Erasmus School of Law

Corporate Criminal Liability in Indonesia: Regulation, Implementation and Comparison with The Netherlands

Strafrechtelijke aansprakelijkheid van rechtspersonen in Indonesië:
regulering, implementatie en vergelijking
met Nederland

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Erasmus University Rotterdam

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List of Abbreviations

CCN	Civil Code of the Netherlands
DCC	Dutch Criminal Code
DCCP	Dutch Code of Criminal Procedure
EOA	The Economic Offences Act (Wet op Economische Delicted)
HIR	Herzien Indlandsch Reglement
ICCPR	International Covenant on Civil and Political Rights
IM2	Indosat Mega Media
KUHAP	Kitab Undang-Undang Hukum Acara Pidana (Indonesian Criminal Procedure Code)
KUHP	Kitab Undang-Undang Hukum Pidana (Indonesian Criminal Code)
KUHP draft	the draft of new Indonesian Criminal Code
MA	Mahkamah Agung (Supreme Court)
PERJA	*Peraturan Jaksa Agung* (the Indonesian Attorney General Regulation)
PERMA	*Peraturan Mahkamah Agung* (the Indonesian Supreme Court Internal Regulation)
PT	*Perseroan Terbatas* (Limited Liability Company)
RV	Reglement of de Rechtsvordering
SEMA	*Surat Edaran Mahkamah Agung* (the Indonesia Supreme Court Circular)
UNCAC	United Nation Convention against Corruption
UNTOC	United Nation Convention against Transnational Organized Crime
WvSNI	Wetboek van Strafrecht voor Nederlandsch-Indie.

Introduction

1. Background

The contemporary Indonesian criminal legal system is largely influenced by the period of Dutch colonization. The Criminal Code of Indonesia or *Kitab Undang-Undang Hukum Pidana (hereinafter referred to as KUHP)* originally came from *Wetboek van Straftrecht voor Nederlandsch Indie (hereinafter referred to as WvSNI)* which was enacted by *Koninklijk Besluit* (Royal Decree) Number 33 on 15th October 1915. This *WvSNI* was implemented on 1st January 1918 in Indonesia which was, at that time, called *Nederlandsch Indie*.[1] *WvSNI* was largely copied from the Dutch Criminal Code (hereinafter referred to as DCC) in 1886, however amendments were made to adjust for conditions of colonialism. After the Indonesian Independence Day on August 17th 1945, the Indonesian government decided to continue to apply the Dutch criminal law. Article II of the transitional provision of the Indonesian Constitution 1945 (prior to amendment) states: "All laws which are still in existence shall remain applicable insofar as there are no new laws according to this constitution". Following independence, there were several adjustments made in accordance to the Indonesian legal system and the state administration system, including renaming *WvSNI* to *KUHP* through the Law Number 1 Year 1946 which outlined the Criminal Law Regulation. *WvSNI* was subsequently affirmed as the foundation of the Indonesian legal system, which included basic principles of criminal law.

One of the basic principles that is still adopted by the *KUHP* and is similar to the position of the *WvSNI* and the 1886 DCC is the position of the criminal code that does not recognize the criminal liability of corporation. The 1886 DCC precluded the possibility of sanctioning a corporation in criminal matters in its provisions. This decision was influenced by the ancient rule *"societas delinquere non potest"* which means that a corporation cannot be held criminally responsible.[2] At that time, a corporation was considered a legal fiction in civil law doctrine. A German jurist, *Carl Friedrich von Savigny*, developed the "fiction doctrine", which stated that the recognition of a legal person was based on the fiction that the individual will of each

[1] For further elaboration of the history of Indonesian criminal law in early period of Indonesian freedom in English language can be seen in: Han Bing Siong, *An Outline of the Recent History of Indonesian Criminal Law*, Verhandelingen Van Het Koninklijk Instituut Voor Taal, Land En Volkenkunde, DEEL XXXII, S-Gravenhage, Martinus Nijhoff, 196.

[2] Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective', (1994) *The International and Comparative Law Quarterly*, Vol. 43, No.3, pp. 493-520.

representative is the will of the legal person. *Savigny* argued that such fiction could lead to civil liability, but never to criminal liability of the corporation.[3] In the codification period of the DCC (1881-1886), Dutch legislators followed *Savigny's* advice and did not adopt the civil law fiction doctrine to the criminal law doctrine.[4] In 1951, the liability of corporations for economic crimes was introduced in Article 15 EOA.

The position of the DCC changed in 1976, when general provisions regarding corporate criminal liability were regulated by Dutch legislators through the amendment of Article 51 DCC[5]. Previously, the DCC stated that if the criminal offence was committed by a director or member of a board of management or commissioners, no punishment shall be pronounced against the director or commissioner who evidently did not take any part in the commission of the offences. However, following the amendment, Article 51 DCC now stipulates:[6]

> 1. *Offences can be committed by natural persons and corporations.*
> 2. *In case an offence is committed by corporation, prosecution can be instituted and the punishment and measures provided by law, if they are applicable, can be imposed on:*
>   a. *that corporation, or*
>   b. *on them who have instructed the offence, as well as on them who have actually given guidance to the forbidden action, or*
>   c. *on those mentioned under (1) and (2) together.*
> 3. *For the application of the former subsections, equal status as a corporation is given to: the corporation without civil legal status, the partnership, the firm of ship-owners and the separated property."*

Even though the position of the DCC on corporate criminal liability has changed, the *KUHP* position remains the same. The Indonesian 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*. This position created several problems during the development of the corporate criminal liability system in Indonesia.

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[3] Thomas Weigend, 'Societas delinquere non potest "a German Persective"', (2008) *Journal of International Criminal Justice* 6, pp. 927-945.
[4] De Doelder, 'Criminal Liability of Corporations in Netherlands', in: Hans de Doelder, Klaus Tiedemann, *Criminal Liability of Corporations* (Kluwer Law International, 1996), pp. 289-310.
[5] Paragraph 51 DPC became operative in 1976 (Act of 23 June 1976, *stb*.377).
[6] The English translation from Article 51 DPC has been taken from de Doelder, p. 292.

2. Problems in the Development of Corporate Criminal Liability in the Indonesian Criminal Legal System

In this book, the issues that arose during the development of corporate criminal liability in Indonesia are divided into two categories. The first category is the problem of regulations that relate to the criminal liability of corporations. In this category, regulatory issues stem from the existence of different systems among the Laws that recognize the criminal liability of corporations outside the criminal code. One Law regulates corporate criminal liability through several stipulations, while another Law recognizes the corporation as a criminal perpetrator without any further stipulation. For example, in Law Number 31 Year 1999 *jo* Law Number 20 Year 2001 on Eradication of the Criminal Acts of Corruption (further: Corruption Law), the stipulation on corporate criminal liability in the case of corruption is found in Article 20, and is as follows:

1. *In the event that the criminal act of corruption is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation or its board of directors.*
2. *The criminal act of corruption is taken to be committed by a corporation in the event that the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively.*
3. *In the event that the lawsuit is imposed on the corporation, the corporation is represented by the board.*
4. *The board representing the corporation as referred to in paragraph (3) can be represented by another person.*
5. *The judge can order that the board of the corporation should be summoned to the court and he can also order that the board be brought to the court.*
6. *In the event that the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board.*
7. *The main sentence which can be commuted to a corporation is only the fine, with the understanding that the maximum sentence is increased by one-thirds.* [7]

Contrary to Corruption Law, in Capital Market Law the recognition of corporations as a legal person is only defined in Article 1 Number 23, which states that a person is a natural person, a company, a partnership, an association or any organized group, without any further stipulation.[8] Since the *KUHP* does not recognize corporations as subject to criminal law, the

[7] Complete English version of Corruption law can be seen in http://assetrecovery.org/kc/node/b83089eb-a342-11dc-bf1b-335d0754ba85.html.
[8] The English translation of Capital Market Law Available at:

criminal code cannot be used as *lex generalis* when special Laws do not have further regulations on corporate criminal liability.

Similar to substantive criminal law, criminal procedural law, known as the Indonesian Code of Criminal Procedure (hereinafter referred to as *KUHAP*) does not regulate the prosecution method for corporations in criminal cases. This is because procedural code follows the position of the *KUHP*. The stipulations of procedural law that reference the prosecution of corporations then only depend on the Laws which recognize the corporation as its subject. This creates similar problems to those found within substantive law, as Laws which recognize the criminal liability of corporations only provide limited regulations or even do not stipulate at all on the procedural law.

The second category of problems that arose during the development of corporate criminal liability is the implementation in criminal cases. Even though corporate criminal liability was recognized in the Indonesian criminal legal system in 1951, the implementation of these Laws in real cases is still limited. A survey conducted in 2006 found that Indonesia did not have adequate standards nor criteria in court within the field of corporate criminal liability.[9] This issue emerged because corporate criminal liability was regulated by various Laws, rather than by one general regulation (*KUHP*). Furthermore, the court had not reached agreement regarding corporate criminal liability practices. Similar criminal cases often had different results depending on the knowledge of the law enforcers, who did not possess the confidence to prosecute a corporation.[10] This can be observed in the limited cases brought before the courts, which involved corporations as the defendants. In criminal cases, prosecutors have not used their authority to bring criminal suspects before the court to prosecute corporations. In many cases, the prosecutor only prosecutes a natural person within the corporation as the criminal offender. When a prosecutor only prosecutes a natural person and not a corporation, the court cannot make a decision beyond the indictment and therefore cannot sanction the corporation.

Decades after the first recognition of the criminal liability of corporations in 1951, positive developments in successfully upholding corporate criminal liability began. In 2010, PT Dong

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http://www.bapepam.go.id/old/old/e_legal/law/CAPMARKETLAW.pdf. Accesed on 1 October 2015.

[9] The survey was conducted in 2006 and even though there are some changes in the system of corporate criminal liability in Indonesia which later will be discussed in the next chapters, this country still has not had the general system. See: Harkristuti Harkrisnowo and David K. Linman, *Survey Response, Laws of Indonesia, "Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions*", (2006) FafoAis, p.5.

[10] Ibid.

Woo Environment Indonesia (PT DEI) was successfully prosecuted for committing environmental pollution. The case ended with the decision of the Indonesian Supreme Court Number 862K/Pid.Sus/2010 which decided to sanction a fine to PT DEI, a waste processing company, for polluting the environment. Following this decision, several cases against corporations were handled by prosecutors and had various results. Several existing cases on the criminal liability of corporations are expected to positively influence the development of a corporate criminal liability doctrine in the Indonesian criminal legal system. But in fact, the decisions of these cases often create further controversial questions about how to establish the system of corporate criminal liability in Indonesia.

The research of this book was conducted during the period of 2014 to 2018. In that period, Indonesia has taken several important steps to solve both the problems of regulations and the problems of implementation in criminal cases. However, Indonesian corporate criminal liability systems still require further development. The two main problems and the fact that the Indonesian criminal legal system is struggling to develop a better system to establish the criminal liability of corporations will be the focus of this book.

Indonesia is not the only state struggling to establish the best corporate criminal liability system within the country's criminal legal system. Most countries worldwide face similar problems when establishing a corporate criminal liability system and in providing a legal basis for prosecuting corporation. The many conflicting opinions exist about whether corporations should be subject to criminal law have incited the development of several theories about how to establish the *actus reus* and *mens rea* of corporations. The discussion of the development of corporate criminal liability in Indonesia is enriched by drawing on other experiences in other countries, especially the Netherlands as it is the root of the Indonesian criminal legal system. Learning from the best practice of other countries will help discern the best system of corporate criminal liability for Indonesia.

3. The Relevance of the Study

The scientific relevance of this study is to provide an understanding of the existing regime of corporate criminal liability in the Indonesian criminal legal system, as well as the problems related to its development. Comparative theoretical review and case studies of corporate criminal liability will provide recommendations for future development of the Indonesian corporate criminal liability system. Special attention will be given to the

development of corporate criminal liability in the Netherlands since the criminal legal system of this country is the root of the Indonesian Criminal legal system.

The view of this study is that the future development of corporate criminal liability in Indonesia depends on two factors: the systematic law and the professional law enforcers (prosecution services and judges). The law-making process related to the criminal liability of corporations must pay attention to the general criminal legal system and the law enforcers need to have a better understanding of theory to impute the criminal liability to corporations. Moreover, this study also examines the implementation of corporate criminal liability through criminal cases in Indonesia, legal scholars' opinion and a comparative law study, which culminates into a proposal to enhance the development of corporate criminal liability in Indonesia.

4. Research Question

Drawing from the historical background, the following research question emerges:

"What is the development of corporate criminal liability in Indonesia, especially compared to the Netherlands?"

Several sub-questions that follow from that research question are:

a. What are the general developments and the theories of corporate criminal liability?
b. What are the corporate criminal liability regulation problems in the Indonesian criminal legal system?
c. What are the problems in the implementation of corporate criminal liability in Indonesia?
d. What is the corporate criminal liability development in the Dutch criminal legal system?
e. What can be proposed to develop the system of criminal liability of corporations in Indonesia?

5. Terminology and Definition

The important concept of this study is "the development of corporate criminal liability" in the Indonesian legal system. This concept consists of three important words which are "development", "criminal liability" and "corporation". "Development" is defined as the

process of developing or being developed.[11] The word "corporation" (noun) is defined as a large company or group of companies authorized to act as a single entity and recognized as such in law.[12] As a legal term, corporation is defined in the dictionary as an artificial person created by state through the law.[13] In this book, the term corporation is defined in a broad sense, as it refers not only to business entities that have been formed into legal corporation (such as a limited liability company), but to all business entities, regardless of their status of legal form. The foundation of criminal law is a maxim of "*actus non facit reum nisi mens sit rea"* which means that an act does not make a person guilty unless their mind is also guilty.[14] This means that someone is only guilty of criminal offences when they committed a criminal act *(actus reus)* and have an appropriate state of mind or mental element *(mens rea)* in relation to that act. It is in line with the perspective of *Packer* which mentioned that the ground of criminal law depends on three important notions which are offence, guilt and punishment.[15] Therefore, in this study the definition of the development of corporate criminal liability is, "the process of developing corporation illegal activity relating to crime, to be criminally responsible" in the Indonesian legal system.

6. Methodology

Primary and secondary legal resources are used in this study.[16] Primary legal resources consist of legislations, regulations, court decisions and international conventions. Secondary legal resources include textbooks, journal articles, and encyclopaedias.[17]

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[11]*See* http://www.oxforddictionaries.com/definition/english/development?q=development, accessed on 19 January 2015.
[12]*See* http://www.oxforddictionaries.com/definition/english/corporate?q=corporation, accessed on 19 January 2015.
[13] Michel J.Phillips, 'Corporate Moral Personhood and Three Conception of the Corporation', (October 1992) *Business Ethics Quarterly*, Vol 2, No.4, p.437.
[14] R. A. Duff, Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law: Philosophical Introductions, (Oxford: Blackwell, 1990), p.7.
[15] Packer explained that all those three concepts symbolize the basic problems in substantive criminal law which are:
(1) What conduct should be designated as criminal;
(2) What determinations must be made before a person can be found to have committed a criminal offense;
(3) What should be done with persons who are found to have committed criminal offense.
See further on Herbert L.Packer, *The Limit of the Criminal Sanction* (Stanford: Stanford University Press, 1968), p.17.
[16] The primary legal resources consist of the authoritative records of the law made by the law-making authorities. *See* Enid Campbell, E.J. Glasson, Ann Lahore, *Legal research: Materials and Methods*, 2nd Edition (Sydney: Law Company Book Limited, 1979), p.1.
[17]Secondary sources comprise all the publication that pertain to law but which are not themselves authoritative records of legal rules, *Ibid*.

This study explores an array of theories, court practices, and opinions of legal scholars, the government, parliament, prosecutors and judges to determine the conceptual and practical challenges in corporate criminal liability in Indonesia. The focus of analysis is a combination of Indonesian criminal law regulations, Indonesian court decisions on corporate crime, the development and existing theories in corporate criminal liability and the development in the Netherlands as the root of Indonesian criminal law. The study will use criminal law regulations to analyse the applicable law and problems surrounding the regulation of corporate criminal liability. The study will also use court decisions to analyse the way the corporations are prosecuted and the binding element in judicial decisions, or *ratio decidendi* of judges, when cases are adjudicated.

A comparative study is used as a way to broaden and enhance the "supply of solution" as well as offers to scholars to have critical capacity to find the solution from other countries' experiences.[18] This will pay special attention to the Dutch development of corporate criminal liability. Despite the difficulties to get precise understanding of the Dutch criminal legal system in this research due to linguistic and cultural barriers of the researcher,[19] the Dutch experience is chosen since the Dutch criminal law has an important position to Indonesia as a result of sharing rule in the past. Up to present, the foundation of the Indonesian criminal legal system, which is the Indonesian criminal code, is still based on the 1886 Dutch Criminal Code. Even though after 1945 Indonesia has developed their own system, including trying to reform its criminal code, it is still useful for Indonesia to learn from the contemporary development of the Dutch criminal law theory and practice.[20] Finally, the analysis also covers the existing theory in criminal liability that offers insight into the best approach to develop corporate criminal liability in the Indonesian legal system.

7. Structure of Study

This study aims to provide a better understanding of the corporate criminal liability regime and sketch out the problems faced by Indonesia in implementing corporate criminal liability into its criminal legal system. Comparative study will enrich the data provided. Cumulative

[18] Konard Zeigert and Hein Kötz, *An introduction to Comparative Law*, 2nd Edition (New York: Oxford University Press, 1998), p.15.
[19] Nils Jansen, Comparative Law and Comparative Knowledge, in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford and New York: Oxford University Press, 2006), p.339.
[20] Further discussion on the importance of learning from the Dutch experience will be discussed later on Chapter 4.

analysis will feed into a proposal on how to deal with the problems that arise during the development of corporate criminal liability.

