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PAPER PROCEEDINGS

SCHOLAR SUMMIT 2017

"ON SHAPING THE BETTER WORLD"

10 - 11 OCTOBER 2017
UNIVERSITAS INDONESIA
DEPOK, CAMPUS

SCHOLAR SUMMIT 2017

PAPER
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10 – 11 OKTOBER 2017

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Welcome Remarks

Prof. Dr. Ir. Muhammad Anis, M. Met.
Rector

Welcome to Universitas Indonesia!

On behalf of Universitas Indonesia, I would like to express our sincere appreciation and gratitude to you, prominent scholars and academics, for your participation in this event.

We are gathering here today to reunite our spirits and effort in answering the challenge of international movement that is "Sustainable Development Goals" (SDGs). Various aspects have been visited by SDGS, not only those dealing with human rights but also those dealing with the basic needs of humanity. It is undeniable that no poverty, no hunger, good health, quality education, gender equity, clean water and sanitation, renewable energy, good jobs and economic growth, industry innovation and infrastructure, reduced inequalities, sustainable cities and communities, responsible consumption, climate action, life below water, life on land, peace and justice, can only be achieved by partnerships for the goals. States are expected to walk side by side in forming the better society and the better world. That is the very core of objective in having this event, to make every one of us believe that nothing could not be formed as long as we stand together and hand in hand to realize the SDGs for the prosperity of world community.

Among you are specialist in various sciences from health science, science and techology as well as social humanities, and we need to be ready to play our own role in promoting human security and education role in shaping the community for forming the better world. The strategic theme "Shaping the Better World" is very clear in sending the message that we as the academicians are bound also to build up our own partnership in achieving the SDGs including in equipping the society by training young generations as our future agents in building the much better society living in much better world.

May you have a very fruitful Summit!

Welcome Remarks

Prof. Dr. Bambang Wibawarta, S.S., M.A.
Vice Rector for
Academic and Student Affairs

Greetings from Universitas Indonesia!

I am delighted to welcome you to UI Scholar Summit 2017 in Universitas Indonesia, dedicated to theme “Shaping the Better World”.

As a first leading comprehensive university in Indonesia, we are at the forefront of three pillars of higher education; academic, research, and community engagement. As a nation’s flag carrier university, we are aware of our role in the development of the country and our contribution for the regional and global challenges.

It is our commitment to activate our cooperation with foreign partners and improve its implementation. Over the years, our international cooperation with universities worldwide have been continually developing, its among our internationalization strategy where Universitas Indonesia is committed to take part in various field and contribute to address national, regional and global challenges.

The “Scholars Summit 2017 : Shaping the Better World” is held to enhance the interaction between UI scholars and our foreign partners as well as to synergize the efforts in order to shape the better world through academics findings. Universitas Indonesia is clearly aware that higher education is challenged to be continously enriched by having quality education, sound research and beneficial community engagement as well as to give advocacy to the decision makers in any policy making and strategic plan. Thus, we encourage every one of you to be with us and share with us all the good things being a scholars and to keep believing that all the big changes will always be initiated by a small step. We could make an improvement and develop the globalization for the prosperity and the greater good of the world society by our small steps in making this Summit a successful one.

Have a fruitful academic collaboration!

Welcome Remarks

Prof. Melda Kamil Ariadno, SH., LL.M., Ph.D.
Head of International Office
Chairperson
Scholar Summit 2017

Dear Honorable Scholars,

Greetings from **International Office of Universitas Indonesia**!

We are pleased to have you here at Universitas Indonesia, the best and oldest universities in Indonesia. With almost 160 years experience within growing and changing academic field, we invite all scholars around the world in celebrating the positive spirit of developing international education.

The background of this event is originally initiated from the awareness that we have widely international counterparts across the world and we are challenged to improve access to qualified high level of education, tightened interactions among us to shape the better world and to write our names in the realm of globalized movement. That is why we title this event as "UI Scholar Summit 2017 : Shaping the Better World".

In this event, you will have an opportunity to share your thoughs and idealism among partners. It is our opportunity to unite our efforts as scholars in making our contribution in developing much better world for our next generations. Intergenerational equity is something to hold on as our responsibility in making the good enviroment and conditions for our grand children, great grandchildren and all generations to come.

