

Some Notes on The Supreme Court Regulation Number 13 of 2016 Regarding the Handling Procedures for Criminal Case by Corporation

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Abstract. In modern law, criminal liability does not only refer to the human being, but also to a corporate. Following the universal law development, corporate criminal liability has been regulated in some Acts in Indonesia and actually there is no legitimate reason for law enforcer not to enforce it. One of the crimes that can involve a corporation is corruption, as stated in Indonesia Act Nr. 31 of 1999 Jo. Act 20 of 2001 regarding the combating of corruption. There is no corporation that be brought by Commission against Corruptions to the court until now. Although it is not entirely true, the incomplete regulations are often blamed by some people for the absence of criminal cases involving corporate taken to the court. They blamed that the corporation's examination as the defendant of the crime in the criminal process of law is still unclear. With the spirit to complete the corporate criminal liability regulation, the Indonesia Supreme Court published its Regulation Nr. 13 of 2016. This Supreme Court Regulation is actually expected to be the guideline of handling procedure for the corporate criminal case for the law enforcer. Unfortunately, there are some notes that can reduce the quality of that regulation.

Keyword: Notes, Supreme Court Regulation Number 13 Tahun 2016, Corporation

1. Introduction

According to Article 59 Indonesia Penal Code, a corporation is not a legal subject. The corporate criminal liability concept is known in a special Law; inter alia, under Anti-Corruption Law and Anti Money Laundering Law. Under those Laws, the legal entity shall be held criminally if the individual, who commit the crime, can be attributed as an activity of a corporation, as long as that individual acts on behalf of the legal entity within the authorization of that entity in order to provide gain for the entity. However, there is only one corporation ever accused of being a defendant's label before the court, prosecuted, and given a decision. Considering the lack of corporations being brought to justice, Indonesia Supreme Court has issued its Regulation Nr. 13 of 2016 ("Regulation"). It is published with the intention to serve as a guide for law enforcer, with the background that the procedures of corporation examination as perpetrators are considered unclear. The purpose of this writing is to review and put some notes on the Regulation by linking it to the various legal concepts that exist with regard to corporations.

2. Methodology

By using a normative juridical approach, a theoretical assessment study of the principles and norms of law relating to corporate criminal responsibility as set in the Regulation is conducted. The reference data is secondary data, by using primarily legal material and secondary legal materials.

3. Findings

3.1. To Article 1 of the Regulation

Article 1 Number 1 the Regulation provides a meaning of the corporation as a legal entity or non-legal entity. In Indonesia Law Nr. 40 of 2007 ("Company Law"), the term 'corporation' is not found. Until 1986 this word was not found in the Indonesia legal dictionary.[1] Corporation means business entity,[2] came from the word corpus, means body, [3] or also an institution treated as a

human, or institution that come from a human's act,[4] and also known as corporate,[5] or die Korporation,[6] that have the same meaning as the legal entity.

Since the 20th century law has known corporation as the legal person, not a non-legal person. This idea was an invention of the Romans.[7] History did not mark down when the corporation is known as a legal entity.[8] The corporation started to evolve in England at least from the 19th century, [9] and has its own course in school since 1876.[7] The corporation is seen as a legal entity.[10][11] This view was influenced by private law [4]. Another opinion is that corporation is not only a legal entity; it is also a non-legal entity. [12]

A legal entity has the capacity to act in law. A corporation as a non-legal entity cannot be held responsible for itself. A non-legal entity cannot be equated as a legal person. Only the legal person may act in law on behalf of itself and be responsible for its actions. So, the corporation has 2 (two) meaning; the first, in the literal sense, is a legal entity; second, in a broader sense, is a legal and non-legal entity.

3.2. To Article 1 Number 2 and Number 3 of the Regulation

This Regulation gives a definition of the parent company, subsidiary company, and sister company. From the Company Law, the term is 'parent company', as it is mentioned in Article 84 Number (2) Point b Company Law. There is no explanation regarding what parent company itself means on that Company Law. The parent company, according to Article 1 Number 2 of the Regulation itself, is interpreted as a legal entity company. Obviously, parent company means only as a corporation in the form of company limited liability. Meanwhile, the term of sister company is found in the Company Law in the same article. It can say that the relation between one company limited liability with another as a relation between the parent company and its own subsidiary company as long as the shareholder connection is still there.

As long as one company has a share in another company, then that one company will be called as the parent company, and the other is called the subsidiary company. The connection between a parent company and its subsidiary is found in the corporation as a legal person.

The relationship between parent and subsidiary company is related to the shareholding. The Company Law emphasizes so, but did not explain further. It is different from the old Indonesia company law, the Law Nr. 1 of 1995, wherein its Article 29 was given explanation regarding the relationship between parent and subsidiary company.