The first chapter of this study elaborates the nature of corporate criminal liability from the point of its development, describes advantages and disadvantages related to the criminal liability of corporations and reviews the existing theories in corporate criminal liability. This will provide a comprehensive understanding of the current corporate criminal liability system, which can aid in the further development of corporate criminal liability in Indonesia. Chapters 2 and 3 focus on how the Indonesian criminal legal system regulates and will regulate the criminal liability of corporations within their Laws and explore issues concerning punishing corporations through law stipulations. These chapters also critically discuss the implementation process for corporate criminal liability through the criminal courts, particularly focusing on prosecution and how criminal courts ruled on such decisions in several cases. These chapters also discuss several problems of implementation.

The 4th chapter of this book elaborates on the development of corporate criminal liability in the Netherlands, particularly with respect to the regulations and implementation. Comparative perspectives will enrich this research by comparing the problems and the solutions used both in Indonesia and the Netherlands, as the Netherlands is a civil law country and the country of origin of the Indonesian criminal legal system. Understanding connections between the recent development of corporate criminal liability in Indonesia and the root of the Indonesian criminal legal system will derive valuable lessons. As the countries have similar foundations in criminal law, comparing respective developments on corporate criminal liability will help Indonesia deal with problems as they emerge.

Finally, Chapter 5 summarizes previous discussions by briefly synthesizing the problems and critiquing both the way the Indonesia regulates law on corporate criminal liability and the way Indonesia implements the criminal liability of corporations while offering solutions to deal with these problems. Hopefully, the study will provide significant evidence that a better system of corporate criminal liability in the Indonesian criminal legal system is needed. This chapter also offers several recommendations to develop a better system of establishing the criminal liability of corporations in Indonesia.

Chapter 1

The History and the Development of Corporate Criminal Liability

1.1. Introduction

The Industrial Revolution and the rising world population are influential factors in the development of the role of corporations in society. Individual scale manufacturers cannot fulfil the daily needs of millions of people; these needs necessitate the role of corporations which have the resources to produce mass amount of goods and services. Modern corporations do not only take a part in supplying basic daily needs of people, such as food, housing and clothing, but they also dominate all aspects of life such as civil, traditional, or way of life in society. Corporations control the world monetary system, which involves banking, capital market, a huge amount of people's money and natural resources such as oil and gas. Moreover, in several countries private corporations are also involved in activities that are the primary duty of the government. For instance, in the United States and the United Kingdom private corporations run private prisons, based on the contract between the government and corporations.[21] Besides that, private army corporations of the United States are the security contractor that replaced the role of the government army in Iraq.[22]

Industrial modernization has given an opportunity for corporations to fulfil the high demand of the goods and services from customers, which can generate huge profit for the corporations. Moreover, the growing interconnectedness among countries around the globe in the globalization era also gives an 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

[21] See, http://www.bbc.com/news/uk-england-birmingham-24442303 and http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289, accessed on 10 September 2017.

[22] The famous private army in Iraq is the Blackwater Corporation, an American security contractor security. See the several news related to the operation of the private army in Iraq on http://www.rjionline.org/sites/default/files/twp_private_armies_of_iraq.pdf, accessed on 7 June 2015.

technology in all aspect of life.[23] 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.[24]

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.[25] That incident is considered as the world's worst industrial accident.[26]

The examples mentioned above show how corporate activities both positively and negatively influence society. If corporations' activities are on the right track, society could

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[23] For example in the USA, the Business Roundtable (BRT) which is the association of chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy mentioned that the U.S. corporations have more than 16 million employees and invest $158 billion annually in research and development – equal to 62 percent of U.S. private R&D spending. Those corporations have also given more than $9 billion a year in combined charitable contributions. *See http://businessroundtable.org/about, accessed on 1 November 2016.*

[24] The brief history of the Enron case can be seen on http://www.cbc.ca/news/business/the-rise-and-fall-of-enron-a-brief-history-1.591559, accessed on 20 October 2017.

[25] There is no official data related to the number of the victims of that disaster but based on hospital records 20,000 people died and almost 600,000 people were left with irreparable physical damage. See http://www.theguardian.com/world/2009/dec/03/bhopal-anniversary-union-carbide-gas?guni=Article:in%20body%20link. For the summary of the case can be seen on: M.J. Peterson. 2008. "Bhopal Plant Disaster." International Dimensions of Ethics Education in Science and Engineering. Available at www.umass.edu/sts/ethics. Accessed on 10 August 2015

[26] See, http://news.bbc.co.uk/2/hi/south_asia/8725140.stm, accessed on 20 October 2017.

profit hugely. On the other hand, if corporations exercise bad conduct, society can be harmed extensively. The questions emerged from that fact are: how can legislators deal with the fact that corporations could create societal harm, and, could criminal sanctions, instead of civil and administrative sanctions, be imposed to corporations as moral condemnation for that conduct? The answers to those questions have been long discussed within the world's legal systems. The fact countries such as Brazil and Bulgaria still do not recognize the criminal liability of corporations, while Germany only recognizes the administrative penalties for corporations, is indicative of a continuing debate concerning punishment by criminal sanctions for corporations.[27]

Indonesia is not the only country that has difficulty imputing criminal liability to corporations. Therefore, in the context of these problems, it is important for Indonesia to learn from the general development of criminal liability of corporations within various legal systems. To have a comprehensive understanding it is important to discuss the arguments against the criminal liability of corporations; although Indonesia has already recognized corporations as the subject of criminal law sanction. For that reason, this chapter will firstly elaborate on the theoretical obstacle of imputing criminal liability to corporations and follow with the counter. Secondly, this chapter will discuss the recognition of corporate criminal liability to impute criminal liability to the corporation, including several arguments that are used to support the criminal liability of corporations and several theories which exist to establish the criminal liability of corporations. Learning about the general development of the criminal liability of corporations in world legal systems, the debates about the advantages and disadvantages of corporate criminal liability, the obstacles and proposed solutions to implementation, can hopefully inspire Indonesia to deal with the problems to develop corporate criminal liability.

1.2. The Theoretical Obstacle

The purpose of criminal law is to provide an orderly society whereby citizens are secure in their personal, property and dignity against harm from other members of society (criminals). Criminal law, through criminal responsibility authorizes some individuals to punish others because criminal responsibility involves an element of human agency, which are the legal enforcers. The basic principle of criminal responsibility was originally only concerned about the liability of the natural person, in terms of person in blood and flesh for their misconducts,

[27] See the comparison among countries related to the criminal liability of corporations on Arthur Robinson, ''Corporate Culture' As a Basis for The Criminal Liability of Corporations', (2008) *Report for the United Nations Special Representative of the Secretary-General on Human Rights and Business.*

since criminal law was developed within the idea and moral stance of individualism that emphasizes the moral worth of individuals.[28] Since criminal sanctioning was originally developed only for natural persons, sanctioning the legal persons for misconduct will produce several theoretical dilemmas, which are used as arguments against the criminal liability of corporations.[29] The first question is about how to determine whether a corporation has committed a criminal act (*actus reus*). The second is about how to determine the *mens rea* (moral blameworthiness) of a corporation. Thirdly, since corporations are only a law creation entity (legal fiction), how can legal enforcers prosecute a corporation before criminal court? Finally, a corporation is an entity that is established for certain aims as shown on their corporate charter. Committing criminal offences is absolutely absent in the goal of corporations; therefore, corporation acts cannot be considered committed criminal offences because there are no laws or bylaws that give them a legal foundation to commit a crime (*ultra vires* doctrine).[30]

1.2.1. Corporations cannot be Morally Wrong

It is imperative that criminal responsibility include discussions about moral responsibility. Moral responsibility is an important element for applying criminal sanctions, because moral responsibility indicates that one is deserving of punishment for their conduct.[31] In criminal law, criminal sanctions can only be imposed to parties who are involved directly or indirectly in misconduct and perform their action in a morally blameworthy way.[32] For that reason, a criminal law regime stipulates that criminal sanctions cannot be imposed to individuals who are incapable of moral responsibility such as infants, insane persons and incompetence persons.

Moral responsibility is a kind of causal responsibility that denotes who or what is to blame for something that happened, and it is attributed to individual(s) when they act intentionally.[33] To determine whether an individual's actions are morally blameworthy the conduct of the individual and whether their conduct is morally acceptable within society is evaluated. Moral responsibility is a fundamental condition for criminal punishment, but not all morally blameworthy conduct warrants criminal punishment. In moral responsibility, when moral

[28] Celia Wells, *Corporations and Criminal Responsibility*, (Oxford: Clarendon Press, 1994), p.14.
[29] V.S. Khanna, *'*Corporate Criminal Liability: What Purpose Does it Serve*',* (1996) *Harvard Law Review* Vol.109 No.7, p.1479.
[30] L.H. Leigh, The Criminal Liability of Corporations in English Law, (London, 1969), pp.8-9.
[31] John Hasnas, 'the Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability', *American Criminal Law Review,* Vol.46:1329. P.1330.
[32] Ibid.
[33] Manuel Velasquez, 'Debunking Corporate Moral Responsibility', (October 2003) *Business Ethic Quarterly*, Vol.13, No.4, pp.531-562.

blameworthiness is determined, authorization is not automatic for others to take an action against the perpetrator, because moral responsibility does not involve law enforcement issues. To take action against an individual who is deserving of punishment when they act in a morally blameworthy way, falls within the scope of criminal responsibility. The difference between moral responsibility and criminal responsibility is that only criminal responsibility has the authority agents to deal with the moral blameworthiness and not vice versa.

Based on the reasons mentioned above, Velasquez argued that it is impossible to attribute moral responsibility to corporations.[34] He believes that corporations are not agents. There are two types of agents in responsibility, natural or unintentional agents and intentional agents. Natural agents such as hurricanes, tornadoes, and earthquakes can be responsible for causing damage, but that agent's actions are not intentional and therefore they cannot be morally responsible. Intentional agents such as a natural person can be morally responsible because they can cause events intentionally. Corporations are not agents because they are not real individual entities and are distinct from natural persons within the organizations.[35] Secondly, corporations cannot be morally responsible because they are not causally responsible for the actions of their employees since corporations can only act when individuals within the corporations, act. Thirdly, corporations cannot act intentionally, and recognition can only happen by attributing another party's (or natural person's) intention within the corporations.[36] Keeley argued that by considering organizations as moral persons to determine their social responsibilities is an unhappy development in moral philosophy.[37] In his view, corporations have no intentions and goals at all.[38]

The common sense of society mirrors the individualism of criminal law. For example, when a natural person commits a criminal act, society's reaction will be to directly blame perpetrator for their misconduct and focus on how they should be punished based on the Laws. People are also concerned with how the process of investigation and the trial of the perpetrators is run. Society will not question why criminals should be punished, nor will they question the ratio of criminal punishment to the natural persons.[39] In contrast, when a corporation as a legal person commits a crime, society often questions whether it is possible to punish a corporation,

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[34] Ibid.
[35] *Ibid.*, p. 538.
[36] *Ibid.*, p. 545.
[37] Michael Keeley, 'Organizations As Non-Persons', (1981) *15 The Journal of Value Inquiry* 149–155, 149-155.
[38] *Ibid*., p. 2.
[39] Manuel Velasques, *Loc.Cit.*, p. 545.

how to enforce laws with corporations and what the purpose of punishing corporations is. There are many advantages and disadvantages to punishing corporations, but the common perception of society shows that imputing criminal liability to corporations requires a solid basis to be accepted in a well-established system that believes only natural persons can be criminally liable.

1.2.2. The Criminal Liability of Corporations against the Basic Principles of Criminal Law

The theoretical basis to reject criminal liability of corporations is the fact that corporations are human creations and exist as a tool to support their business and social activities. As a human creation, a corporation is definitely incapable to act and has no will to exercise. Corporations can only act through the natural persons who act on behalf of corporations or as the agents of corporations. Nonetheless, a state of mind with legal significance, such as knowledge, intention, malice or belief, only emerges from the agents of corporations, while corporations have no such capacity.[40] Therefore, criminal liability can only be established toward natural persons. Mueller argued that the development of the criminal liability of corporations is like weeds that have grown in the land of criminal law.[41] As a weed, it grew without someone cultivating or breeding it. Further, he stated that as a weed it had not done much harm, but the usefulness of the weed is debatable among the law farmers. The usefulness of the criminal liability of corporations is a polarizing concept, with advantages and disadvantages and respective supporting arguments.

A special characteristic of the criminal law system is the focus on the characteristic of natural persons as the primary subject of criminal law. All crimes in criminal law logically can only be perpetrated actively or passively by the natural persons, since only the natural persons have the capability to act physically. This means that the act was caused by an individual's own bodily movement or the individual helped to make the act happen or failed to prevent the misconduct when they could have and should have prevented it.[42] Furthermore, criminal responsibility can also only be imputed to natural persons since only natural persons have the freedom to make decisions; they have a culpable mental state by committing an act

[40] Amanda Pinto, Martin Evans, *Corporate Criminal Liability*, (London: Sweet and Maxwell, 2003), p.16.
[41] He mentioned "Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of mens'rea- though a rather degenerated mens rea-, a few genes from tort law and a few from the law of business associations". See, Gerhard O. W. Mueller, 'Mens Rea and the Corporation: a Study of the Penal Code on Corporate Criminal Liability', 19 U. Pitt. L. Rev. 21 1957-1958. P. 20.
[42] Manuel G. Velasquez, 'Why Corporations Are Not Morally Responsible for Anything They Do', (1983) *Business & Professional Ethic Journal*, Vol.2, No.3, p.2.

intentionally or recklessly. The famous maxim of criminal law that states that the act does not make a person guilty unless their mind is guilty *(actus reus non facit reum nisi mens sit rea)*, makes it difficult to determine whether corporations could commit an offence that included a criminal state of mind or not. If we simply apply that perspective, the conclusion is clear that the cornerstone of criminal liability is that the moral blame of natural persons does not include the corporation. But, there should be a way for the criminal law regime to deal with the negative effects of corporations on society. Therefore, there should be a solid justification to determine whether corporations can be attributed with moral responsibility and how to impute criminal liability and attribute fault to corporations.

The absence of the *actus reus* and the *mens rea* of corporations in criminal offences becomes the strongest counter-argument against the criminal liability of corporations in the countries that have a common law tradition, such as the U.S. and the United Kingdom.[43] On the other hand, in the European civil law system countries, the influence of the principle *"societas dilinguere non potest"*, meaning that corporations cannot be blameworthy, leads to the rejection of imposing criminal punishment to corporations.[44] Those two legal systems have the same basic argument against the criminal liability of corporations, which is that the original character of criminal law was not fit for the characteristics of corporations. The criminal punishment is imposed on the offender based on their moral blameworthiness as a response to the wrong manifest in the criminal conduct.[45] The basic elements of the criminal act, which are *actus reus* (criminal conduct) and *mens re*a (guilty mind), are originally implemented only for the natural person. Criminal punishment can only be imposed on the natural person, because only the natural person who can physically commit a criminal act has the capacity to form intent. In contrast, the corporation is only a creation of the law or a legal fiction that cannot conduct an offence by itself and does not have its own intention. It is not logical to make corporations criminally liable based on conduct and intention, but instead it should be based on the attribution of the conduct and the intention of the natural persons within corporations. The attribution of the *actus reus* and the *mens rea* of natural persons within corporations, to

[43] Sara Sun Beale, *'*Is Corporate Criminal Liability Unique*?'* (2008) Duke Law Legal Studies, Research Paper Studies No.215, p.1513.
[44] Sara Sun Beale, Adam G Safwat*, '*What Development in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*',* (2004) *Buffalo Criminal Law Review*, Vol. 8:89, p.105.
[45]*Ibid.*, p. 98.

corporations is obviously against the basic principle of legal thought that in criminal law everyone should be held responsible and punished according to their own actions.[46]

In the context of corporate criminal liability, to some extent, the natural persons within the corporations could be held criminally liable for their own misconduct, but their conduct could also lead to the criminal liability of their employers, which is in this case the corporation. Double liability, both by the natural persons and the corporations, based on the single conduct of the natural persons within the corporation, is an overlapping liability as the actual perpetrator is the natural person. Furthermore, the attribution of the criminal when sanctioning corporations based on the conduct of certain people within corporations, is an unfair punishment as parties within corporations, such as employees and shareholders, who are not involved directly to the offence, will also undergo the effect of the criminal sanction.[47]

The sanctions in criminal law, such as capital punishment and imprisonment, are considered the most severe sanction compared to other legal sanctions, such as civil or administrative sanctions. The severe sanctions in criminal law are the primary sanctions to create the deterrence effect, both to the offenders and society. In the case of corporate criminal liability, those two criminal sanctions absolutely cannot be imposed to corporations because of the unique characteristic of the corporations. For that reason, *V.S. Khanna* stated that corporate criminal liability served no purpose because the corporations cannot be imprisoned, therefore raising questions about whether criminal sanctioning is an effective influence on corporate behaviour.[48] The argument against the criminal liability of corporations also comes from the basic principle in criminal procedural law. As a legal fiction, the requirement of the physical attendance of the defendant before the court clearly cannot be fulfilled when the defendant is a corporation. Since liability in criminal law is the individual responsibility of the perpetrators, the appearance of the natural persons before the court as the representative of the corporation is against the basic principle in criminal law.