I would like to take this chance to express my appreciation to all the leaders of Universitas Indonesia, Rector and all Vice Rectors, for the endless support and trustworthy to us in organizing this event. We are thanking our Deans and Research Managers as well as scholars from various faculties whom have been tremendously trying to work together with us in preparing everything necessary. Lastly, of course my thankfulness is given to all member of the Organizing Committee, for their remarkable effort and dedicated work in preparing the local arrangements. Without them this event would never be happened.

Have a productive and fruitful networking!

The Implementation of Corporate Criminal Liability in Environmental Crime Cases in Indonesia

Nani Mulyati[188] and Topo Santoso[189]

Abstract

Corporate crimes may bring greater and wider negative impact to the society compared to street crimes. Environmental crimes, such as forest slashing and burning, are one form of the criminal acts that are often committed by the corporations. In the last few years, there are several environmental crime cases undertaken by the corporations in Indonesia. These cases are important corporate crime cases and have been judged by the courts. This paper will examine those cases relating to the implementation of the corporate criminal liability's doctrine that is adopted by the judges and criminal sanctions given to the corporation to minimize future environmental crimes. In order to do that, scientific methodology that is adopted in this research is doctrinal legal research with cases approach, where not only law cases but also relevant regulations and legal theories are scrutinized to draw conclusion about the issues. It is found that the judges adopted the doctrine of vicarious liability to attribute criminal liability to the corporations; where the acts and the mental elements of the boards represent the acts and the mental elements of the corporation. Moreover, criminal sanction that is often given to the corporations is criminal fine with some kind of additional sanctions. It is hoped that the finding of this research will provide crucial materials for judges, other legal enforcement officers, and academia on how Indonesian judges implement corporate criminal liability particularly in environmental crime cases.

Keywords: corporate crime, environmental crime, criminal law, corporate criminal liability

Introduction

Environmental pollution is one form of crime that is very dangerous for our earth's environment where we live and our grandchildren will live. There are many harmful effects of environmental pollution, such as health problems because of polluted air, water, and soil, global warming and other harm and discomfort to other living organisms. Environmental crimes are very likely to involve corporations, where the crimes are committed within the scope of the corporation or for the benefit of the corporation. For example, corporations undertake land clearing by illegally slashing and burning the forest, or corporation could also dispose hazardous and poisonous materials to the environment to reduce production cost and so on.

[188] Phd candidate at the Faculty of Law, Universitas Indonesia, can be contacted through email: natnoey@gmail.com. (Presenter of the paper at the event).

[189] Professor of Criminal Law at the Faculty of Law, Universitas Indonesia, can be contacted through email: santosox@ui.ac.id

Since Law No. 23 of 1997 concerning Environmental Management has been enacted in Indonesia, it is accepted that corporations are independent legal subject that are different from its members; they can be liable criminally in their own name for the crime they committed. Since the passing of this regulation, there have been several legal cases that charged corporations for environmental crimes. Those are important cases in enforcing environmental crimes because not many verdicts convicted corporations as liable subject; most of the cases charged the natural person inside the corporations as the responsible person, not the corporation itself.

This article examines legal judgements that punish corporations for environmental crimes, particularly about its criminal liability and the imposition of the criminal sanction. This paper analysis legal basis that is used by the judges to attribute criminal liability to the corporations, correlation between corporate criminal liability and personal liability of the natural persons inside the corporation, as well as penalty that is imposed to the corporations. In order to answer these questions, doctrinal legal research was adopted, where regulations, law cases, and legal theories were scrutinized to draw conclusion about the issue.

This article is organized in five sections. The first section is the introduction. The second section analyses corporate criminal liability doctrine. Then in the third section, examine corporate criminal liability for environmental crimes stipulated in Indonesian regulations. Section four discusses about the implementation of corporate criminal liability and criminal sanctions that are imposed to corporations in environmental crime cases. And lastly, in the section five there will be conclusion about the issue.

Corporate Criminal Liability Doctrine

When explored in depth about corporate criminal liability doctrine, generally can be divided into five doctrines: vicarious liability, identification, aggregation, corporate culture (Pieth & Ivory , 2011) and combined doctrine (Sjahdeini, 2017). Vervaele (2007) divides these doctrines into two approaches, first is indirect liability, where organizations are always considered acting through its members. Therefore, it must be sought individuals who are in certain position within the corporation, whether it is the directors, other executives or other members, and then their *actus reus* and *mens rea* attributed to the corporation. Secondly is direct liability, where *actus reus* and *mens rea* can be traced directly from the corporation. Direct liability approach is the development of realistic corporate personality theory. Scholars who support realistic corporate personality, such as Lederman (2000), argues that corporations are self-identity that possessed all natural characteristics like human. If Vervaele's opinion associated with corporate criminal doctrine mentioned above, vicarious liability and identification doctrine are indirect liability, while aggregation and corporate culture doctrines are direct liability.