In relation to this Regulation that completes the definition of the subsidiary company, which says 'that also has the status of a legal entity', it seems like too exaggerated, because between the subsidiary and the parent company is related to share ownership; then it is clear that it was talking about company limited liability. Besides, the use of the word 'parent corporation' as equivalent to 'parent company' is not in accordance with the meaning of corporation on the Regulation itself. A corporation has to mean as a legal entity, especially company limited liability, if it is about parent and subsidiary company. A non-legal person cannot have shares in a limited liability company, and vice versa. Only the legal entity can have or can own other legal entity.

3.3. To Article 1 Number 8 of the Regulation

The definition given from this Article for 'criminal act by the corporation' is slightly inappropriate as there is not any special law-regulated criminal act by a corporation. The available law is laws that stipulated criminal provisions, where there is also a regulation about corporate criminal liability.

3.4. To Article 3 of the Regulation

Article 3 defines what constitutes a corporate crime, in which a corporate criminal act is a crime committed by person based unemployment relationship, or others, individually or collectively, acting for and on behalf of the corporation in and outside the corporation's environment. It should be

underlined here that corporate criminal act has two (2) liability structures; the imposition of liability and sanctions to the directors and also to the corporation[13]. When the director of a corporation has an element of mens rea (guilty mind) and moreover has been found guilty by the court, its mens rea can be considered as the corporation's mens rea. In such case, the corporation could be liable for the crime. Under-identification doctrine, certain people in a corporation will see as the corporation itself, where their mind and action is considered as the corporate, [14] and what it does are regarded as corporate acts. [15]

3.5. *To the Article 4 Number 2 of the Regulation*

This provision is intended to provide guidance for judges in imposing criminal sanctions against corporations, with one of the 3 (three) criteria. These 3 (three) criteria should not be a reflection of the element of corporate's guilty mind. A corporate fault will exist whenever the element of guilt or mens rea is found in the person who directs the mind and the will of the corporation. Theory of identification considered that the mens rea of the person who is the directing the mind and will of the corporation can be identified as a corporate fault. [15] The person is seen as the corporation itself [14] and what he did is linked to the corporate interests.

The first criteria in the Regulation, which refers to a criminal act committed to the benefit or the interests of the corporation, is not an element of fault, but one of the requirements for which corporations may be liable. Other requirements that the company is liable for criminal liability from what the officer has done, are: first, the act is committed by the authorized person to do so; second, the act is done by not exceeding its authority; and third, the action is done within the scope of the intent and purpose of the company. The first criterion should be part of the formulation of what constitutes a corporate crime.

With regard to the second and third criteria on this Article 4 Number 2, it becomes a question of how there can be a corporate crime, if the crime is committed not for corporate interest. In addition, the second and third criteria make an impression that the offender is not the director of the corporation, and the corporate director, does not prevent the crime. This criterion is confusing, because a corporate crime can only happen if it is done by the director, and the director has been well formulated by Article 1 Number 10 of the Regulation. This means that the second and third criteria should not be included, because if the director of the corporate commits a corporate crime, then it means that it is the corporation that committed the crime; so how did the corporation allowed or prevented that crime?

3.6. *To Article 5 of the Regulation*

This article is somewhat exaggerated. The resignation or death of a director which does not result from an act that has been done does not bind the company. The company is still responsible for the act of the director who has resigned or died because his act is seen as a company's activities. To hold corporate criminal liability needs 4 (four) requirements as explained above. As long as the above requirements have been fulfilled, the criminal liability can be sought from a corporation. The element of fault or mens rea will exist in the corporation if directing mind and will of the person identified as the corporation itself has an element of fault, whether or not the person is still present in the corporation when the corporation is required of criminal liability. This means that both the corporation and the director as a person can be sought for criminal liability. Resignation or death of the director does not eliminate the liability of the corporation.

3.7. *To Article 6 of the Regulation*

The Company Law has no longer placed a rigid separation between the shareholders and the company itself, because the separation veil may be breached whenever there is a misuse of the company for an unlawful act. The piercing corporate veil is occurring in situations of abuse of form and corporate position, [16] performed by the court as an exception separate entity principle. [17]

From the criminal law side, the involvement of another party in an act perpetrated by an offender will result in the responsibility of the person involved. This concept is clear in Article 55 and 56 of the Criminal Code. The involvement of the parent and sister company may be seen as the involvement of shareholders in a criminal act committed by a corporation. Thus, it seems that Article 6 only confirms the obvious.