In addition, the *ultra vires* doctrine in the past was also used as an argument to challenge the criminal liability of corporations. Based on that doctrine, corporations are an entity established with specific purposes based on their charter; therefore, the activities outside the

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[46] Antonio Fiorella *edt*, (2012) *'*Corporate Criminal Liability and Compliance Programs: Vol II Toward a Common Model in the European Union*', Jovene Editore*, p. 58.

[47] Sara Sun Bale, *a Response to the Critics of Corporate Criminal Liability*, (2009) http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2735&context=faculty_scholarship., p.1., accessed on 10 January 2015.

[48] V. S. Khanna, *Op.Cit.*, p. 1477.

scope of corporations are ultra vires and the corporation could not be made liable. However, the argument to protect corporations resulting from the *ultra vires* theory was eliminated first in tort law and subsequently in the criminal law by the recognition of corporate criminal liability.[49]

1.3. Practical Obstacles to the Criminal Liability of Corporations

Apart from the theoretical obstacle in imposing criminal sanctions to corporations, several pragmatic reasons against the criminal liability of corporations have also emerged. The counter arguments that come to light are based on the opinions that sanctioning corporations with criminal sanctions are not necessary for several reasons.

1.3.1. Other Sanctions are better than Criminal Sanction

The first counter argument to the corporate criminal liability is questioning the importance of sanctioning corporations with criminal sanctions. Other legal measures, such as civil law sanctions and administrative sanctions, are considered better to be imposed on corporations than the criminal sanction. That opinion is based on several reasons.

First, in the context of the difficulty in establishing the *actus reus* and *mens rea* of corporations in criminal law, the civil or the administrative sanctions become a better punishment for corporations, since the legal fiction is already recognized as a subject in civil law and administrative law. Yet, criminal sanctions can still apply to the illegal activities of corporations, but only for the individual within the corporation who directly committed the criminal offence. In other words, when a corporation has committed illegal activities, the civil or the administrative sanction can be imposed on corporations, while the criminal sanctions can be imposed to the natural persons within the corporations.

The only primary criminal sanction that can be imposed on corporations is a fine, where the amount is solely based on the Articles in certain Laws that have been violated by perpetrators. In contrast, the main sanctions in civil and administrative law regime also include the fine, where the amount is based on the degree of the damages caused by the corporations. Then, it can be seen that the civil law and administrative law regimes are the ideal measures to deal with the misconduct in corporate activities. Moreover, the doctrines which have been used to establish the criminal liability of corporations was originally based on the civil law liability doctrine for tort, which imposed the liability of corporations based on the conduct of its agent

[49] L. H. Leigh, *Op.Cit*, p. 7-8.

(*respondeat superior doctrine*).[50] Borrowing the civil law liability doctrine in criminal law liability shows the limitation of the criminal law regime to deal with the misconduct of subjects other than the natural person. This leads to the question of why criminal law liability should be used when the civil law liability of corporations already exists.[51]

Secondly, imposing criminal punishment to corporations is inefficient because the criminal proceeding is considered more complicated than the civil law proceeding. Before the criminal trial begins, the criminal law enforcement process starts with the investigation and the prosecution, which involves parties such as investigators and prosecutors, along with the complicated investigation and prosecution procedures. Moreover, the requirement to prove the criminal offence beyond reasonable doubt, trial by jury in adversarial system, law of evidence and the double jeopardy principle makes the criminal law enforcement costly.[52]

Thirdly, good reputation is important for corporations' business activities. A criminal conviction can lead to the damage of the corporations' reputation.[53] Society stigmatizes corporations directly after the investigation process begins.[54] When the result of the criminal trial is an acquittal from the criminal charge, the bad stigma of the corporation by society is not automatically eliminate. If reputation is the important value for business activities, then corporations will suffer the most in the criminal process, rather than the natural persons within the corporations, as corporations often get more attention, especially from its business partners and consumers, than the natural persons within the corporation. In addition, the unjustified reputational harm may also happen to corporations when they are convicted for less serious crimes.[55] In certain cases, the degree of the crimes committed by corporations are less severe compared to the reputational harm of corporations. Since corporations often have important economic influences in society in terms of employment and providing daily needs of society, the criminal prosecution should consider the public interests because the altered reputation of corporations lasts for a long time.

To protect corporations from unjustified reputational damage, civil and administrative sanctions are more suitable. Those regimes have similar characteristics to criminal law, which

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[50] Elkins, James R. 'Corporations and the Criminal Law: An Uneasy Alliance', (1976) *Kentucky Law Journal*, 65.1 p. 79.
[51] V.S. Khanna, *Op. Cit*., p.1485.
[52] Sara Sun Beale, Adam Safwat, *Op.cit*., p. 99.
[53]*Ibid*., p. 100.
[54] Based on Labelling Theory, the stigmatization begins directly after the investigation process. See Tim Newburn, *Criminology*, (Devon: Willan Publishing, 2009), pp. 210-224.
[55]Ibid.

are the imposition of liability on the corporations and the goal of deterrence. *Khanna* stated that the deterrence effect is the aim of both corporate criminal liability and corporate civil liability. Moreover, to reach the deterrence effect, criminal sanctions such as fines, probation, debarment and withdrawal of license can easily be made available in civil law regimes for corporations, which are less stigmatized by society compared to the criminal law regime.[56]

1.3.2. Other Legal Sanctions Provide More Severe Sanctions

The new critique to criminal liability of corporations states that in the corporations' point of view, criminal sanctions are the least costly penalty.[57] The possible criminal punishment that can be imposed on corporations is a fine. In several Laws the amount of the fine as a criminal sanction for a criminal offence is too low compared to the corporations' ability to pay the fine. The corporation can easily pay the fine without significantly influencing the corporate financial balance, especially when the corporation is a multinational corporation. The amount of fine in criminal sanctions is already determined within the Laws. It means that the legal enforcers are bounded by the Laws when imposing the amount of fine to the corporations. Since the amount of fine is already stipulated within the Laws, the corporations can predict the maximum amount of fine that they will endure when committing a crime. It is possible that in certain cases, the corporation's decision to commit a misconduct is caused by the fact that the profit from the crime committed by the corporation is much higher than the fine imposed. Moreover, the cost of criminal law enforcement to the corporations, could be higher than the amount of fine that is imposed on the corporations. In that case, it is possible that the government pays more for the enforcement of the law than the fine received. The criminal law enforcement always involves many parties such as investigators, prosecutors and judges, and the complexity of the law enforcement process is very costly.[58]

In contrast, criminal sanctions are the most severe sanction that can be imposed on the natural persons because the criminal punishment imposed is of the highest value to the natural persons, which are their freedom and their life. Only criminal sanctions can deprive the natural person's freedom and even their life. On the other hand, by using the same characteristics of criminal punishment, the fine as the possible sanction to corporations does not have the same

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[56]V. S. Khanna., *Op.Cit.*, p. 1499.
[57] Sara Sun Beale, Adam Safwat. *Op.Cit*., p.101.
[58] In the United Kingdom for example, the judge was forced to dismiss a Class A drug-dealing case after prosecutors withdrew evidence on the second day of trial, allegedly because of concerns over how much the defence would cost the taxpayer. See. http://www.express.co.uk/news/uk/456096/Crown-Prosecution-Service-lets-criminals-go-free-to-save-on-costs, accessed on 20 September 2017.

weight as the sanctions to natural persons because the ability to pay the fine can lessen the deterrence effect of the criminal punishment for corporations.

Civil penalties are more flexible to impose on corporations. In civil penalties, the amount of the fine is based on the request of the plaintiffs depending on their loss or injury. The civil penalties are a more severe punishment for corporations when the corporation that committed illegal activities brings harm or injury to society and should compensate both material and immaterial losses from its illegal activities. The fine in criminal law can be measured from the beginning since the maximal amount is already stated in certain Laws. In contrast, the amount of civil law compensation cannot be measured from the beginning because it depends on the real losses to the victims. The measurable cost that should be paid from the misconduct in criminal law may lead to the choice to commit a crime when the offender calculates that the result of the crime will give more advantages than the sanctions.

1.3.3. The Huge Resources of Corporations in Criminal Cases

Corporations as a business entity have huge resources. This includes human resources, such as highly skill employees, strong financial resources, and economic and political influence. It is possible that the revenue of a corporation can be bigger than the revenue of a country. *Walmart*, an American retail corporation, has a revenue on par with the GDP of the 25th largest economy in the world, as it surpasses 157 smaller countries.[59] All of those corporation's resources can lead to the difficulty of corporate criminal law enforcement. Corporations can hire the best and the most expensive lawyers and experts to defend themselves in criminal trial or influence the investigation, the prosecution and the trial by influencing the legal enforcers. Corporations can also use their political influence on the government and the legislator in the drafting process of the Laws and regulations that protect the corporations' interest as well as to limit the budget of legal enforcement.[60] Moreover, corporations with a lot of employees have a huge control over basic needs of society, and this also contributes to the difficulties of the law enforcement. Law enforcers often deal with the difficulties of prosecuting corporations due to the risk of sacrificing the interest of the employees' welfare and the fulfilment of basic needs of society.

[59] See the following website, accessed on 1 December 2017: https://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?international=true&r=US&IR=T.
[60] Sara Sun Beale, Adam Safwat, 2004, *Op. Cit.*, p. 102.

State budget in law enforcement is also an important issue. Every case has a limited budget, especially in the investigation phase. A lot of resources are spent in the investigation phase to collect evidence. Limited budgets are an obstacle in collecting evidence and can lead to a long or even a failure of the investigation process. On the other hand, the corporation as a defendant has a lot of resources in every phase of law enforcement to ensure protection in criminal trial. In a country with a weak legal enforcement and corrupt practices, the huge resources of corporations can influence the legal enforcers in the law enforcement process.

From the elaboration on arguments against the criminal liability of corporations above, the objections to impose criminal sanctions on corporations are based on the difficulty to apply the basic principle of criminal law to corporations since those entities are only a legal fiction. The world development, especially after the Industrial Revolution, has given an important influence toward the development of the criminal liability regime. Apart from the objection to impose criminal sanction to corporations, most countries have already recognized corporations as the subject of criminal law and are trying to develop a better system to make corporations criminally liable.

1.4. The Legitimation in Imposing the Criminal Liability to Corporations

As already discussed in subchapter 1.2.1, the justification to impose criminal sanctions on corporations should begin by determining whether corporations are morally responsible parties or not. The party that agrees with the criminal liability of corporations argue that corporations can be attributed with moral responsibility. Peter French stated that corporations' activities are based on corporate policies which are derived from corporations' internal decision structures. Therefore, corporations can act intentionally when the misconduct was a result of those internal decision structures.[61] Similar to that argument, another author stated that corporations are morally responsible because they are "real entities". This means that the act of corporations can be separated from the act of natural persons within corporations.[62]

The next important question regarding the criminal liability of corporations is the justification to establish the criminal responsibility of corporations. The justification to impose criminal punishment to the corporation derives from the same justification to impose criminal punishment to natural person. Criminal law is an instrument to make a moral statement to

[61] Peter A French, 'the Corporation as Moral Person', 16 *Am.Phil.Q*.207, 211, 1970.
[62] Michael J. Philips, 'Corporate Moral Personhood and Three Conception of the Corporations', (1992) *Business Ethic Quarterly*, 435, 254.

certain conduct, while criminal punishment is the imposition of something that is intended to be burdensome or painful, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so.[63] The justification in imposing criminal punishment follows from the existence of criminal law, which include six requirements that should be met in order to punish perpetrators.[64]

1. *There is a body of rules capable of guiding action (primary rules)*
2. *There are beings (person) capable of following these rules or not as they choose, capable of choosing on the basis of reasons, and capable of treating the prospect of suffering specified evils as a reason against doing an act (to be weighed with other reasons for and against),*
3. *There is a procedure (authority) for inflicting types of evil (penalties) upon a person if he does not follow the rules,*
4. *There are (secondary) rules connecting failure to follow primary rules (crimes or offences) with certain penalties,*
5. *Both the primary and secondary rules are supposed to be known to the persons subject to them (in general, at least), and*
6. *Imposition of the penalty is (in general, at least) justified by the person's not having followed the appropriate rule when he could have.*

The main legitimation for criminal punishment is conducted between the deterrence and the retribution theories, but most people agree that the aim of criminal punishment is found in both of those justifications.[65] To some extent, those justifications can also become a legitimate and significant justification for punishing corporations.

The doctrine of deterrence has an important role in clarifying the relationship between sanctions and human behaviour. This doctrine said that punishments will create a deterrent effect when the fear or actual imposition of punishment causes obedience.[66]

The deterrent value of punishments is directly related to the types of criminal punishment, such as capital sentence, imprisonment and fine. Punishments have the highest potential for preventing misconducts when they are severe, certain, and swift in their implementation. Deterrence is based on a rational idea of human behaviour in which individuals freely select

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[63] Adam Bedau Hugo, *Punishment, Crime and the State,* (Stanford: Encyclopedia of Philosophy, February 19, 2010).
[64] Celia Wells, *Op.Cit*., p. 18.
[65]Ibid.
[66] Brent Fisse, 'Recontructing Corporate Criminal Law: Deterence, Retribution, Fault and Sanction', *Southern California Law Review*,Vol. 56:1141.p. 1146.

between alternative courses of action to increase pleasure and diminish pain.[67] From this utilitarian perspective on crime and punishment, criminal answers to problems become a less interesting option when the costs of this conduct will be more than its expected benefit. From a deterrence perspective, all types of punishment have a potential deterrent effect as long as it is recognized as a severe, certain and swift.[68] In the context of corporations, the most severe sanction in criminal law, which is capital punishment or imprisonment, certainly cannot be applied to corporations. The only punishment which fits to corporations is a fine. Criminal sanctions are often said as the most severe sanction compared to civil law sanctions and administrative law sanctions, because criminal law sanctions implicate the deprivation of a human's freedom or even a human's life. Since the fine is the only possible sanction for corporations, then, in what way can criminal punishments deter corporations? Criminal punishments can give a deterrence effect to corporations in two ways.

Firstly, the activities of corporations have a motive to gain as much economic benefits as possible. Therefore, all conducts of corporations normally will be based on a calculation of potential costs and benefits. To achieve deterrent effects, the fine for corporations must involve an elevated level of monetary deprivation, so that the corporations will reconsider reoffending. The punishment to corporations should focus on the most valuable thing to corporations, which is its assets because they are like a body or soul for a human being. Secondly, deterrence effect for corporations can also result from the nature of criminal punishment. The basic difference between criminal law punishment and civil law punishment is around the expressive nature of the sanction. Criminal law punishment is

> *"conventional device for the expression of attitudes of resentment and indignation, and of judgment of disapproval and reprobation….punishment, in short, has a symbolic significance largely missing from other kinds of penalties".*[69]

Therefore, the imposition of criminal punishment to corporations are not only about the fine but also about giving criminal stigma to corporations. Convicting a corporation for a crime gives confirmation to society that a corporation has harmed society. A good image for a corporation is very important. To some extent that condition can negatively affect the activities

[67] Based on utilitarian perspective, for punishment, the pains and unhappiness caused to the offender must be 'outweighed" by the avoidance of unpleasantness to other people in the future – thus making punishment morally right from a utilitarian point of view.
[68] Brent Fisse, *Op.Cit*., p.1146.
[69] *Ibid*., p. 1147.

of corporations, for example, the boycott of a product and the decline of the corporation's share price in capital market.

The next justification for the imposition of criminal punishment is retribution. Based on this theory, wrongdoers should be punished because they deserve it, regardless of any future beneficial consequences. The famous maxim for retribution is created from the Old Testament that accentuates the idea of *"an eye for an eye and a tooth for a tooth"*.[70] Neither constrained by questions of offender culpability nor directed at avoiding future wrongdoing, offenders under a retributive philosophy simply got what they deserved. This principle of punishment was consequently modified in neoclassical thought to identify that some offenders who committed similar offences may be less blameworthy or culpable because of factors outside of their control (e.g., diminished capacity, mental disease or defect, immaturity). Under this revised retributive theory of just deserts, punishment should primarily fit with the moral gravity of the crime and, to a lesser extent, the characteristics of the offender. Coherent with a retributive philosophy, punishment under these sentencing systems focuses primarily on the seriousness and characteristics of the criminal act rather than the offender. Even though retribution is often connected to criminal sanctions, it is equally applicable to other types of legal sanctions and informal sanctions. For example, civil litigation that is based on the principle of strict liability is similar to retributive philosophy, in that compensatory and punitive damages focus on the gravity of the prohibited act rather than characteristics of the offender.

As the justifications of criminal punishment, both deterrence and retribution cannot be seen as separate theories, but they should be understood as the theories which complete each other. The retribution theory should be used as a limitation on the distribution of deterrence.[71] The retribution theory can justify the punishment of corporations if retribution is based on "justice as fairness".[72] Since a corporation consists of many parties, such as the corporation itself, shareholders and personnel, distribution of retributive punishment should be considered when punishing a corporation, especially to the innocent parties who were not involved in the misconduct and had not received any benefits.

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[70] This maxim originated from the Old Testament on Matthew 5:38.

[71] H.L.A. Hart, 'Punishment and responsibility on Brent Fisse, Reconstructing Corporate Criminal Law: Deterence, Retribution, Fault and Sanction', *Southern California Law Review*, vol. 56:1141., p. 1168.

[72] 'Developments in the Law-Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions', 92 *HARV. L. REV*. 1227, 1365-75 (1979) on Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterence, Retribution, Fault and Sanction', *Southern California Law Review*, vol. 56:1141., p. 1168.