Vicarious criminal liability is doctrine taken from the law of torts in civil law based on respondeat superior doctrine (Garrett, 2014). According to respondeat superior doctrine, a principal may be liable for its agent misconduct, if it is committed within their scope of employment (Sjahdeini, 2007). Employment principle as one requirement in vicarious liability can also be in other relationship based on the delegation principle (Arief, 2010).

The second doctrine is identification. Identification doctrine is the development of vicarious liability doctrine in corporate criminal liability (Maglie, 2005). This doctrine

limits the doctrine of vicarious criminal liability that states that not everyone in the organization has sufficient status to cause corporations to be vicariously responsible for their crimes (Gobert, 2011). According to identification doctrine, corporations are identified through its key person or head of the corporations; these key persons are seen as *legal alter ego* of the corporations, so their actions are the actions of the corporation (Gobert, 2011).

Next is aggregation doctrine. According to aggregation doctrine, a corporation can own intention or group intention, which can be traced from the aggregation of will and actions of some key persons within the corporation (Pieth & Ivory , 2011). Pursuant to Remmelink as cited by Muladi and Priyatno (2015), shared knowledge of the boards of directors can be considered as corporation's knowledge. Suprapto as also cited by Muladi and Priyatno (2015) asserts that corporation's culpability is collective culpability of the corporation's management. Aggregation doctrine makes it easier to attribute criminal liability to corporation because it eliminates the difficulty of identifying managerial culpability in large corporation (Cavanagh, 2011).

The next doctrine is corporate culture or corporate disorganization doctrine. Pursuant to corporate culture doctrine, a corporation may own guilt by itself if the corporation's culture or working ethos enables the commission of crime (Pieth & Ivory , 2011). Fisse and Braithwaite (1993) affirm that corporate's cultures are transmitted from one generation to next generation unaffected by the change of personnel or members of the corporation. Sarre (2007) asserts that corporate's culture can be observed formally from corporate's procedures and policies, or informally on how those cultures influence the action and behavior of individual's within the corporation.

The last is combined doctrine proposed by Sjahdeini (2017) as an alternative to corporate criminal liability. He explains ten elements to be fulfilled: the act is an offence, either an omission or commission; *actus reus* can be done or ordered by the directing mind or controlling mind of the corporation; *mens rea* is drawn from the directing mind's *mens rea*; benefit the corporation, crime is committed by utilizing corporate's existence, facility, or budget; the act is *intra vires* (within powers), carried out in the framework of the goal and purpose of the corporation; criminal act committed by directing mind of the corporation is within his working scope and authority; if the *actus reus* is not carried out directly by the directing mind, the act shall be by order, or authorized, or approved by the directing mind, or consent shall be deemed to be granted if the directing mind do not prevent or prohibit the commission of the crime or fails to take adequate action when the offence occur; there is no justification and excuse for the crime, *actus reus* and *mens rea* do not have to be on one person but can be in some individuals within the corporation.

Corporate Criminal Liability in Indonesian Regulation Concerning Environmental Protection and Management

Some regulations that are currently used as the legal basis in an environmental crime in Indonesia are Law No. 32 of 2009 concerning Environment Protection and Management, Law No. 18 of 2013 concerning The Prevention and Eradication of Forest Destruction, Law No. 41 of 1999 concerning Forestry, Law No. 39 of 2014 concerning Plantation. However this paper only focuses on discussion about corporate criminal liability stipulated on Law. No. 32 of 2009, because this law stipulates corporate criminal

liability more complete.

The provisions regarding corporate criminal liability are stipulated in articles 116 to 120 of Law No. 32 of 2009. Article 116 states that:

(1) "In the case of the environmental crime being committed by, for and on behalf of a business entity, the criminal offense and penalty shall be imposed on:
    a. the said business entity; and/or
    b. person ordering the crime or person acting as activity manager in the crime.

(2) In the case of the environmental crimes as referred to in paragraph (1) being committed by a person acting the working scope of business entity on the basis of working relations or other relations, the penalty shall be imposed on the ordering party or leader in the crime without regarding whether the crime is committed individually or collectively."