3.8. *To Article 12 Number (2) of the Regulation*

The Article affirms that the charge to a corporation shall be made fit to the Article 143 Criminal Procedure Code with some adjustments. Actually, the adjustment is not needed, and the mention of identity in Article 143 can be used for it. First, name refers to the name of the corporation. Second, place of birth may refer to the establishing place of the company. Third, the age or date of birth may refer to the date of the establishment's deed of the company. Fourth, company's gender; can be proposed as a closed corporation or a public company. Fifth, concerning corporate citizenship, which can be seen from the place or law in which the company was established. Sixth, residence; may refer where the company is registered. Seventh, about religion; it can refer to sharia or non-sharia companies. Eighth, occupation; refers to the scope of business or purpose and business activities of the company.

3.9. *To Article 15 of the Regulation*

This article stated that in case the corporation is placed as a suspect or defendant in the same case with the director, then the director representing the corporation is the suspect or defendant. It determines too that other director who does not become suspects or defendants may represent the corporation in the case. The question now is whether this Article 15 imperative or not. If yes, then there should be no provision of Number (2) on it. On the contrary, it should also be understood that the determination of eligibility of a director which will represent the corporation shall be in the hands of the directors, and not in the investigator or public prosecutor.

3.10. *To Article 16 of the Regulation*

Article 16 Number (1) talks about the possibility of the determination from the court's chairman. The problem is, not all of the process to the corporation's liquidation has to go to the court. The Number (2) of Article 16 stated that court's determination can only be given before the plea to the delay of liability to debt payments or request for bankruptcy was registered. The process of liquidation cannot be postponed, if the process does not go to the court.

4. Conclusion

The Regulation is supposed to give guidance for the law enforcer to handling the criminal case that involved corporation as the perpetrator, but there are notes on some articles which could decrease the quality of the Regulation. Despite all of that, the handling of the criminal case that involved corporation actually does not depend on the existence of the Regulation itself, because for some particular criminal acts procedural rules were included in that law.

5. References

- [1] Hamzah A 1986 *Kamus Hukum* (Jakarta: Ghalia Indonesia)
- [2] Departemen Pendidikan Nasional 2008 *Kamus Besar Bahasa Indonesia* (Jakarta: Gramedia Pustaka Utama) p 735
- [3] Phillips B D F and M J 2001 *The Legal, Ethical, and Regulatory Environment of Business* (Mason: West Legal Studies in Business) p 490
- [4] Priyatno D 2004 *Kebijakan Legislasi Tentang Sistem Pertanggungjawaban Pidana Korporasi di Indonesia* (Bandung: Utomo) p 12
- [5] Termorshutzen M 1999 *Kamus Hukum Belanda-Indonesia* (Jakarta: Djambatan) p 88
- [6] (ed.) GW. *Deutsches Wörterbuch* 1986 (München: MozaigVerlag) p 782

- [7] Rogers H W *Corporations* [Internet]. Available from: http://digitalcommons.law.yale.edu/cgi/view_content.cgi?article=5082&context=fss_papers
- [8] Davidson D V, Knowles B E, and Lynn M. Forsythe RRJ 1987 *Comprehensive Business Law: Principles and Cases* (Boston: Kent Publishing Company) p 836
- [9] Hamilton R W 1990 *Corporations Including Partnerships and Limited Partnerships: Cases and Material* (St. Paul: West Publishing Co) p 12-13
- [10] Setiyono H 2004 *Kejahatan Korporasi: Analisis Viktimologi dan Pertanggungjawaban Korporasi Dalam Hukum Pidana Indonesia* (Malang: Bayumedia) p 2
- [11] Thomas W. Dunfee and David B. Cohen JRB 1992 *Business And Its Legal Environment* (New Jersey: Prentice Hall) p 523
- [12] Priyatno M 1991 *Pertanggungjawaban Korporasi Dalam Hukum Pidana* (Bandung: STIH) p 20
- [13] Snyder W P M; CM *Corporate Crime* [Internet]. [cited 2010 Sep 11]. Available from: www.dartmouth.edu/~csnyder/crimesurvey19.pdf, p. 1
- [14] Suman S *Corporate Criminal Liability - An Analysis* [Internet]. Available from: <http://www.legalserviceindia.com/article/I101-Corporate-Criminal-Liability---An-Analysis.html>, p. 4
- [15] Goulding S 1999 *Company Law, 2nd Ed.* (London: Cavendish Publishing) p 57
- [16] Weinstein C W 2009 *S. Smith & Keenan's Company Law. 14th ed.* (Harlow: Pearson Longman) p 22
- [17] Ramsay I and Noakes D B *Piercing the corporate veil in Australia* [Internet]. [cited 2017 Jun 15]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299488, p 2