In addition, another justification can be seen from the social and political perspective of society. Criminal law arises in specific social and political context in certain societies and provides the minimum condition for the imposition of liability.[73] Criminal law can be seen as an instrument, symbol or ideology to achieve a purpose or to make a moral statement of a certain conduct.[74] The concept of criminal law represents a statement of moral or other values and it is connected with the perception of society. Different societies will have different moral values. One society cannot state that their value is better than the other. That moral value is based on political consensus through the parliament and is legalized as law that is applied to society. In this position, perception of society on moral value becomes an important factor to determine which acts violate the moral value of society and which party is punishable through the Laws. In this position, the recognition of corporations as the subject of criminal punishment within the Laws is possible if society accepted that corporations deserve to be criminally punished for their misconduct. Apart from the theoretical argument in imposing criminal sanctions to corporations, several pragmatic arguments can also be used to support the criminal liability of corporations which will be discussed as follows.

1.4.1. The Pro Arguments on Criminal Liability of Corporations

1. Criminal Sanctioning as a Response to the Corporations' Wrongdoing that Harms Society

The first benefit of imposing criminal sanctions to corporations concentrates on the function of the criminal law that states that criminal sanctions are important to respond to the corporation's misconduct. In fact, the corporations in society are real because they can own their property, conduct legal acts such as making contracts with individuals or other corporations, and they can sue and be sued in civil court.[75] Corporations have huge power and resources that can influence society, and sometimes their conduct can cause real harm.[76]

The existence of the modern corporation in society and their possibility to harm society becomes the reason that corporations should be morally condemned for actions that violate the law.[77] The legitimation to impose a criminal sanction to a corporation based on its possibility to harm society, can also be derived from the perspective of the harm principle which was introduced by John Stuart Mill on his essay "On Liberty". In his perspective the government

[73] Celia Wells, *Op.Cit*., p.15.
[74]Ibid.
[75] Sara Sun Beale, 2009., *Op.cit* p.1483
[76]*Ibid* ,p. 1482
[77] Friedman, L. (2000). *In Defense of Corporate Criminal Liability*., Harvard Journal of Law & Public Policy., 23., p.834

can legitimately restrict the individual freedom by imposing and enforcing laws when an action harms somebody else.[78] Criminal law expresses the society's condemnation of prohibited activities and sanctioning corporations with other legal sanctions could send the message to society that the corporations have the right to engage in prohibited activities.[79] The problem to impute the criminal liability of corporations in the hallmark principle in criminal law that criminal liability is based only on the individual moral blame, has been solved by the implementation of the attribution of the misconduct of the natural persons within corporations as the misconduct of the corporations. That attribution is the solution to impute criminal liability to corporations.

The argument which states that corporations are only a fiction and always base their conduct on the conduct of the natural persons within the corporations has been changed by the fact that a modern corporation has an identifiable persona. In modern society, the identifiable persona of corporations makes the presence of corporations felt and accepted within society apart from the natural persons within the corporations. *Pamela. H. Bucy* has the opinion that corporations actually have an "ethos", which is an abstract and intangible character separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activities. The corporate ethos is separate from the natural persons within corporations and the corporations itself.[80] Therefore, in the globalization era where multinational corporations are active players of development, it is no longer relevant to question the existence of corporations' as the subject of criminal punishment.

2. Criminal Justice System Infrastructure and the Benefits of Sanctioning Corporation

It is not always the case that according to the disadvantages argument, a corporation with huge resources to defend itself in criminal court will create difficulty for criminal law enforcement. The criminal justice system has a more complete infrastructure compared to other legal systems, such as civil law and administrative law. The organization structure of criminal law legal enforcers, namely the police departments, prosecutor offices and the criminal court, are advantageous for establishing the criminal liability of corporations.[81] Furthermore, legal enforcers have more resources, such as the professional legal enforcers and budget, to conduct legal enforcement than the individual or group of individuals as the plaintiff in civil law cases.

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[78] John Stuart Mill. *On Liberty*., (Canada Batoche Books 2001), p.13. (original book published 1859)
[79] Sara Sun Beale, Adam Safwat., 2004. *Op.cit*., p.103
[80]Pamela.H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN.L. Rev. 1095. P.1123
[81] Sara Sun Beale, Adam Safwat., 2004. *Op.cit*., p.104.

In the criminal law regime, when corporations commit illegal conduct that violates the Laws, the legal enforcers should take necessary action to enforce the law against the corporations when evidence is sufficient. In contrast, according to civil law, the individual, society, or the state that suffers from the corporate's misconduct, has a choice to take action to sue the corporation.

In the globalization era with many transnational corporations, especially from developed countries operate across the world, corporations can make more money than several developing or under developed countries. To some extent, that situation can lead to unbalance power between corporations and the government that creates obstacle in prosecuting corporations. In this side, functioning criminal law to deal with that condition becomes more important. Criminal justice system can balance an unequal position between corporations and the government. Globalization is also marked by strong international cooperation in criminal matters among countries in the world. Several international instruments oblige the member states to fight together against the misconduct of corporations.[82] Article 10 of the UN Convention against Transnational Organized Crime (UNTOC) stipulates that corporations may be held liable for organized crime including participation in organized group, laundering proceeds of crime and corruption. The form of corporate liability based on that convention can be in form of civil, criminal or administrative liability. By ratifying the convention and recognizing the criminal liability of corporations within its legal system, a poor country for example can balance its position toward giant corporations by seeking cooperation from other member states to narrow the opportunity of corporations to commit a crime.

In the criminal law enforcement process, the offenders face the State through its law enforcers. When the offender is a corporation, there will be a balanced position between two parties, the law enforcers as state organs with authority, against the corporations as the defendants with their resources. On the other hand, the parties involved in civil law trial sometimes have an unbalanced position. For example, when the plaintiff is just an ordinary individual against the corporation as the defendant, the plaintiff will face more difficulties to vindicate than the corporation because of limited access and resource.

[82] United Nation Convention against Corruption (UNCAC) and UN Convention against Transnational Organized Crime (UNTOC) for example stipulate the obligation to establish the liability of legal persons. See also Mohamed Mattar, Corporate Criminal Liability: Article 10 of the Convention Against Transnational Organized Crime, (2012) *Journal of International Affair, Fall/Winter 2012, Vol.66, No1.*

3. Various Possible Criminal Sanctions to Corporations

The counter-argument of the corporate criminal liability, which mentions that the fine is the criminal sanction for corporations is less severe than the other legal sanctions, is not completely true. In criminal law, criminal sanctions are divided into main sanctions and additional sanctions. The possible main criminal sanction to corporations is only a fine because other criminal sanctions such as capital punishment and imprisonment can only be imposed to the natural persons. The additional sanctions in criminal law, such as the complete or partial stoppage of the corporations' activities and the forfeit of the corporations' assets, are a suitable criminal sanction for corporations, since those additional criminal sanctions threaten the existence of the corporation.

The amount of the fine for corporations should be adjusted to the condition of corporations that have different characteristics from natural persons, especially in its financial ability. The characteristics of the additional sanctions pointing directly to the existence and the activities of the corporations, should be maximized to be imposed together with the main sanction on the corporations in order to maximize the deterrence effect to corporations.

4. Criminal Convictions as the Basis to Take Other Legal Actions

The imposition of criminal sanctions to corporations is a comprehensive approach to deal with the misconduct of corporations. By making the corporations criminally liable, corporations will be legally liable in all legal aspects, that is: criminal law, civil law and administrative law. That comprehensive approach will influence corporate behaviour within society. Furthermore, the criminal conviction will support the process of others' legal liability. The process of the civil case against corporations will be easier if the corporations are found guilty in a criminal case, because the plaintiff in civil court can use the criminal court's decision as proof that the corporation has committed misconduct that caused loss to the plaintiff. The criminal law decision will be helpful for the plaintiff in a civil case, which has limited resources, to prove the misconduct of the corporation before the civil law court. The individual and society will reap the benefits from the imposition of a criminal sanction on a corporation when they want to file a case against a corporation in a civil court. They can use the criminal court decision as the basis of the lawsuit because the misconduct of the corporation has been proved by the criminal court's decision. The individual or the society will only need to prove that the misconduct of the corporation caused loss to them.

From the discussion related to the pros and cons in imputing the criminal liability of corporations above, it is concluded that both sides have their own arguments to support their own position. But, in this modern and globalized era where corporations are one of the main actors in post-Industrial Revolution, societal development and the activities of corporations can negatively affect society, the criminal law regime must adapt to these contemporary circumstances. Enabling corporations to be criminally liable is one of the judicious ways to protect society. Moreover, the development of the criminal liability of corporations shows that many countries have recognized the criminal liability of corporations and have tried to develop easier systems to establish the criminal liability of corporations. The next subchapter will discuss the recognition of corporate criminal liability in several countries with common and civil law legal systems. That discussion presents an overview on how those countries recognize and develop their corporate criminal liability regime.

1.4.2. The Attribution of Natural Persons' Blameworthiness and Corporate Behaviour in Establishing the Criminal Liability of Corporations

After discussing the justification of imposing criminal punishment to corporations both theoretical and practical, the next important question related to the criminal liability of corporations is how to establish the criminal liability of corporations. The reason that only natural persons can be criminally punished is that the nature of criminal law, which has special characteristics, needs both an *actus reus* and a *mens rea* of the perpetrator to be criminally responsible. The *actus reus* requirement is derived from the perpetrator's bodily movement and the *actus reus* requirement is derived from the perpetrator's intentions. Those requirements then become the basic and the most important theoretical obstacle in the recognition of the criminal liability of corporations. When a natural person commits the misconduct, it will generally be clear who is criminally liable for that misconduct because the human individual is morally responsible for what they performed. In contrast, when the corporations commit misconduct, such as tax fraud, the question is which parties are morally responsible. It cannot be said that everyone in the corporation committed tax fraud and every single person within the corporation should be blamed or punished. As a single entity, the responsibility within the corporations' context should be seen as the responsibility of the group, and not to be seen as the responsibility of each individual within the group.

For a natural person, the mental state with which they committed the misconduct determines their moral culpability. On the other hand, since a corporation cannot commit a misconduct by itself it also has no mental state, so the act and moral culpability of a corporation

is indeterminate. Therefore, to establish the blameworthiness of corporations, the attribution of the conduct and mental state of natural person to the corporation becomes the key basis in the development of corporate criminal liability. The various systems of corporate criminal liability have three different theories which are (1) Vicarious Liability, (2) Identification Theory and (3) Corporate Culture theory.[83] All of those theories have basic similarity that attributes the *actus reus* and *mens rea* of natural persons within corporations as *actus reus* and *mens rea* of corporations.

1. Vicarious Liability

The first theory of corporate blameworthiness is based on the civil law theory of vicarious liability or respondeat superior theory which originally was developed in 19th century.[84] This theory considers that corporations are morally responsible for the acts and intent of each of its agents.[85] This theory considers a corporation vicariously responsible for the acts of every one of its agents, accusing the corporation through the theory of agency the mental state of any employee. Under this theory, a corporation is blameworthy even when a single agent commits a crime for the benefit of the corporation. The argument for that is that the employer gets the benefit of the employee's work, so that the employer should also carry the responsibility.

Yet, it could be seen as unfair to accuse the corporation of the intent of an agent without also considering whether meticulous and careful efforts were made by other agents to prevent the crime.[86] But, this theory is adopted with various small adjustment by many countries such as Australia and the United States.[87] This theory became the common theory to answer the question on how to determine whether a corporations has committed an offence. In this case, based on the conduct of its agents.[88]

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[83] 'Developments in the Law- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions', *92 HARV. L. REV.* 1227, 1365-75 (1979). P. 1242.
[84] L.H.Leigh, Strict and Vicarious Liability: a Study in Administrative Criminal Law, (London: Sweet & Maxwell, 1982), p.11.
[85] *Ibid*. p.1.
[86] 'Developments in the Law', *Ibid.*
[87] Christina de Maglie, 'Model of Corporate Criminal Liability in Comparative Law', (2005) *4Wash.U.Glob.Stud.L.Rev.547,* p.553. Website: www.digitalcommons.law.wustl.edu/globalstudies/vol4/iss3/4, accessed on 10 January 2015.
[88] See the history of the implementation of this theory in the UK in subchapter 1.5.1.

2. Identification Theory

The second theory is the identification theory or *alter ego* theory.[89] This theory is similar to the vicarious liability theory, which establishes the criminal liability of corporation based on certain conduct of natural persons within the corporation. But, instead of deriving the misconduct from every agent within the corporation, this theory identifies that only the act of the natural person who held an official position (directing mind) within corporation could lead to the liability of the corporation. Corporations will only be responsible for their acts and intent, not for the acts of lower-level employees.[90] This theory considers that only the corporate officials could be regarded as the directing mind and will of the corporations, since their position gives the authority to determine corporate activities.[91]

3. Corporate Culture Theory

The third theory is the corporate culture theory. This theory did not intend to establish the criminal liability of corporations solely from direct attribution of the misconduct of a natural person within a corporation. This theory proposes that a corporation is blameworthy only when its procedures and practices unreasonably fail to prevent corporate criminal violations. The criminal liability of corporations is established in all theories by attributing the fault of the natural persons within corporations as the fault of the corporation.

The application of respondeat superior doctrine from civil law to determine corporate criminal liability is based on the fact that in the past development of a comprehensive understanding of organizational behavior did not go well.[92] In this century, the development of the theory of organizational behavior has grown rapidly in order to understand the deeper nature of corporations and their activities.[93] Based on this theory, corporations exhibit their own special kind of intentionally, namely corporate policy.[94] Corporations are a group of people with a common goal, generally an economic goal. The activities of a corporation always involve interaction among its employees. Every single agent of a corporation has their own function and they work based on standards of procedure, corporate culture and obedience to

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[89] This theory is developed in the United Kingdom and will be further discussed in the elaboration of the development of corporate criminal liability in the UK.
[90] ' Developments in the Law*', p. 1242.*
[91] Amanda Pinto, Martin Evans. *Op.Cit*., p. 61.
[92] Carlos Gomez-Jara Diez, 'Corporate Culpability as a Limit to the Over criminalization of Corporate Criminal Liability: the Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship', (2011) *New Criminal Law Review: an International and Interdiciplinary Journal*, Vol.14, No.1, p.80.
[93] See Pamela Bucy, 'Corporate Ethos: A Standart for Imposing Corporate Criminal Liability', (1991) *75 Minn.L.Rev.* 1095.
[94] Celia Wells, *Op.Cit*., p. 82.

structural decision making. Based on that fact, illegal conduct by a corporation is the consequence of corporate processes. Corporate moral fault may depend on the internal processes within corporations. Thus, under the third theory, a corporation is blameworthy when its practices and procedures are inadequate to protect the public from corporate crimes.[95] Corporate blameworthiness therefore depends not solely on the commission of a crime but on the overall reasonableness of corporate practices and procedures designed to prevent destructive regulatory offenses.[96] The corporate culture theory does not nullify the existence of natural persons' acts in determining the criminal liability of corporations as long as their acts still reflects the organizational attitude.

From the aforementioned discussion in this subchapter, it is therefore concluded that there are solid justifications to impose criminal sanctions on corporations. The attribution of *actus reus* and *mens rea* of natural persons to the corporation becomes the basic theory in establishing the criminal liability of corporations. Moreover, the corporate culture theory has emerged to determine the criminal liability of corporations, not only by attribution of the misconduct from corporate agents but also maintaining that corporations themselves can commit crimes.

1.5. An Early Development of Corporate Criminal Liability in Common Law Systems and Civil Law Systems

The discussion on the legal basis and the way to impute criminal liability to the corporations are not new issues. This discussion has taken more than a century, and even though the concept of the criminal liability of corporations has been accepted in many common law and civil law countries, many debates among the legal scholars still exist. The reason behind the debates is the primary concern of the law in the early development, which had always given the concern to the natural person as the subject of law, since the law was originally created to regulate the relationship among the natural persons.[97]

The development of the world civilization and the negative and positive influences on society was the reason corporations became a new subject of criminal law besides the natural persons. The criminal liability of corporations' development within legal systems around the world is a good example of the quote from the Greek philosopher *Heraclitus* that "*everything*

[95] 'Development in the Law', *Op.Cit*. p. 1243.
[96] Ibid.
[97] Thomas J Bernard, 'The Historical Development of Corporate Criminal Liability', (February, 1984) *Criminology*, Vol. 22 No.1, p. 3.

changes and nothing stands still".[98] The process of the recognition of the criminal liability of corporations in many countries' legal systems started with the denial of the criminal liability of corporations before moving to the acceptance of the criminal liability of the corporations. The rejection of the criminal liability of corporations in the early development of corporate criminal liability could be understood as the process of finding the legal basis for the new concept of the criminal law subject, since corporations have fully contradictory characteristics to the natural persons. In the early development of the criminal legal theories in the past, the criminal law doctrine only considered a natural person, which is the person in flesh and blood, as the subject of criminal liability. Moreover, corporations emerged when the criminal law principle was already well established within the legal system of many countries.

The existence of corporations as the juristic persons was a result from law creation that originally came from the civil law principle. In the civil law regime, the recognition of corporations as legal fictions developed based on practical reason. The rapid development of corporations led to the need of additional capital within corporations. The huge amount of corporations' capital made the shareholders create a protection from the losses when the corporations failed. Therefore, the recognition of corporations as the legal fiction was used as the way to share the losses between the shareholders and corporations.[99] The East India Company became the first modern corporation when, in 1912, it was decided that the investment would be tackled by the corporation itself and the natural persons (members of the corporation) possessing shares.[100] Since the corporations began to possess property and be involved in business, they were recognized by the law as persons. The recognition of the corporations as legal persons in civil law did not face obstacles because corporate liability for damages in civil law can be easily establish since corporations' assets guarantee compensation for the damages caused by the corporations' activities.