The first important thing to be highlighted from this provision is that corporations meant here is limited to profit oriented organization, because it is intended only to organization with business goal (business entity). Therefore, other types of organization such as non-profit oriented organizations, public corporations, and quasi-public corporations are excluded from criminal liability according to this regulation.

Regarding corporate criminal liability, at a glance, there is no problem with the formulation of Articles 116. If Article 116 (1) is read separately with Article 116 (2), where stipulates that an environmental crime is committed by, for or on behalf of the corporation, therefore the offence and penalty shall be imposed to either the corporation or to the person ordering the crime. It can be concluded from this provision that corporation is subject to criminal prosecution and criminal sanction if the crime committed by, for or on behalf of the corporation. Some criteria that has been proposed by a well known 2003 case in the Netherlands ((*Drijfmest Case*) to identify a crime is committed by, for or on behalf of the corporations are that the crime give benefit to the corporation, the crime is part of corporation's everyday normal business, and corporation accept the crime.

However if then Article 116 paragraph (2) is associated with paragraph (1) it becomes ambiguous, because it is stated that if the crime committed by a) someone with working relation, b) or with other relations, c) acting the working scope of the corporation, then the penalty is imposed to a) ordering party, b) or the leader in the crime. Article 116 (2) further is concealed arrangement stipulated on paragraph (1), because it states that corporation is not subject to criminal sanctions when environmental crimes are committed by persons based on working relationship or other relationships, and acted within its working scope.

Based on theory of corporate criminal liability, one possible ground to be used to attribute criminal liability to the corporation is the doctrine about vicarious criminal liability, where corporation as the principal may be blamed if the offence was committed by someone in working relationship (agent) or acted the crime as part of his working scope within the corporation (Sjahdeini, 2007). If the purpose of the Article 116 paragraph (2) is to explain that in attributing criminal liability to the corporation accepted by this regulation is the doctrine of vicarious criminal liability, then it is necessary to be regulated. However, this paragraph (2) do not do that, it stipulates the opposite situation, if the circumstances are fulfilled, the penalty shall be imposed on the boards not to the corporation. Therefore it is unclear then under what circumstances a crime committed by, for, or on behalf of a corporation may be imposed criminal sanction to the corporation itself.

Another issue pertaining corporate criminal liability as regulated by Article 116 is when a prosecution of criminal offence may be brought against a business entity but under certain circumstances the sanctions can only be imposed to the boards of the directors, will cause ambiguity about the separation subject between the boards and the business entity. Moreover, if Article 116 is associated with Article 118 which explains that: "with regards to the crime as referred to in Article 116 paragraph (1) letter a, penalty shall be imposed on business entities represented by executives authorized to represent the business entities inside and outside the court in accordance with legislation as functional executives." This provision leads to the understanding that corporation and the boards of the directors are interchangeable in the prosecution and imposition of the sanctions. There will be case where the charge is brought against the corporation but the penalty is imposed to the boards or the other way around, where the charge is brought against the boards but the penalty is imposed to the corporation. This condition can be seen from some court decisions as will be discussed on part three below.

Wibisana (2016) also identifies several problems in the provision about corporate criminal liability stipulated in Law No. 32 of 2009 concerning Protection and Management of Environmental. One of it is regarding the imposition of the penalty as stipulated in Article 119, and Article 98 - 115. Those articles bring the conclusion that corporations may be subject to imprisonment and monetary penalty. This condition is not possible because corporations do not have physical body to be imposed with imprisonment. The most likely penalty to be imposed to corporations, especially corporation with profit orientation, is in fact only monetary penalty.

Regarding the calculation of the amount of fine that can be imposed to corporation, this regulation seems to have limitation on the clarity. This provision appears to be regulated on Article 117, although the provision of this article is very ambiguous as it refers to Article 116 paragraph (1) letter b that is intended for corporate executives and not for the corporation. However, it seems that this article also intends to regulate the amount of penalty for corporation where it is stipulated that the amount of fine imposed to corporation is aggravated one third of the penalty for individual perpetrators.

In addition to monetary penalty, Article 119 explains that some additional penalty or disciplinary measures may be imposed to corporations. Article 119 stipulates some additional penalty for corporations are: a. seizure of profits earned from the crime, b) closure of business and/or activity wholly or partly, c) repairing the impact of the crime, d) requirement to do what has been neglected without any right and/or e) placing the company under custody no longer than three years. Article 119 explains that the additional penalty is facultative, not mandatory. Though, Sjahdeini (2017) argues that it will be more effective to impose additional penalty as compulsory for corporation, so corporation do not only impose with fine but also with compulsory additional penalty. For example, fine coupled with announcement of judge's verdict will bring more shamming effect to the corporation.

