle leave certain cases not prosecuted. The prosecution service being hierarchically positioned under the Minister of Justice, this minister may be called to account by Parliament for choices made by the prosecution service.

Under Dutch law, each defendant, the person in control of the offence being committed as well as the

corporation is charged separately. For prosecuting a corporation, one indictment is needed [10]. For the prosecution of a person in control of the offence committed by that corporation, one single indictment alleging when the corporation was committing an offence, that person was in control of the offence being committed [11]. It is not a requirement for a person to be prosecuted for having been in control of the unlawful conduct, however, that the corporation itself is also prosecuted or could also be prosecuted for that same conduct.

2. Comparison of Corporate Criminal Liability Model With Legal Reality Model

Other Countries	Dutch
Aggregation Model : Liability of corporations based on the act of one or more employees fulfilling the elements of the offence	The liability may be based on the conduct of the corporation itself, e.g. not complying with licence conditions.
Identification model : The corporation being identified with certain of its organs such as the board of directors	The courts are not required to establish which organ has made a certain decision or committed a certain act
Corporate culture Model: Liability of a corporation based on the circumstance that the offence fits in their culture	The culture of a corporation (which may be hard to establish in court) is not more than one element next to others on which basis it may be decided whether the corporation has committed a certain offence.
Vicarious Liability: The corporation being accountable for certain acts of certain natural persons of corporations	The corporation itself is the actor.
Strict Liability	Corporations can commit all kinds of offence, including crimes with an element of <i>mensrea</i> (intent or negligence).

III. CONCLUSION

However, despite the lengthy design process, the application of the Criminal Code in the future will significantly change the criminal justice system in Indonesia. One of the changes is corporate recognition as the subject of criminal law in criminal law. In hope of implementing this process new concept in Netherland to Indonesia perspective can help inform of Criminal code that accepts corporate criminal liability. With that it will ensure that the Indonesian criminal law system will have a comprehensive system to establish corporate criminal liability compared to the current conditions.

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