The change of the classic principle in criminal law related to the subject of criminal law did not run smoothly, and many debates surrounded the recognition of corporations as the subject of criminal law. Even though many countries have recognized the criminal liability of corporations within their criminal legal systems, the debates still exist. In the United States for example, corporate criminal liability was recognized in 1909 *through New York Central &*

[98]Daniel W. Graham, *Heraclitus, a Greek philosopher of the late 6th century BCE*, Internet Encyclopedia of Philosophy, available at http://www.iep.utm.edu/heraclit/, accessed on 10 January 2015.
[99] Thomas J. Bernard, *Op. Cit.*, p. 4.
[100] Ibid.

Hudson River R.R. Co. v United States.[101] However, on the 100th anniversary of that decision, *John Hasnas* argued that there is no theoretical justification for corporate criminal liability and that liability is the violation of the theoretical structure of Anglo-American criminal law.

The development of corporate criminal liability in the world both in common law countries and civil law countries, started from the condition that corporations were unable to commit crimes and transitioned into the condition that corporations could commit crimes. The developments of corporate criminal liability within the common law countries started earlier than the countries that have a civil law legal tradition.[102]

In contrast, the acceptance of the civil liability of corporations in several countries' legal systems has developed in diverse ways. The development of the civil liability of corporations was much earlier and faster than the development of the criminal liability of corporations.[103] For example, since the beginning of the twelfth century, European countries accepted the civil liability of corporations through the development of the legal fiction theory by *F.C. von Savigny* which considered the nonhuman entities the same as the humans before the law.[104]

The discussion of the general development of corporate criminal liability in the world legal systems will analyse the general development of corporate criminal liability within several countries in different legal systems tradition. The development of corporate criminal liability in common law legal system, especially, the U.S. and U.K will be discussed,[105] while in civil law legal system the overview of the development in several western European countries will be explored. Furthermore, the discussion will elaborate on the early development and the acceptance of corporate criminal liability along with the problems surrounding the implementation of the corporate criminal liability.

1.5.1. The Development of Corporate Criminal Liability in Common Law Countries

Countries with common law traditions recognized corporate criminal liability earlier than the countries with a civil law legal tradition, because the Industrial Revolution catalysed massive industrialization in the nineteenth century. The economic change, as the result of

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[101] New York central & Hudson River R.R. Co. v United States, 212 U.S.481 (1909)
[102] Guy Stessen, 'Corporate Criminal Liability: A Comparative Perspective', (July 1994) *International and Comparative Law Quartely*, Vol.43, p.499.
[103] Thomas J. Bernard. *Op Cit*, p. 5.
[104] F. C. von Savigny, system des heutigen römischen Rechts, 1840, vol. II, § 94, p.310 on Vincenzo Fiorella (ed), Corporate Criminal Liability and Compliance Programs Volume II "Towards a Common Model in the European Union, (Jovene Editore, 2012), p.56.
[105] The discussion related to the development of the corporate criminal liability in the U.S. will focus only on federal law.

industrialization, was firstly enjoyed by the common law countries, such as U.S., England and Wales.[106] For that reason, corporate criminal liability first emerged in common law countries as a response to the rise of the existence and the activities of corporations as the main actor in industrialization.

1.5.1.1. The Overview of Corporate Criminal Liability in United Kingdom

Before recognizing the criminal liability of corporations, English Courts denied that criminal liability could be imputed to corporations. The English Courts were of the opinion that a corporation was a legal fiction. As a legal fiction, a corporation under the *ultra vires* rule could only conduct acts that were specifically regulated in the corporation's charter, and it was impossible for corporations to regulate the misconduct in the corporation' charter.[107] The courts also questioned the absence of the *mens rea* of the corporations as the basic principle in criminal law to be imposed to the criminal offenders. Then, the difficulty in finding the right punishment for corporations became the last argument of the courts to deny the criminal liability of corporations since corporations cannot be imprisoned.[108]

The theoretical argument against the criminal liability of corporations mentioned above was broken down by the fact that during the Industrial Revolution, corporations experienced a substantial rapid growth, which influenced almost every aspect of human history. Besides the numerous advantages, corporations also began to cause damages to society.[109] For that reason, the development of corporate criminal liability in the U.K. gradually took shift. The first case related to criminal liability in the U.K. was in 1842 when the English Court made the decision to impose criminal punishment to a corporation found guilty in the case of *Birmingham & Gloucester Railway Co*. The case involved a strict liability for nonfeasance. Nonfeasance means the failure to do something that should have been ensured to be performed based on Laws.[110] At that time, corporate bodies such as railway companies were established on special charters or private Laws which obliged specific duties to the corporation.[111] In that case, the railway company failed to build connecting arches above a railway line that the company had

[106] Guy Stessen, *Op.Cit*., p. 495.
[107] Markus Wagner, *Corporate Criminal Liability National and International Responses*, (Background paper for the International Society for the Reform of Criminal Law, 13th International Conference Commercial and Financial Fraud: Comparative Perspective, Malta, 8-12 July 1999). p. 2.
[108] Guy Stessen., *Op.Cit*. p. 495.
[109] Celia Wells, *Corporations and Criminal Responsibility*, Oxford University Press, 2nd edition, 2001, p. 87
[110] Amanda Pinto and Martin Evans, *Corporate Criminal Liability*, (Sweet & Maxwell, 2003), p. 25.
[111] Celia Wells, *Op.Cit*. p. 88.

built; thus, humans and other traffic could not cross the line safely.[112] After that, the decision expanded from nonfeasance to misfeasance in the case of *Rv.Gt North of England Railway Co* in 1846.[113]Another railway company was brought before court following the breach of a statutory duty. In this case, because of committing – rather than tolerating a wrong.[114] The company had unlawfully destroyed a highway in the construction of its own bridge. Misfeasance is a term used in tort law to describe the performance of an act that might be lawful but done in an improper manner causing another person injury.[115] Nonfeasance describes a failure to act that leads to a potential harm to another party, while misfeasance describes some acts that are legal but may cause harm to another party.

The next development was that the court had a strong opinion to impose vicarious liability on corporations.[116] Vicarious liability doctrine is a mechanism whereby the law attributes blame to the acts of another.[117] In the *Mousell Bros Ltd v London & North West Ry Co Ltd* case, the criminal responsibility of corporations was established on the basis of vicarious liability for the acts of its servant acting within the scope and course of his employment. The summary of the case is mentioned as follows.[118] Section 98 of the Railways Clauses Consolidation Act 1845 ruled that the owner of goods or other persons responsible for them, was required to provide to the collector of tolls for the railway, an exact account of the goods to be carried. In Section 99 of the Act, if such a person gave a false account *with intent to avoid* the payment of tolls, he committed an offence. In that case, the company had delivered the lorry loads of its goods for carriage on the railway. On each occasion, the driver handed over a consignment note that falsely described the loads. This was deliberately done on the instruction of the manager who had the authority to sign the consignment notes in order to avoid the proper payment. In that case the judge decided that the owner of the goods, the principal, was liable if his servant gave a false account with the state of mind required by the act. This was explained by Atkin J, the judge in that case, who answered the question of intent.[119]

"I see no difficulty in the fact that intent to avoid payment is necessary to constitute the offence. That is an intent which the servant might well have, in as much as he is the person

[112] Amanda Pinto, *Op.Cit.* p. 23.
[113] Guy Stessens, *Op.Cit*. p. 496.
[114] Amanda Pinto, *Op. Cit.*, p. 25.
[115] http://www.legaldictionaries.org/misfeasance, accessed on 19 January 2015.
[116] Guy Stessens. *Op.Cit.* p.496.
[117] Smith and Hogan.*Op.Cit.*, p. 258.
[118] Amanda Pinto, *Op.Cit*. p. 35.
[119]*Ibid.*,p. 36.

who has to deal with the particular matter. The penalty is imposed upon the owner for the act of the servant if the servant commits the default provided for in the statute in the state of mind provided for by the statue. Once it is decided that this is one of those cases where a principal may be held liable criminally for the act of his servant, there is no difficulty in holding that a corporation may be the principle. No mens rea being necessary to make the principal liable, a corporation is in exactly the same position as a principal who is not a corporation."

Before 1944, it could be argued that all cases of corporate criminal liability were based on vicarious liability,[120] and then in 1944 there was a big change where a company was held criminally liable for itself. In the three cases, the English Court imposed criminal sanctions to corporations based on direct liability or the identification doctrine. Those cases were: [121]*DPP v Kent and Sussex Contractors, R v ICR Haulage, and Moore v Bresler*.[122] In the first case, the fraud suspected must had intention to deceive and it was held that the transport manager's intent was the intent of the company. The decision in the first case then was accepted in the *ICR Haulage* case and applied to a common law offence when a company was convicted of a conspiracy to defraud, with the act and the intent of the managing director being the act and intent of the company.[123]

Through the 1944 case, the law of corporate criminal liability in the UK had developed from a system of vicarious liability to a system of direct, primary liability of the corporation. The 1944 decision departed from the vicarious liability approach by imposing corporate criminal liability for *mens rea* offences. The courts were influenced by the *alter ego* doctrine of the civil law of tort. In that doctrine, acts of the most senior officers of the corporations were identified as being the acts of the corporation itself (identification theory).[124] The 1944 decision used this theory in criminal law, but the decision remained unclear, especially when considering the question what natural person could make corporations criminally liable. At that time, it was broadly understood that a natural person making corporations criminally liable was contingent on the nature of the charge, the position of the officer or agent and other relevant facts and circumstances.[125]

[120]*Ibid*, p. 39.
[121] Cecilia Wells, *Op.Cit.*,p. 94.
[122] Amanda Pinto, *Op. Cit.*, p. 39-46.
[123] Smith and Hogan, *Op.Cit.*, p. 248.
[124] Guy Stessen, *Op.Cit*., p. 508.
[125]*Ibid*, p. 508-509.

The question determining what natural person could make the corporation criminally liable was answered by a decision involved in *Tesco v Natrrass* in 1971. In that case, Tesco had been charged with an offence under Article 11 (2) Trade Descriptions Act 1968. The case can be summarized as follows.[126] In September 1965, Tesco Supermarket offered a cheap washing powder. The offer was advertised mostly in the window of Tesco storefronts and some on the local and national newspapers. One day, a consumer wanted to buy a box of the washing powder offered at a special price, but he could only find the full price washing powders. When he consulted a supermarket employee, he was informed that there were no large quantities of the packets at the special price, so he should pay the full price. Then he complained to his local weight and measures inspector who brought in the prosecution. Through further investigation, it was found that the local manager was responsible for the alleged facts and Tesco supermarket had done everything possible to train its local manager (due diligence). The House of Lords held that the local manager could not be equated with the corporation; therefore, Tesco supermarket could avoid any criminal liability.[127] Reference was made to a dictum of Lord Denning in a civil case where he compared a corporation to a human body; while some individuals working in the corporation represented the brain of the corporation, other individuals represented the hands. And, only the brains represented the company.[128]

The officers that could represent the corporation were assessed with the controlling officer test: does the person control the corporation as the brain controls the human body? Based on the opinion from Lord Reid, this became a question of law, after the facts in certain cases had been proved.[129] The brain of the corporation usually pointed to the members of the board of directors, the managing directors and some other person responsible for the general management of the corporation. If some parts of their management function were delegated by the management to someone else in the corporation, that person would be a controlling officer as well, if they were acting independently of any instruction. Here, it could be concluded that the main factor in the controlling officer test is whether the senior officer could act independently or not. Furthermore, the English law in corporate criminal liability is not based on the individual's title or position but inquires if the person is part of the directing mind and will of the corporation, regardless of their formal status.

[126]Amanda Pinto, *Op.Cit.*, p. 49.
[127] Guy Stessens, *Op.Cit.*, p. 509.
[128]*Ibid.*, p. 509.
[129]Ibid.

There was an opinion that the identification doctrine was not enough to manage the reality of decision making in many modern companies. In *H. M. Coroner for East Kent (1989)*, the aggregation doctrine was considered.[130] Based on this doctrine, the *mens rea* of different individuals in the corporation aggregated to combine a sufficient blameworthy "state of mind" of the company.[131] This doctrine possesses some advantages and also a weakness. One of the advantages of this doctrine is that it can identify the impossibility of segregating a single individual who has committed a crime with *mens rea.* In addition, this doctrine also can prevent companies from avoiding the responsibility behind the corporate structure.[132] In contrast, the weakness is that the doctrine ignores the reality that the genuine core of the wrongdoing might not be what a certain individual in a corporation has done, but the fact that the company has no organizational structure or policy to prevent each individual doing what they have done in a way that accumulates into a crime.[133] However, this doctrine was rejected in that case.

The important remark from the development of the corporate criminal liability in the UK is in the context of the lack of a unified criminal code, the Laws on corporate criminal liability are spread on a sporadic basis in criminal and non-criminal statutes.[134] All statutes that recognize the criminal liability of corporations are absent in the regulations on how to impute criminal liability to corporations. In the midst of that sporadic law basis, The House of Lords determined the test to establish the criminal liability of corporations by introducing the identification theory. That theory became one of several theories that served as the basis of the development of a corporate criminal liability regime among the countries.

1.5.1.2. The Overview of Corporate Criminal Liability in the United States

The position of the U.S. criminal legal system in the past related to the criminal liability of corporations was similar to many countries that were against the criminal liability of corporations. The reason behind the acceptance of the criminal liability of corporations was similar to countries that placed the development of the corporate role and activities in society as more important than imputing criminal liability to corporations.

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[130] Clarkson and Keating, *Criminal Law: Text and Materials*, (London: Sweet & Maxwell, fourth edition, 1998), p. 240.
[131] Smith and Hogan, *Op. Cit*., p. 257.
[132] Clarkson and Keating, *Loc.Cit*.
[133] Ibid.
[134] James Golbert, *Country Report; UK*, on James Golbert, Anna Maria-Pascal ed, *European Development on Corporate Criminal Liability*, (London: Routledge, 2011), pp. 315-325.

In the U.S, the federal law had an important role in the development of the corporate criminal liability by establishing an important principle as the basis to prosecute corporations.[135] The early twentieth century was the era of development for the doctrine to establishing the corporate criminal liability in the U.S. federal law. In that period, the American Congress broadened the scope of federal law to corporations in response to an unprecedented concentration of economic power in corporations, which created new hazards to public health and safety.[136] The basic principle of the criminal liability of corporations in the U.S. is based on the respondeat superior theory, which originally came from the tort law in private law.[137] In the context of the recognition of corporate criminal liability in the U.S., the recognition of the criminal liability of corporations faced many challenges from society. Debates of U.S. legal scholars related to the recognition of corporations as the subject of the criminal law is still present today.[138]

The first important case related to the criminal liability of corporations in the U.S. was *the Santa Clara County v. Southern Railroad* in 1886. In this case, the Supreme Court decided that a corporation could be considered a natural person.[139] The next step was in 1903, when the U.S. Congress enacted the Elkin Law, which made it possible to implement corporate criminal liability in the Interstate Commerce Commission Law. The Law Stated:[140]

That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act, with reference to such persons, except as such penalties are herein changed.

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[135] Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, Paper Presented at The German Conference on Comparative, Marburg Germany, September 2013,p.1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375318, accessed on 23 February 2015.
[136] Ibid.
[137] Ibid.
[138] Several legal scholars criticized the criminal liability of corporations that can be found in many literatures. See for example: Albert W. Alschuler, 'Two Ways to Think About the Punishment of Corporations', (2009) *46AM. CRIM. L. REV.* 1359; Pamela H. Bucy, 'Corporate Criminal Liability: When Does It Make Sense?*'* (2009) *46 AM. CRIM. L. REV*. 1437.
[139] Dominik Brodowski et. al, *Regulating Corporate Criminal Liability*, (Switzerland: Springer, 2014), p. 2.
[140] Sara Sun Beale, *2013, Op.Cit.*, p. 4.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person

In 1909, New York Central, a railroad company, was involved in the illegal rebates payments that violated the rule that the railroads should charge all shippers the same published rate. That case involved the company's manager and assistant traffic manager who agreed to give an illegal reduction of 5 cents off from the original price of 23 cents per 100 pounds to transport large amounts of sugar from New York to Detroit. The illegal rebate created an unhealthy competition among other shippers and dealers. In addition, the illegal rebate also caused the shipper not to use the boat to transport sugar because of the low rate given by the railroad company.[141]

Several important remarks can be found from that case. First of all, the company argued that the criminal punishment to the corporation was unconstitutional and that it could lead to the punishment of the unrelated and the innocence parties within the corporation such as the shareholders without due process.[142] Secondly, even though the defendant argued that corporate criminal liability was unconstitutional, the Supreme Court agreed with the criminal liability of corporations and stated that the acceptance of corporate criminal liability was in line with the modern development of law. The Supreme Court in its decision quoted the discourse in American criminal law, which stated that:[143]

Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously

Thirdly, the Supreme Court also mentioned that imposing criminal punishment to the corporation was a good policy and an effective regulation in response to the existence of corporations in economic activities. Criminal liability was considered lawful to be imputed to the corporation that benefited from the misconduct of their employee, in that case the manager

[141]Ibid.
[142] Sara Sun Beale, 2013, *Ibid*., p. 4.
[143]Ibid.

and assistant manager, based on the stipulation in the Elkin Law and Interstate Commerce Commission Law.[144]

In the New York Railroad case, the Supreme Court created the standard to establish the criminal liability of corporations, which became the basic principle in the U.S federal law. The foundation to establish the criminal liability of corporations initially came from the respondeat superior principle of tort law in private law.[145] In tort law, corporations can be held responsible based on the conduct of the agent within the scope of the corporation, when the act is committed in whole or partially for the benefit of the principal (corporation). In the criminal liability of corporations' context, the U.S. Supreme Court broadened the scope of the act of the agent by regulating that the act is assumed to be done for the corporation when the agent exercising the corporate power authorized to him to act.[146] According to this case, the manager and the assistant manager were authorized to determine the costs of the shipment. Therefore the New York Railroad was liable for the act of its manager and assistant manager.[147] Currently, in the U.S. all the federal Laws can be applied to corporations except for the Laws that regulate otherwise.[148] Moreover, the principle of the respondeat superior based on the New York Central Case became the fundamental principle to establish the criminal liability of corporations in all federal cases in federal courts.[149]

Sara Sun Beale stated that the recognition of corporate criminal liability in the U.S., both based on the Laws made by Congress and the Supreme Court decision in the New York Central case, reflected the implementation of a utilitarian and pragmatic approach.[150] The recognition of the criminal liability of corporations in U.S. was based on the fact that the corporation became the main actor that had huge power in the world economy, which necessitated law that could respond to corporate conduct effectively. The criminal punishment was seen as one of the effective ways to respond to corporations' liability for their conduct.