The Implementation of Corporate Criminal Liability in the Environmental Cases

This paper examines four environmental crime cases committed by PT. Dongwoo Environmental Indonesia (PT. DEI), represented by Kim Young Woo as President director (*Indonesia v Kim Young Woo*. Supreme Court Verdict No. 862 K/PID.SUS/2010), environmental crime committed by PT. Adei Plantation & Industry (PT. API), represented

by Tan Kei Yoong as regional director (*Indonesia v PT. Adei Plantation & Industry* (PT. API). Supreme Court Verdict No. 2042K/Pid.Sus/2015), environmental crime committed by PT. National Sago Prima (PT. NSP), represented by Eris Ariaman as president director (*Indonesia v PT. National Sago Prima* (PT. NSP), Pekanbaru High Court Verdict No. 27/Pid.Sus/2015/PT.PBR), and environmental crime committed by PT. Kallista Alam, represented by Subianto Rusid as director (*Indonesia v PT. Kallista Alam*, Supreme Court Verdict No. 1554 K/Pid.Sus/2015).

PT. DEI is company enganged in the management of liquid waste of hazardous and toxic substance (B3), established since 2001, in North Cikarang, Bekasi. PT. DEI convicted to dispose B3 substance without proper processing to an unoccupied land in Sempu Hamlet, Pasir Gembong Village, North Cikarang, causing the surrounding community to experience headaches, dry throat, chess tightness, stomach nausea and vomiting. Supreme Court Verdict No. 862 K/PID.SUS/2010 decided at April, 7th 2011 convicted PT. DEI guilty of committing "continuous environmental pollution." Imposing a fine of Rp. 650 Million (USD 48.5 thousands), subsidiary criminal confinement for 6 (six) months. Besides primary penalty, PT. DEI also be imposed with additional penalty in the form of seizure of the profits and closure of the corporation.

Next is PT. API, which is doing palm oil plantation business in Pelalawan and Bengkalis, Riau Province. They are alleged to commit environmental crime as dumping the creek for land expansion and forest burning to prepare the land. This action has caused extensive forest fires and resulting smog that pollute the air beyond its pollution threshold, damage the soil chemical, biological, physical properties, and damaging the aspect of flora. The Supreme Court decided that PT. API guilty of committing criminal offence "because of its negligence resulting in exceeding the environmental damage criteria standard." Supreme Court punished the company to pay fine as much as Rp.1,5 Billion (USD 111.3 Thousands) and additional penalty in the form of recovery the environmental damages as much as Rp.15,1 Billion (USD 1.1 Millions).

Next case that I want to examine is *Indonesia v PT. National Sago Prima* (PT. NSP). PT. NSP is a business entity engages in agriculture, forest utilizing, and utilization of non-timber forest products in industrial plantation forest in Riau Province. They are alleged to conduct land preparation by burning the forest and deliberately allowing fire that cause soil and environmental damages. PT. NSP found guilty committing environmental crime "because of its negligence resulting in exceeding the environmental damage criteria standards." Sentence the company to pay fine as much as Rp.2 billion (USD 148.5 Thousands) and additional penalty in the form of obligation to provide adequate facilities of forest burning prevention and control system under the supervision of Meranti Environmental Agency for 1 year.

The last case that I analysed is *Indonesia v PT. Kallista Alam.* PT. Kallista Alam is plantation and agriculture company, mainly palm oil plantation, located in Kabupaten Nagan Raya, Kecamatan Darul Makmur. They are alleged to commit land preparation by burning and deliberately allowing the fire to occur repeatedly and continuously, resulting in soil and environmental damage. From the trial hearing, the judges convicted PT. Kallista Alam for committing environmental crime of clearing the land for palm oil plantation by destroying the environment continuously. Sentenced the company to pay Rp 3 Milyar (USD 222.7 Thousands).