The important remark that can be concluded from the development of corporate criminal liability in the United States is the decision of the Supreme Court to implement the criminal liability of corporations by recognizing the civil law tort doctrine of respondeat

[144]*Ibid.*,p. 5.
[145]Ibid.
[146]Ibid.
[147] *Ibid.*, p. 5.
[148]*Ibid.*, p. 8.
[149]Ibid.
[150]*Ibid.*, p. 6.

superior into the criminal law. Based on that doctrine, the liability of corporations is derived from the attribution of natural persons' conduct to a corporation. The Supreme Court has made clear standards in establishing the criminal liability of corporations, which are that the employee must act, at least in part, for the purpose of benefitting the corporations or with the belief that the corporation will benefit from the conducts of natural persons within the corporation and the employee should clearly and visibly have authority to act on behalf of the corporation.

1.5.2. The Development of the Corporate Criminal Liability in European Civil Law Countries

European civil law countries originally denied the imposition of criminal liability to the corporation. The famous principle that became the basis of this decision was the maxim *"societas delinguere non potest"*, meaning that a legal person cannot be blameworthy. That principle was sincerely dedicated by Pope Innocent IV to prevent the papal excommunication of legal persons such as business corporations and cities for offences committed by the natural persons within it.[151] This maxim later became a judicial artefact since many European countries have recognized the criminal liability of corporations within their legal systems.

The early development the criminal code in several European countries mirrored the legal position of the legislators that denied the criminal liability of corporations. The denial of the criminal liability of corporations can be seen for example in France. Even though in 1670, the *France Grande Ordonance Criminelle* had recognized criminal sanctions for corporations, when drafting the French Criminal Code in 1810, the French legislator did not regulate the possibility of sanctioning corporations.[152] Historically, The French Criminal Code had an important position in the development of criminal law in the continental system, as several countries such as Belgium and the Netherlands based their criminal code on the French Criminal Code. As a consequence, in the early beginning of the criminal code, these countries were similar to the position of France that denied criminal liability of corporations.[153]

Similar to common law countries, European countries changed their position on the recognition of criminal liability because the influence of corporations within society, especially in economic activities, created risks for society. Many cases appeared relating to the

[151] Dominic Brodowski, *Op.Cit.*, p.1.
[152] Guy Stessen, *Op.Cit*., p.494.
[153] *Ibid*., p. 495.

misconduct of corporations, such as the environmental destruction and the damages to consumers caused by corporations' activities. The criminal sanctions then were regarded by many European countries as the right and effective response to corporate misconduct.[154]

On the other hand, other European countries still argue that the legal persons cannot be criminally liable, and they implement other sanctions to deal with corporate misconduct, such as administrative sanctions. Germany is one of the countries in Europe that use administrative sanction against corporations. The German Code on Administrative Infractions *(Gesetz über Ordnungswidrigkeiten)* is the basis to impose administrative fines to corporations.[155] The administrative fine can be imposed on a corporation when the directors, a representative and the individual who held the functional control within the corporation, conduct a criminal offence or an administrative infraction that violated the obligation of the corporation or benefited the corporation.[156] The administrative fine can be imposed to the corporation without the requirement to determine the natural persons within the corporation who actually conducted the offence. It just needs to be proven that someone acted for the legal person in a capacity designated by a statute and committed an offence.[157] The administrative sanction can also be imposed to corporations when the misconduct was committed by the corporation's employees on behalf of the corporation as long as the responsible officer of the legal person was unsuccessful in preventing or discouraging the commission of that offence through appropriate control of the subordinate.[158]

In 1994 the French Criminal Code introduced the concept of the criminal liability of the legal persons for all criminal offences.[159] The legal entities that can be considered a legal person based on the French Criminal Code are the companies, associations, unions, foreign corporations and public entities, namely public companies and institutions, local communities with the state as the exception.[160] In addition, the French Criminal Code excludes several

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[154] Sara Sun Beale, Adam G Safwat, 'What Development in Western Europe Tell Us about American Critiques of Corporate Criminal Liability', (2004) *Buffalo Criminal Law Review*, Vol. 8:89, p. 108.
[155] Thomas Weigend, *Op. Cit.*, p. 931.
[156] *Ibid.*, p. 931.
[157] Ibid.
[158] Ibid.
[159] Pascal Beauvais, *Country Report: France*, in James Gobert, Ana Maria Pascal *ed*, *European Developments in Corporate Criminal Liability*, (New York: Routledge, 2011), p. 240.
[160] See Article 121-2 of the France Criminal Code, the English version of the France Criminal Code can be accessed on http://www.legislationline.org/documents/section/criminal-codes, accessed on 7 February 2016.

companies as the legal persons because of their legal structure, namely simple companies, partnerships or group companies.[161] To establish the criminal liability of corporations, the French law attributes the act of the organ or the representative of the corporations to the corporations. The legislation that specifically regulates certain legal persons determines the scope of the organ of corporations in French law. In addition, the individuals who can be considered the representative of corporations are the employees who hold a position delegated with power.[162]

Belgium, which adopted their criminal code from France, had also changed their position related to the criminal liability of corporations by the amendment of the Criminal Code, the Criminal Procedure Code and the Criminal Investigation Code on May 4th 1999, which regulated that all criminal offences under the Belgian law can be committed by corporations.[163] Based on Article 5 of the Belgian Criminal Code, the scope of corporate criminal liability is applied to private and public legal persons. Private legal persons are defined broadly because all business entities as economic actors can be criminally liable under Belgian law, regardless of their legal personality, such as companies in the process of being established, civil partnerships which have not been constituted as commercial company, temporary associations, etc.[164] On the other hand, even though criminal liability can also be imposed to the public legal persons, based on the stipulation in Article 5 of the Belgian Criminal Code, many Belgian public legal persons enjoy immunity from the criminal prosecution. In fact, all public authorities in Belgium are immune from criminal prosecution.[165] There are no specific stipulations that regulate how to attribute criminal liability to corporations; therefore, the Belgian judges have the authority to establish it in criminal cases.[166] In Belgian law, the liability of the legal persons may be derived from the attitude of the legal persons itself, or it may be established from the material act of its employees or representatives.[167] In Belgium, offences which require the proof of intent of the offender can also be committed by the legal persons. What must be proven is whether the offences have been committed based on an

[161] Pascal Beauvais, *Op.Cit*., p. 240.
[162]*Ibid*., p.241.
[163] Melanie Ramkissoon, *Country Report: Belgium*, in James Gobert, Ana Maria Pascal *ed*, *European Developments in Corporate Criminal Liability*, (New York: Routledge, 2011), p. 240.
[164]*Ibid*, p. 125.
[165]Ibid.
[166]*Ibid*, p. 216.
[167]Ibid.

intentional decision taken within the legal person or through a specific relationship of cause and effect of negligence by the legal person.[168] Besides that, the act of the lower level employees in the scope of employment of the corporation can also be a basis to determine the criminal liability of corporations.[169]

Another country in the continental system that changed their position related to the criminal liability of corporations is the Netherlands. In addition, the Netherlands is one of the first countries in Western Europe that adopted the criminal liability of corporations within its criminal legal system.[170] Since this country had an important influence on the development of the Indonesian legal system, the detailed elaboration on the development of the criminal liability of corporations in the Dutch criminal legal system will be discussed in a separate chapter. As a short overview, the process of the recognition of the criminal liability of corporations in the Netherlands began during the 1920s until the 1930s, when the Dutch Criminal Court started to impose sanctions on the natural persons who were in a social position of ordering the prohibited act. This was called the functional offendership, which implied the element of vicarious liability.[171] Then in 1951, the Netherlands finally recognized the criminal liability of corporations in their criminal legal system, limited to economic offences by the enactment of the Economic Offences Act, a Law which unified the laws governing the investigation, the prosecution and the punishment of economic crimes.[172] This Law then became the foundation for the next step of the development of the criminal liability of corporations in the Netherlands, when in 1976, Dutch legislators amended Article 51 of the Dutch Criminal Code that stipulates that all criminal offences can be committed both by the natural persons and the legal persons.[173]

The overview of the development of the corporate criminal liability in common law and civil law systems demonstrates that all countries recognized the corporation as the subject of criminal sanctions based on the pragmatic foundation that corporations were an important economic actor in society and their activities often lead to harm. The criminal sanction was the right and effective sanction to respond to the misconduct of corporations. The process of the

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[168]Ibid.
[169]Ibid.
[170] Sara Sun Beale, Adam Safwat., 2004., *Op.Cit*., p.110.
[171] Guy Stessen, *Op.Cit*., p. 500.
[172] B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands', (December 2010) vol. 14.3 *ELECTRONIC JOURNAL OF COMPARATIVE LAW*, available at http://www.ejcl.org/143/art143-9.pdf, p. 2., accessed on 10 April 2015.
[173] Since the Dutch criminal legal system has a strong connection to the Indonesian criminal legal system, the elaboration of corporate criminal liability in this country will be deeply discussed in a different chapter.

recognition of corporate criminal liability was not easy. This needed more than a century to change the position of the law within the countries. France for example just stipulated the criminal liability of corporations in 1994. It took 184 years for France to change their criminal code from the first version enacted in 1810. On the other hand, Germany is still one of the few countries in the world that keeps their position that the corporations cannot be held criminally liable. Even though the criminal liability of corporations has been recognized by most countries' legal system in the world, the debate concerning the legitimacy to impute the criminal liability of corporations still continues. The fact that many countries have already recognized corporations as the subject of criminal punishment is proof that in the future all countries could accept the regime of the criminal liability of corporations. The approaches to attribute the criminal liability of corporations will be subsequently discussed.

1.6. The Approaches to the Criminal Liability of Corporations

The basic principle of criminal law only recognizes the natural persons as the subject of criminal offences because philosophically only the natural persons can physically commit a criminal act and have the capacity to form intent. That principle was an obstacle to impute the criminal liability of corporations. For that reason, the concept of corporate criminal liability took a long period of time to be accepted. The legal system in each country needed the ground of justification in order to impute criminal liability to corporations. The approaches that have been used among the countries are commonly different, though they have general similarities which can be categorized as follows:

1. The types of the legal entity that can be held criminally liable;
2. The types of the criminal offences which can be committed by the corporations;
3. The way to attribute the criminal liability of corporations. [174]

1.6.1. The Types of the Legal Entities that can be Held Criminally Liable

The recognition of corporate criminal liability begins by determining which organizations or entities can be considered a corporation or legal person as the subject of criminal law. The regulations must set the entities that can be the subject of criminal liability besides the natural person; since in practice, many forms of organizations or entities exist along with their various forms and purpose. The determination of the entities that can be criminally liable also functions

[174] Christina de Maglie, 'Model of Corporate Criminal Liability in Comparative Law', (2005) *4 Wash.U.Glob.Stud.L.Rev*.547, p.550., available at www.digitalcommons.law.wustl.edu/globalstudies/vol4/iss3/4, accessed on 10 January 2015.

to give legal certainty towards the entities itself. This can prevent a motive to avoid criminal liability by committing crimes through a certain form of entity that is not the subject of criminal liability. This shall also give certainty to the entities that are not the subject of criminal liability to avoid criminal prosecution for their conduct. In the modern world, the main actor of business activities is the natural persons as well as organizations. New forms of organizations, along with their characteristics such as multinational and complex structures, have emerged as a consequence of modernization, creating its own complexity. Corporate criminal liability as an answer to modernization in law enforcement should also anticipate the development of new forms of organizations.

In comparative perspective among the countries' legal systems, the recognition of entities that can be held criminally liable is based on three forms.[175] Firstly, Laws that recognize the criminal liability of corporations do not define which entities can be the subject of criminal law. The Laws stipulate that the criminal offences can be done both by natural persons and legal persons and how to establish the criminal liability of corporations, but do not stipulate further on the types of legal persons that can be criminally liable. Legal persons are only defined in a general way, which is all organizations or entities other than natural persons. The Law that uses this approach has stipulated on criminal liability of corporations, but without specific provisions that defines which organizations that can be a legal person that is included as a criminal law subject. This approach gives a broad interpretation of entities that can be the subject of criminal liability, which means that all existing entities are the subject of criminal law. It is also possible to include new forms of entities that may emerge in the future. On the other hand, this general approach has created an unclear legal definition of a corporation that can be criminally liable.

Secondly, some Laws that recognize the criminal liability of corporations, have determined specific entity types that can be the subject of criminal sanctions within its stipulations, such as corporations, partnerships, associations, non-profit organizations, etc. This approach bases the qualification of entity on the form of corporations in civil law, regardless of whether the corporations have civil legal status or not. The determination of explicit type of entities that can be the subject of criminal liability within the Laws creates a legal certainty in the law enforcement process. Legal enforcers, courts and society can precisely understand what legal persons are. In contrast, defining the types of legal person can narrow the concept of legal

[175] *Ibid.*, p. 551-552.

persons and limit the scope of interpretations. Since the list of entities within the Laws are often based on all existing entities in society, the need of interpretation on the type of entity that can be the subject of criminal law is not that important. Furthermore, when a new entity emerges in society, the legislator can simply amend the Law by setting the new form of entity within the list.

The third model to determine the entities that can be held criminally liable is through limiting the criminal liability of corporations only to the entities which have civil legal status. Basically, this approach is similar to the second approach, but limits the entity only to corporations with civil legal status. This model is influenced by the old theory that distinguishes between civil legal status entities and non-legal status entities.[176] Only entities with civil legal status can be criminally liable because they have clear structure of corporate organs. For example, a limited liability Corporation *(Ltd)* has clear organs, such as board of directors, board of commissioners, shareholders, and employees. The clear organs and their liability could lead to effectiveness and safety in legal enforcement.[177] The recognition of the legal persons in the France is the example of the third form of the recognition of the legal persons as the subject of the criminal punishment. As mentioned before in subchapter 1.5.2, The France Criminal Code excludes several companies as the legal persons because of their legal structure.

Recently, public entities have also become the subject of criminal liability, since public entities often conduct activities in the private sector. Since public entities have different characteristic than private entities, the criteria to establish criminal liability of public entities also has their own characteristics. The criminal liability of public entities gives a message that criminal law regimes in this modern world have been applied in a broad way and has developed rapidly since the first recognition. Corporate criminal liability not only covers private entities that always have economic motive, but also the public entities were previously immune from criminal prosecutions.

1.6.2. The Types of the Criminal Offences that can be committed by Corporations

The next important thing in the recognition of the criminal liability of corporations is the determination of which offences can be committed by corporations since there are many acts that can be criminal acts based on different Laws. The way to determine which acts can be committed by corporations within the countries in the world generally are based on three

[176] *Ibid*., p. 551.
[177] Ibid.

different forms.[178] Firstly, corporations are considered to be able to commit all criminal offences that can be committed by the natural persons. By making no differences about criminal acts that can be done both by natural persons and corporations means that all criminal acts theoretically can be committed by corporations. In fact, not all criminal acts in nature can be committed by corporations such as rape, bigamy and perjury. The nature of criminal offences causes limitations of the criminal liability of corporations. The example of this model can be seen in the stipulation of the criminal liability of corporations in the Netherlands. The stipulation in the Article 51 Paragraph 1 of the Dutch Criminal Code stipulates that the legal persons can commit all criminal offences that can be committed by the natural persons.

Secondly, the criminal offences that can be committed by corporations are not regulated in the general Law, but one by one in the different Laws. Therefore, determining which crimes can be committed by corporations depends on certain Laws, as there is no general rule on the establishment of the criminal liability of corporations. This model has led to various regulations on criminal liability of corporations in nature depending on the Laws that stipulate it and may cause differences among the Laws in establishing the criminal liability of corporations. In addition, since the general Law does not regulate the regime of corporate criminal liability, when specific Laws also do not regulate it, those Laws automatically cannot be implemented by corporations. The regulation on corporate criminal liability within general Law has a key position within a country's criminal legal system. As an umbrella law, general criminal Law is a safety net in case the specific Laws do not regulate it, or special Laws become the *lex specialis* when regulating it differently.

The third way to determine what offences can be committed by corporations is by making a specific list of crimes corporations can commit in the general Law. This approach is different from the first approach, as instead of opening all offences to be committed by corporations, a specific list is made to create a limitation of certain offences. The limitation of offences that can be done by corporations within the Laws will close the opportunity of interpretation of other criminal offences that can be done by corporations. It is different than the first model that regulates that all criminal offences can be done by corporations. That model opens up for a broad interpretation of what criminal offences can be done by corporations. For

[178]Ibid.

example, at the very beginning, corporate manslaughter was impossible, but the recent development has accepted that manslaughter can be done by corporations.[179]

1.6.3. The Ways to Attribute Criminal Liability to Corporations

As a legal fiction, corporations can only act through the act of the natural persons within and on behalf of the corporations. Therefore, to establish the criminal liability of corporations, several important questions should be answered. Firstly, what acts and what level of intent of natural persons within the legal persons can make corporations criminally liable? Secondly, what is the meaning by the act within the scope of corporations? And the third question is important that the acts should be with the intent to benefit the corporations?

In establishing the criminal liability of corporations, in comparative perspective, several general criteria have been established in many countries' legal system. Theory in civil law regime which is *"repondeat superior theory"* has been adopted to establish the liability of corporations based on the conduct of other parties.[180] Besides *respondeat superior* theory that attributes the conduct of certain natural persons within corporations to the corporations, there is also a theory that uses the policy and practice within corporations that fail to counter the misconduct within corporations as the determining factor to establish liability. The corporations recently became more modern and have a complex structure of bureaucracy. That condition leads to the difficulties in establishing criminal liability based on certain individual conduct within corporations. Therefore, the policy and the procedure within corporations, especially those that are inadequate to protect society are important factors in making corporations criminally liable. Even though it is different among the countries, general similarities can be highlighted. Commonly, a corporation can be considered criminally liable when the agent of the corporation commits a criminal offence within the scope of the corporation with the intent to benefit to the corporation.[181] From those general approaches, certain countries have their own specific approaches by broadening the interpretation of the criteria or make narrow interpretation of the criteria. The various interpretations from those criteria are:

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[179] The discussion related to the corporate manslaughter can be seen for example on Gobert, J., 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?*'*, (2008) *The Modern Law Review*, 71: 413–433.
[180] Christina de Maglie, *Op. Cit.*, p. 551.
[181] *Ibid*., p. 553

1. Defining the agent of corporations who commit a crime

Since a corporation is a legal fiction, all corporate activities are conducted by natural persons of corporations (agent of corporations) and the establishment of criminal liability is based on the certain conduct and intent of the agent. Therefore, determining who can be considered the agent of corporations is key to establishing the criminal liability of corporations since the *mens rea* of the agent determines the *mens rea* of corporations based on respondeat superior theory. In general, there are two models to attribute the act of the natural persons within the corporations to the corporations.[182] The first model is by attributing the acts of the senior officers of the corporations as the act of the corporations. This model is called the direct attribution because the directors of the corporations are the representation of the corporations; therefore, a corporation is deemed to have acted when the directors have acted.[183] Therefore, the *actus reus* and the *mens rea* of the high officers of the corporations are considered as the *actusreus* and the *mens rea* of the corporations.

The second model to determine what acts of the natural persons within the corporations can lead to the criminal liability of corporations is based on the vicarious liability principle. Corporations can be held criminally liable based on the act of all natural persons within the corporations, both the act of the directors of the corporations and the act of the ordinary employees or the representatives, as long as those persons have acted within the scope of corporations.[184]

Countries that use a broad interpretation to determine that the agent of corporations consider all natural persons who act on behalf of the corporations regardless of their position. Not only natural persons who have managerial position, but also ordinary employees and other parties can be the agent of corporations and their conduct can be considered as the conduct of corporations. On the other hand, countries which use a narrow interpretation only consider that natural persons who have managerial and authoritative position within corporations can be the agent.

Broadening the interpretation on the agent of corporations can lead to the effectiveness of the law enforcement. The conduct of corporations do not only rely on the conduct of certain people within the corporations. In the context of the complex structures and modern forms of corporations, broad interpretations can mitigate corporations from taking

[182] Guy Stessen, *Op.Cit.*, p. 506.
[183] *Ibid.*, p. 507.
[184] Ibid.

cover from the prosecution by hiding within the complex structure of corporations. Law enforcers can easily determine the parties and conduct of the natural persons within corporations required to establish the liability of corporations. This approach also has a negative side. Since many types of individual conduct within corporations can lead to the criminal liability of corporations, corporations can be easily become a victim when the misconduct is committed by an ordinary employee without the knowledge or outside the consent from the director or the management of corporations.

2. Interpreting the conduct within the scope of corporations

As an organization, the activities of natural persons within corporations should be separated by the individual conducts within corporations and the individual conducts on behalf of corporations. Not all individual conducts within corporations is done on behalf of corporations. The individual conducts on behalf of corporations should have a link with the daily activities of corporations. The important element to establish corporate criminal liability of is proving that the act of the natural persons within corporations is done within the scope of the corporations. The individuals within the corporations who act in their own interests cannot lead to the liability of the corporation, even when those persons are the director of the corporations. The acts can be committed within the scope of corporations when the acts are done by the individuals who have the authority or the capacity to act and their acts comply with the internal regulations of the corporation.[185]

The act of individuals within corporations should reflect their daily activities, tasks and duties as the employee of the corporation. In the past, the scope of corporations was interpreted as all the conducts that were clearly or implicitly approved by the authoritative power within corporations. This has changed into all conduct of employees that occur when performing the duties in their jobs, even though the conduct is out of consent of the authoritative power of corporations.[186]

3. Intention to give benefit to the corporations

The existence of the intent of perpetrators to benefit corporations from their misconduct is an essential requirement, since economic motive is the main reason for corporate crime. The question then, is what kind of benefit is needed to be proved in corporate crimes. The important requirement is that the perpetrator is proven to want to benefit the corporations. The important

[185] *Ibid*., p. 513.
[186] 'Developments in the Law-Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions', (1979) 92 *HARV. L. REV*. 1227, 1365-75 1250.

thing is to prove the intent to benefit and not the benefit itself, as the corporations can be found guilty even when they do not receive actual or partial benefits from the misconduct. Several countries regulate the benefit criterion differently. One country requires that the acts should give benefit corporations, while another country does not require that corporations obtain an economic advantage as a result of the offence.[187]

1.7. Conclusion

The advantages and disadvantages related to the criminal liability of corporations shows that the recognition of corporations as the subject of criminal punishment will always open room for debate about whether as an entity corporations are able to be criminally liable since the core of criminal liability is derived from the *actus reus* and *mens rea* of persons in term of flesh and blood. The recognition of corporate criminal liability within the criminal legal system is a matter of choice for a country. From discussion above both advantages and disadvantages have their own argument to defend their opinion. However, the global trend shows that the number of countries that recognize the criminal liability of corporations are much higher than the countries that deny it. The existence and the importance of corporations in every aspect of life is the reason to control their behaviour. The current challenge for every country is how to create a system that is simple yet accountable, but still protects the rights of corporations as criminal legal subject.

As a matter of choice, this research then posits that corporate criminal liability systems are necessary to effectively cope with the existence of corporations which can harm society more than natural persons when they commit a crime. When criminal law regime provides more costs than expected benefits to the perpetrators, in this case corporations; thus, corporations which always have economic motif in every conduct will seriously consider their acts. In addition, criminal sanction can be seen as a moral statement by society toward acts that violate moral values. By opening a possibility to sanctioning corporations, corporations will be similar to natural persons that can commit acts against moral values of society. However, since corporations also have a huge positive influence on society, criminal law principles should be the last approach when handling corporations in criminal cases.

Several countries' experiences in establishing the criminal liability of corporations reveal that both different legal systems, common law system and civil law system, have similar basic problems to developing the regime of corporate criminal liability. The problems are the

[187] *Ibid.*, p. 1243.

justification to impute criminal sanctions to corporations and the various ways to establish the criminal liability of corporations. The answer to those problems vary among the countries because each country has its own way to determine the criminal liability of corporation. Nevertheless, similarities exist within those various ways. The similarity is the attribution of act and mental element from natural persons to the corporations that contributes to the basic theory in establishing the criminal liability of corporations among the countries, and the corporate culture theory which elaborates corporate behaviour as an important element to determine the misconduct of corporations. Moreover, the deterrence and retribution approaches as the legitimation on imposing criminal sanctions to natural persons have also given the legitimate and significant justification for punishing corporations**.**

Chapter 2

Corporate Criminal Liability in the Indonesian Legal System

2.1. Introduction

The Indonesian criminal legal system has recognized the criminal liability of corporations since 1951, shortly after Indonesia's independence in 1945. This country takes a unique approach to corporate criminal liability by recognizing corporations as the subject of criminal punishment outside the criminal code. Recognizing corporations as the subject of criminal law punishment when the Indonesian general criminal code has not yet recognized corporations as subjects will engender significant problems. This chapter aims to give an overview of the development of the corporate criminal liability regime in the Indonesian criminal legal system both in substantive criminal law and criminal procedural law. It will also explore the problems surrounding the recognition of corporate criminal liability among various Laws. To provide a comprehensive understanding, the discussion will start with the general criminal law system in Indonesia and the position of the criminal liability of corporations within both the criminal code and the criminal procedural code. Since by various Laws outside the general criminal law regulate the recognition of a corporate criminal liability in the Indonesian criminal legal system, the discussion of the corporate criminal liability system will focus on several Laws that recognize corporations as the criminal law subject. While hundreds of Laws recognize corporation as its subject exist in Indonesia this chapter will only review the ones which represent various approaches toward corporate criminal liability within their stipulations.

This chapter also discusses the future of corporate criminal liability in Indonesia through the stipulations in the draft of new *KUHP*. The discussion is important because the stipulations in this draft will give a significant change to the regime of criminal liability of corporations in Indonesia. This country has spent more than 50 years struggling to make a new criminal code. The government and the parliament often state that the *KUHP* draft would become the priority to be finished, but until this thesis is concluded in July 2018, the draft has not been enacted yet.[188] There are many pros and cons in society toward the substance of the draft; therefore, it

[188] It is common that the legal drafters always promise to finish the KUHP draft every year. The statement from legal drafters can be seen for example: Pemerintah Menargetkan KUHP Disahkan Tahun 2015 (the Government will finish the KUHP in 2015), *Beritasatu.com* 19 November 2014, accessed 23 March 2016 and available at:

still cannot be predicted the definite time of the enactment of the new KUHP. In 2018, the law making process of the *KUHP* draft is closer than ever before. It seems that the law making process of the new *KUHP* is at the final stage. Both parliament and the government have promised to finish the draft on 17 August 2018 as a gift to Indonesia in independence celebration.[189] However, there are still several disagreements between the government and the parliament about the substances of the draft which might hamper the enactment, especially disagreements on anti-corruption articles within the draft.

2.2. The History of the Indonesian Criminal Legal System

Historically, the Indonesian criminal legal system is inextricably linked to the colonialism period, especially when Indonesia was still known as *Nederlandsch Indië*. Indonesia was previously occupied by both the Netherlands and Japan, though in different periods.[190] Dutch colonialism was the longest period in Indonesian history and strongly influenced the civil law system Indonesia, especially in the criminal legal system, even today.[191] The basis of the Indonesian criminal legal system, especially in substantive criminal law, has not changed significantly since the independence of Indonesia on August 17th 1945 from the Japan occupation period. As a new nation, the Indonesian founders fully understood that prompt action was necessary to deal with the vacuum of law caused by the transition from colonialism to an independent country system. The day after the proclamation of independence, the Indonesian Constitution 1945 came up with a judicial solution by stipulating in Article II of the Transitional Provision of the Indonesian Constitution 1945 that: *"All laws which are still in existence shall remain applicable insofar as there are no new laws according to this constitution"*. The 1945 Decree Number 2 by President Soekarno on October 10th, 1945 emphasized that the stipulation in Article II Transitional Provision of the Indonesian

http://www.beritasatu.com/nasional/226409-pemerintah-target-kuhp-disahkan-pada-2015.html. See also, RUU KUHP Disahkan Januari 2018, Hukuman Mati Tidak Dihapus (the KUHP draft will be enacted january 2018, Death Penalty Still Exist), *Kompas.com* 19 December 2017, available at https://nasional.kompas.com/read/2017/12/19/21265411/ruu-kuhp-disahkan-januari-2018-hukuman-mati-tak-dihapus.

[189] Di depan Presiden, Ketua Dpr Berjanji RUU KUHP Selesai pada HUT Kemerdekaan (In Front of President, the Speaker of the Indonesian House of Representatives Promises to finish the draft of KUHP at the Indonesian Independence day), *Okezonenews.com*, 28 May 2018, accessed on 3 June 2018, available at https://news.okezone.com/read/2018/05/28/337/1903854/di-depan-presiden-ketua-dpr-janji-ruu-kuhp-selesai-pada-hut-kemerdekaan.

[190] The Brief History of Colonialization in Indonesia can be seen on Collin, Brown, *A Short History of Indonesia "Unlikely Nation"*, (Australia: Allen & Unwin, 2003), accessed on 10 January 2015, available on http://cdn.preterhuman.net/texts/history/A%20Short%20History%20of%20Indonesia.pdf.

[191] Peter Mahmud Marzuki, *An Introduction to Indonesian Law*, (Malang: Setara Press & Zaidun and Partner, 2011), p. 27.

Constitution 1945, which specified, with retroactive effect, that all regulations enforce on August 17th 1945, remained valid if they were not in conflict with the Constitution of the Republic of Indonesia and as long as they were not replaced by new provisions.[192]

In the field of criminal law, the implementation of Law Number 1 Year 1946 concerning the Criminal Law Regulation (hereinafter referred to as Law Number 1 Year 1946), marked the decision by Indonesia's new government to apply the Dutch criminal law rather than the Japanese criminal law. Article 1 of that Law, which states that the criminal law enforced was the criminal law binding on March 8th 1942, marked the last day of the Dutch colonialism period before being replaced by Japan.[193] Indonesian legislators chose this because they believed that the Japanese regulations were very incomplete and gave the impression of being made in a hurry during the period of war. Furthermore, Japanese law had harsher punishment and was seen as a fascist law because it was martial law.[194] On the other hand, even though the Dutch criminal law at the time was unsuitable to the new condition of Indonesia as an independent country, it was more comprehensive and had better infrastructure than the Japanese martial law. This is because the Netherlands had many years of colonialism in Indonesia. Besides serving as the basis to enact the Dutch criminal law, Law Number 1 Year 1946 had also made several necessary annulments, revisions and additions to the *Wetboek van Strafrecht voor Nederlandsch Indië (further: WvSNI* which was renamed to *Kitab Undang-Undang Hukum Pidana* or Indonesian Criminal Code, further: *KUHP*).[195] Words written in the *WvSNI* as *Nederlandsch Indie* would then be read as *Indonesie*.[196] The most important regulation in Law Number 1 Year 1946 is the stipulation that stated that all criminal laws that cannot be applied wholly or partially, or are in conflict with the present status of the Republic of Indonesia as an independent country, or have no longer any meaning must be annulled.[197] However, there is still no single official language translation from *WvSNI* in Dutch to *KUHP* in Indonesian, which in practice often leads to different interpretations.[198]

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[192]Han Bing Siong, *An Outline Of The Recent History Of Indonesian Criminal Law*, Verhandelingen Van Het Koninklijk Instituut Voor Taal, Land En Volkenkunde, DEEL XXXII, (S-Gravenhage: Martinus Nijhoff, 1961), p. 2.

[193] In March 8th, 1942 the Dutch East Indies Government signed the unconditionally surrender agreement (Kalijati Agreement) and surrendered its colonies of Indonesia to Japan in Kalijati, Subang, West Java.

[194] Han Bing Siong, *Op. Cit.*, p. 18.

[195]*See* Article VI Law Number Year 1946.

[196]*Ibid.*, Article III.

[197]*Ibid.*, Article V.

[198] In practice, several unofficial translations made by Indonesian legal scholars and one from National Law Development Agency (BPHN) of the Ministry of Justice and Human Rights of the Republic of Indonesia. See the unofficial translation of the WvSNI on: Moeljatno, *Kitab Undang-Undang Hukum Pidana (KUHP)*, (Jakarta:

The development of criminal law procedure in Indonesia differs from the development of substantive criminal law. While the *KUHP* still applies the old law from the Dutch period, criminal procedure law has promulgated the new criminal procedure code in 1981. During the colonial period, the Dutch applied two different criminal procedures. The first was *Inlandsch Reglement (IR),* which was revised in 1941 as *Herziene Inlandsch Reglement (HIR)* for Indonesia *(Boemipoetra),* and *Reglement op de Strafvording (RV)* for the Dutch and other foreigners. Then, during Japanese occupation in 1942, *RV* was abolished, and *HIR* was applied to Japanese territory only.[199] That condition continued after Indonesian independence in 1945 by Article II of the transitional provision of the Indonesian 1945 Constitution (prior to amendment). Then in 1951, Indonesia formally adopted the *HIR* and totally reformed the structure of the Indonesian courts through Emergency Law Number 1 of the Year 1951.[200] Similar to *KUHP*, there was no official translation of the *HIR* into the Indonesian national language. Consequently, there are several translation versions used in Indonesia until 1981.[201] Since December 31 1981, *Kitab Undang-Undang Hukum Acara Pidana"* (hereinafter referred to as *KUHAP*) has replaced the *HIR* as criminal procedural law by the enactment of Law Number 8 of the Year 1981 on Criminal Procedure Code.[202] After 20 year of implementation, in 1999 Indonesia started a process to reform the *KUHAP* which is still in discussion in parliament until now.