Of the cases described above, will be drawn some important notes. The first is

about basis for attributing criminal liability to the corporation. Although Article 116 of Law No. 32 of 2009 is not really clear in describing which doctrine or standard to be used to attribute criminal liability to corporation, from the cases that has been examined can be concluded that judges sometimes adopt vicarious criminal liability and identification doctrines. For example in PT. DEI case, the judges explain that the conduct of disposal hazardous waste by PT. DEI is based on the order of production manager and is known by Kim Young Woo as president director. Knowledge possessed by Kim Young Woo as president director who also can be called as directing mind of the corporation, about the criminal act implies that the crime also desired by the corporation so that the liability can be attributed to the corporation.

Moreover, the standard of profit gained by the corporation resulted from the criminal conduct is also adopt by the judges to attribute corporate criminal liability. For example in PT. DEI case, judges assert that monetary advantages gained by PT. DEI by disposing hazardous waste without proper processing and procedure may imply that the corporation is indeed desired by the corporation and committed for the benefit of the corporation. Therefore, corporation as legal person may be subject to criminal liability.

Another standard adopt by the judges to attribute criminal liability to corporation is negligence to prevent and or negligence to take necessary action to prevent the occurrence of the crime. The judges in PT. NSP case adopt this standard to attribute criminal liability. The judges state that lack of adequate facilities of forest burning prevention and control system provided by the corporation has resulted in widespread and unstoppable forest burning. Although PT. NSP do not cause the fire and PT. NSP has made effort to stop the fire but the attempt failed. Thus the judges in the opinion that the offense is not a deliberate conduct, but negligence to prevent the occurrence of fires and negligence to prevent the spread of the fire. This standard also adopts in PT. Kallista Alam case, where the judges state that the lack of equipment to prevent the occurrence of land fires shows a low concern for the threat of land fires, either commit deliberately or due to negligence resulting widespread of the fire. Furthermore, the judges explain that Environmental Protection and Management adopts the principle of prudence, with recklessly managed the plantation and that the defendant's staff were unable to extinguish the fire, the judges assured that the land clearing has been done by land burning.

Further discussion will be about the separation of corporate criminal liability and boards of directors or individual criminal liability. In PT. DEI case, the defendant is Kim Young Woo as president director, but in the decision, judges sentence the corporation with penal fine and if the penalty cannot be paid then it is substituted by a confinement of Kim Young Woo. There is no discussion about the separation of legal subject between the corporation and its board of directors as individual legal subject. It seems that they are perceived as the same and interchangeable legal subject. In my opinion, it is inappropriate to confuse these two subjects as the same, where they may be penalised for the liability of the other legal subject. If in this case the judges adopting identification doctrine where the *actus reus* and *mens rea* of its directing mind can be attributed to the corporation, they should state it clearly. Based on identification doctrine, corporation can be criminally liable and be imposed criminal sanction. However in the verification in the trial both subjects must be tested individually in the fulfilment of criminal elements.

If in the case of PT. DEI corporation is also sentenced where the defendant, subject that is prosecuted and charged is the natural person inside the corporation, contrarily

circumstance occurs in PT. API case. In this case the defendant from the beginning is PT. API as legal person, represented by Tan Kei Yoong as managing director. PT. API found guilty for negligently resulting in exceeding standard criteria of environmental damage. Supreme Court punished the company to pay fine as much as Rp.1,5 Billion (USD 111.3 Thousands), if the fine is not paid it is substituted by a confinement of Tan Kei Yoong for five months. In this case Tan Kei Yoong who from the beginning never tried in the court as the defendant, can replace criminal penalty imposed to PT. API. The judges perceive corporation and its board of directors as the same legal subject. Therefore, if the corporation is unable to fulfil its obligation to pay the fine, its representative can substitute it with confinement. This understanding is very dangerous for legal certainty and is violation of human rights.

Cases above have indicated that there is a lack of clarification of the judges in determining the liable subject when crime committed within the corporations. Judges tend to perceive corporation as interchangeable with the board of directors. This interpretation is erroneous considering the corporation is a different subject from the board of directors or management. They should be prosecuted and proven their guilt on their own name. It is unfair to convict a subject guilty for a crime without fair trial or examination of their involvement in the occurrence of the crime. Judges tendency to perceive corporation as interchangeable with the board of directors is persuaded by very minimal and unclear regulation about separation of criminal liability for corporations and board of directors as already discussed earlier of this paper.

This situation is exacerbated by the absence of criminal procedure law for corporations. It adds the complexity of the problem about criminalizing corporation in Indonesian criminal law. This can lead to injustice of the rights of the subjects involved, either individual subject or the corporation. Therefore it is very urgent to provide regulation about criminal procedural law for corporation; not only their obligations, but also their legal rights, when they become suspects, defendants, victims, or witness of the crime.

In PT. Kallista Alam case, in addition to criminal proceedings PT. Kallista Alam is also a defendant in civil case with Reg. No. 12/Pdt.G/2012.PN.Mbo filed by Ministry of Environment. Law No. 32 of 2009 concerning Protection and Management of Environment enables law enforcement by enabling various lawsuits, administrative, civil or criminal lawsuits. Although it is stipulated that employing criminal law in environmental cases still comply with *ultimum remedium* principle which requires the enforcement of criminal law as the last resort after the implementation of other laws is considered unsuccessful.

The identical subject, object, locus and tempus of the act raise the discussion about the possibility that PT. Kallista Alam has gone through double jeopardy or *ne bis in idem* in the trial. Article 76 of Indonesian Penal Code stipulates that “except in the case of the judge’s verdict may still be repeated, a person shall not be charged twice for the act which Indonesian judges have tried him with a fix decision.”

Ferdico, Fradella and Totten (2009) assert that double jeopardy principle ensures that a person cannot be prosecuted twice for the same offence where the conviction has gain a permanent legal force and cannot be imposed with doubled sanction for the same criminal conduct. Neagu (2012) states that the principle of *ne bis in idem* prohibits further prosecution or conviction for the same conduct. Neagu also explains that although the *ne bis in idem* principle seems simple, but there are many problems that can arise in applying

this principle. For example, what basis is used to determine a charge is the same (*idem*), whether by definition or classification of crime committed (*in abstracto*) or on the basis of identical of legal facts in the case (*idem factum, in concreto*); whether the scope of this principle refers to one state jurisdiction or applies internationally, whether the scope of this principle applies only to double prosecution in the realm of criminal law or include administrative, civil or out of the court settlements. In PT. Kallista Alam case, the discussion is about the scope of ne bis in idem principle whether only in criminal law or also includes other settlements.

Generally the *ne bis in idem* principal applies only to criminal proceeding; it does not apply to other legal settlements. For example in European Union, Neagu (2012) affirms that parallel proceedings with administrative or civil proceedings are permitted. The same standard also applies in the United States, as explained by Ferdico, Fradella and Totten (2009). Even in the United States double jeopardy principle does not prohibit parallel State and Federal prosecutions if the criminal conduct violate Federal and States regulations simultaneously.

In PT. Kallista Alam case, judges who decide the case (Judges Agung Surya Jaya, Agung Margono and Agung Suhadi) have correctly applied this principle. Where the judges affirm that the meaning of "a person cannot be charged twice" according to Article 76 of the Penal Code is only applicable in criminal proceedings and not applicable to other proceedings. They confirm that parallel civil proceedings and criminal proceedings even though the object, subject, locus and tempus of the crime are identical is legitimate and does not violate the principle of *Ne bis In Idem.*

Regarding the form of sanctions imposed by judges to the corporations that commit environmental crimes, mostly in the form of fine. Some cases provide also some additional penalty like seizure of the profits and closure of the corporation, recovery the environmental damages, provide adequate facilities of forest burning prevention and control system under the supervision of Environmental Agency for certain period of time. Singer and Fond (2007) assert that justification of a criminal penalty is the interaction between the desire to deter the perpetrators and other corporations to do the same conduct in the future, or to rehabilitate the perpetrator); so not only serves as retribution, which explains that the perpetrator has conduct immorally so it must be punished to compensate his immoral conduct.

Conclusion

The enforcement of criminal crime committed by corporation is still developing. The existence of some cases discussed above is highly appreciated although the regulation about corporate criminal liability is still unclear stipulated on Law No. 32 of 2009 concerning The Protection and Management of Environmental. Judges in attributing criminal liability to corporation adopt vicarious criminal liability and identification doctrine. Besides, judges also employ some standards such as standard of profit gained by the corporation resulted from the criminal conduct and negligence to prevent and or negligence to take necessary action to prevent the occurrence of the crime. It is can be said that the judges are flexible enough in attributing criminal liability to corporation in accordance with the facts of the case.

However, there is a lack of clarification of the judges in determining the liable subject when crime committed within the corporations. Judges tend to perceive corporation as interchangeable with the board of directors. This interpretation is erroneous considering the corporation is a different subject from the board of directors and is dangerous for legal certainty and is violation of human rights.

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