Both *KUHP* and the *KUHAP* do not recognize the corporation as its subject. However, the position of those codes is important, as they are the general code of the criminal law regime in Indonesia. The basic system of substantive and procedural criminal law is based on those codes. Therefore, the special Laws which recognize corporations as its subject can still refer to the general stipulations on those two codes.

Bumi Aksara, 2014), 25thed; R Soesilo, *Kitab Undang-Undang Hukum Pidana, Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Politea Bogor., S.R.Sianturi, *Tindak Pidana di KUHP Berikut Uraiannya*, Alumni AHM-PTHM, Jakarta.

[199]Robert R Strang, 'More Adversarial, But Not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code', (2008) *Fordham International Law Journal*, Volume 32, Issue 1, pp. 194-195.

[200]See Article 1 and 6 Emergency Law Number I Year 1951.

[201] Several translations of HIR are: Mr.R Tresna *"Komentar HIR"*, (Jakarta: Pradnya Paramita, 1970); R Soesilo, *RIB/HIR Dengan Penjelasan*, (Bandung: Politea, 1979).

[202]The English version of *KUHAP* available at https://www.unodc.org/res/cld/document/idn/law_number_8_year_1981_concerning_the_criminal_procedure_html/I.2_Criminal_Procedure.pdf, accessed on 1 October 2015.

2.2.1. The *KUHP* and the Criminal Liability of Corporation

In general, the legal sources in substantive criminal law in Indonesia are based on three sources: the *KUHP* as the general rule in substantive criminal law *(lex generalis)*; numerous criminal Laws on specific crimes outside the *KUHP*[203]; and various Laws which have criminal provisions within their stipulations.[204] The *KUHP* consists of three books: general provisions, felonies and misdemeanours.[205] Using Article 103 of the *KUHP*, the general provisions within the first book can be applied to criminal law regulations outside the *KUHP*, unless the laws outside *KUHP* determine otherwise.

The *KUHP* only recognizes human beings as natural person as able to commit a criminal act, when there is a criminal act related to a corporation, Article 59 of the *KUHP* (similar to former Article 51 of the DCC) states that liability will be duly borne by the corporation's management so made to present on behalf of and in the name of the corporation. However, management staff that are not involved in the criminal act will not be prosecuted.[206] That article becomes the foundation of the *KUHP* and special Laws that do not recognize corporations as its subject that would only sanction the natural person for the crimes that are committed within the sphere of corporations. This poses the question, when special Laws recognize the corporation as its subject, can those Laws refer to the general stipulation within the first *KUHP* book since that code does not recognize corporations as its subject?

The answer for that question is the Laws which recognize corporations as its subject can refer to general stipulations within the KUHP. The arguments for that answer are as follow. Firstly, Article 103 of the *KUHP* stipulates that the provisions of the first eight chapters within the first book of the *KUHP* also applies to offences punishable under other Laws or bylaws, unless otherwise provided by Law. Since special Laws recognize that corporations can commit crimes, that article can serve as the legal basis for using the general provisions when sanctioning corporations, even though the *KUHP* does not recognize the corporation as its subject. Secondly, the Indonesian courts have also accepted within case laws that corporations can commit a continuing act based on the Article 64 paragraph 1 *KUHP* about continuing acts

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[203] The examples of criminal Laws outside *KUHP* are such as Corruption Law, Anti Money Laundering Law and Anti Human Trafficking Law.
[204] Most of Indonesian Laws have criminal provision within its stipulation to ensure the law enforcement of those Laws such as Law on Capital Market, Law on Banking, etc.
[205] Unofficial translation of *KUHP* in English can be accessed on: http://www.humanrights.asia/countries/indonesia/laws/legislation/PenalCode.pdf, accessed on 12 May 2017.
[206] Article 59 of the KUHP stipulates "In cases where by reason of misdemeanour punishment is imposed upon directors, member of a board of management or commissioners, no punishment shall be pronounced against the director or commissioner who evidently does not take any part in the commission of the misdemeanour."

(*voortgezette handelingen*). The courts have also ruled that corporations can participate in crimes with other perpetrators, both the natural person and the legal person, based on Article 55 of the *KUHP* on participation in crime.[207] In conclusion, even though the *KUHP* does not recognize corporations as its subject, sanctioning corporations based on special Laws, using the general stipulation within the first book of *KUHP*, has a solid legal foundation.

Book one of the *KUHP* consists of nine Chapters and 103 Articles. Eight chapters cover: the scope of application; the types of criminal sanctions and measures; exclusion, mitigation and enhancement of punishment; attempt; participation; conjunction of punishable acts; filing and withdrawing complaints in crimes to be prosecuted only upon complaint; and the lapse of the right to prosecute and the punishment theoretically can be implemented to corporations because this book regulates the basic principle in criminal law as long as it is suitable with the characteristic of legal persons.

Basic principles in Indonesian criminal law, such as the legality principle (art.1 *KUHP*), the territoriality principle (art.2 and 3 *KUHP*), the passive nationality principle (art.4 and 8 *KUHP*), the active nationality or personality principle (art.5 *KUHP*) and the universality principle, are applicable for corporations similar to the natural person as well as the stipulations in participation in crime (art.55) and the crime of attempt (art.53 *KUHP*).

Since Indonesia inherited the criminal code from the Netherlands, general system in establishing criminal liability, in this case for natural person, is quite similar. Despite KUHP which is actually a translation from the *WvSNI*, basic literatures in Indonesian criminal law studies which are strongly influenced by the Dutch literatures especially before 1945, make the similarity even stronger.[208] The legality principle (Article 1 of the *KUHP*) becomes the foundation that no act shall be punished unless by virtue of a prior statutory provision. The statutory provision of an offence always contains the constituent elements of the offence. Therefore, before a person can be held criminally responsible for committing criminal offence, all those elements must be summed up and must be proven by the facts presented by the prosecutor before a court. It must be proven that the person acted voluntarily with a wrongful state of mind and in the absence of any justification or excuse for his/her conduct.[209] Where a

[207] See the discussion on the Kalista Alam case and the Cakrawala Nusa Dimensi case in Chapter 3. The Courts in both cases accepted that continuing act and participation can be committed by corporations.
[208] Later in Chapter 4 it will be discussed the strong connection between Indonesia and the Netherlands in criminal law system which then become the reason why this study using the Netherlands experience as a lesson learned.
[209] Sudarto, Hukum Pidana 1 (Criminal Law 1), (Semarang, Badan Penyediaan Bahan-Bahan Kuliah FH UNDIP, 1988), p.85.

constituent element is missing in the charge, a discharge (*lepas*/*ontslag van rechtsvervolging*, Indonesia uses both terminologies) must follow.[210] In contrast, where the public prosecutor cannot prove by evidence that the charge is matched by the facts, an acquittal (*bebas*/*vrijspraak*) must follow.[211]

A guilty mind is an important factor to convict the accused that has been proved as to have committed the criminal act. A person is considered as to have a guilty mind if that one is able to understand and appreciate the wrongfulness of the conduct.[212] As well as the Netherlands, there is no criminal liability without culpability or blameworthiness (*Geen straf zonder schuld).* In culpability, Indonesia also recognizes two form of culpability which are intent (*sengaja/opzet*) and negligence (*alpa/culpa*). Intent consists of acting willingly, knowingly and also acting in the awareness of a high degree of probability. Intent in form of *dolus eventualis* (*kesengajaan sebagai kemungkinan*) which is the case when the offender willingly and knowingly accepts a considerable risk that a certain result may ensues has also been applied in Indonesia. There are two forms of negligence in Indonesia which are *kealpaan yang disadari* (conscious negligence/*bewuste culpa*) and *kealpaan yang tidak disadari* (unconscious negligence/*onbewuste culpa*). Conscious negligence is established when the offender is aware of significant and unjustifiable risk will arise from the act, but think on unreasonable basis that the risk will not occur. On the other hand, unconscious negligence happens when the offender was not aware of the risk, but should have been aware of the outcome.[213]

Additionally, based on the *KUHP*, the statutory grounds for justification are necessity (*daya paksa*)[214], self-defence (*pembelaan darurat*)[215], public duty (*menjalankan perintah undang-undang*)[216] and obeying the official order of a competent authority (*melaksanakan perintah jabatan*)[217]. The grounds for excuse are insanity (*tidak mampu bertanggung jawab*)[218], duress (*daya paksa*)[219], excessive self-defence (*pelampauan batas pembelaan darurat*)[220] and obeying an order issued without authority (*melaksanakan perintah jabatan tanpa wenang*)[221].

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[210] See Article 191 par.2 KUHAP.
[211] See Article 191 par.1 KUHAP.
[212] Moeljatno, Asas-asas Hukum Pidana (Principles of Criminal Law), (Jakarta, Rineka Cipta, 2000) p.157
[213] *Ibid*, p.201-201.
[214]See art. 48 *KUHP*.
[215] See art. 49(1) *KUHP*.
[216] See art. 50 *KUHP*.
[217] See art. 51 *KUHP*.
[218] See art. 44 *KUHP*.
[219] See art. 48 *KUHP*.
[220]See art. 49 (2) *KUHP*.
[221]See art. 51 (2) *KUHP*.

There are two additional defences derived from case law in the Netherlands, which are the absence of substantive unlawfulness and the absence of all blameworthiness due to ignorance (mistake of fact or mistake of law).[222] The Indonesian criminal legal system has also recognized those additional defences. The first is the absence of substantive unlawfulness (*tidak adanya unsur sifat melawan hokum materiil*) as justification defence and the second is the absence of all blameworthiness due to ignorance *(tidak adanya kesalahan sama sekali /AVAS).*

All of these parts of the KUHP also apply for corporations when their liability is established outside the KUHP in special laws. Not everything can be applied in the same way, of course. Theoretically, corporations have an equal position with the natural person in justification and excuse, for instance. However, corporations cannot use insanity as it is fit for the natural person only.

The *KUHP* divides punishments into primary sanctions and secondary sanctions as described in the table below.[223]

Table 2.1.

Main Punishments		**Additional Punishments**	
Punishments	***Descriptions***	***Punishments***	***Descriptions***
Capital Punishment		Deprivation of certain rights	1. Rights to hold offices or specific offices 2. Rights to serve with the armed forces 3. Rights to vote or be voted for in elections held by the virtue of general regulations 4. Rights to be a counsellor or a legal manager and to be a guardian, co-guardian, curator, co-curator over other children than one's own 5. The paternal authority, guardianship, curatorship of one's own children 6. Rights to exercise specific profession.
Life imprisonment		forfeiture of specific property	Property is subject of forfeiture if: 1. The property is the proceed of crime 2. Criminal activity is facilitated by the property

[222]P. J. P. Tak, *Op.Cit*. p. 73.
[223] See Article 10 to Article 43 of the *KUHP*.

Imprisonment	The minimum imprisonment for felony is one day and the general maximum is 15 years and 20 years for special maximum	publication of judicial verdict	
Light imprisonment	The minimum light imprisonment for misdemeanor is one day for general maximum is one year and one year and four month for special maximum		
Fine	There has been several adjustments to the amount of fine in the *KUHP*. The last adjustment is the multiplication by 1000 times the fine in the *KUHP*.[224]		
Isolation *(pidana tutupan)* added in 1946 by the Law Number 2 of the Year 1946 on *Hukuman Tutupan*	The special imprisonment for offenders with respected motives, such as political prisoners		

[224] See Indonesian Supreme Court Regulation Number 2 Year 2012 on the Adjustment of Definition of Petty Crime and the Amount of Fines in Criminal Code.

Based on that table, the fine is the only primary sanction that is suitable to the characteristics of corporations. Forfeiture of specific property and publication of judicial verdicts are the secondary sanctions that corporations can receive. Several articles stipulate the grounds of justification and excuse. The missing regulation is how to execute primary sanctions to corporations when a corporation fails to pay the fine. The *KUHP* stipulates that if a convict fail to pay a fine, light imprisonment will substitute it, which is impossible to be imposed to corporations.

2.2.2. The *KUHAP* and the Criminal Liability of Corporations

As the new criminal procedural code which replaced the *HiR* in 1981 when Indonesia had already recognized the criminal liability of corporations in special criminal Laws, the position of *KUHAP* that does not stipulate regulations related to the position of corporations within the general criminal procedural law is interesting to be questioned. The answer to that question can explicitly be found in the elucidation of Article 2 of the KUHAP.[225] Article 2 stipulates that *KUHAP* shall apply to the administration of justice in the public judicial system at all levels of justice. In its elucidation, as the foundation of the administration of justice, the *KUHAP* follows the principles adhered to by Indonesian criminal law which is the general principles of criminal law based on the *KUHP*.[226] Since the *KUHP* has not recognized corporations as its subject, the *KUHAP* also does not recognize corporations as its subject. Therefore, all stipulations in *KUHAP* are originally only for the natural person. For instance, stipulations on arrest, detention, and the form of indictment and verdict only refer to the natural person.[227] The bill of indictment and the verdict should contain the full name, place of birth, age or date of birth, gender, nationality, address, religion and occupation of the suspect. If the bill of indictment and verdict do not satisfy those requirements, based on the *KUHAP*, these shall be void.[228] Consequently, when corporations become the defendant, it is impossible to fulfil all those requirements. Corporations cannot theoretically fulfil requirements such as religion and gender. That condition often becomes the subject of debate between the prosecutor and the

[225] The English version of the *KUHAP* is available on the following website and accessed on 1 October 2016: https://www.unodc.org/res/cld/document/idn/law_number_8_year_1981_concerning_the_criminal_procedure_html/I.2_Criminal_Procedure.pdf.
[226] Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Discussion on Problems and Implementation of KUHAP: Investigation and Prosecution) (Jakarta:Sinar Grafika 2010), p.86.
[227] See Article 143 *KUHP* for the form of bill of indictment and Article 197 *KUHP* for the form of verdict.
[228] See Article 143 (3) *KUHAP* and Article 197 (2) *KUHAP*.

defendant and their lawyer before the court because it can lead to the annulment of the indictment.[229]

The absence of special procedural law related to corporations therefore becomes the main problem for implementing corporate criminal liability, because adjusting the stipulations within the *KUHAP* for corporation requires its own legal basis.[230] Procedural law relies on the Laws that recognize corporations as it's subject to stipulate their own procedural law specific to corporations. However, in cases when special Laws have limited to no stipulations concerning procedural Law, law enforcers should do a legal breakthrough. Temporary policy, such as common regulations among law enforcers or Government Regulation in Lieu of Law, should provide the legal basis.[231] Chapter 3 will deeply discuss how to deal with procedural problems related to corporations.

2.3. Regulating Corporate Criminal Liability in the Indonesian Criminal Legal System

Resultant from the position of the *KUHP* that only recognizes human beings or natural persons as able to commit a criminal act, if a criminal act occurs in relation to a corporation, liability shall be duly borne by the corporation's management (natural person) and made to present on behalf of and in the name of the corporation. Meanwhile, those uninvolved in the criminal act that are part of the corporation's management shall not be prosecuted.[232]

Despite the position of the *KUHP*, the Indonesian criminal legal system started to recognize criminal liability of corporations quite early, but through many regulations outside the *KUHP*, namely in special criminal Laws[233] and other Laws containing criminal sanctions.[234] Two early Laws recognizing corporations as its criminal law subject are Laws related to economic crimes in 1951 and 1955.[235] Those recognition implies the Indonesia pragmatic approach toward the recognition of the criminal liability of corporations. The law makers at that time viewed that the unlawful activities of corporations as an important actor in

[229] Later in Chapter 4, the debate before the court related to the bill of indictment in several case laws will be discussed.
[230] Remmy Sjahdeini Sjahdeni. *Ajaran Pemidanaan: Tindak Pidana Korporasi & seluk-beluknya*. (The Doctrine of Punishment: Corporate Criminal Liability and it Circumtances) (Jakarta: Kencana.2017), p. 280.
[231] *Ibid*.
[232] See Article 59 *KUHP*.
[233] The examples of certain criminal law acts are the Law on Crime of Money Laundering, The Law on Crime of People Trafficking.
[234] The examples of general acts containing criminal sanction inside are Capital Market Law, Banking Law.
[235] The Laws are Stockpilling Law and Law on the Investigation, Prosecution and the Trial of Economic Crimes which will be discussed in next subchapter.

economic activities, can cause more harmful and dangerous impact to society than conventional crimes. By making corporations criminally liable, it can ensure the effectivity of Laws to fight against economic crimes.[236] After that, the recognition of the criminal liability of corporations within the Laws outside the KUHP becomes a common pattern in the Indonesian criminal legal system. However, in the perspective of *Dwija Priyatno*, the formulation policy of the system in establishing the criminal liability of corporations among the Laws in Indonesia has several weaknesses which are inconsistent, not harmonious and overlapping.[237]

Up to 2017 there were around 120 Laws recognizing corporations as its criminal law subject.[238] That pattern is in line with the way Indonesia develops its criminal law system by enacting many new Laws outside the KUHP in spite of unifying it within the criminal code. Various Laws outside the KUHP recognizing corporations as its criminal law subject can be seen as an effort to create special law (*lex specialis*) that is different with the position of the KUHP (*lex generalis*).[239] *Mardjono Reksodiputro* argues that the acceptance of corporations as the subject of criminal punishment can be seen as an extension of criminal law subject since the criminal code only recognized natural persons as its subject. However, that acceptance is accompanied with a question about the way to determine the mental element (*mens rea*) of corporations. [240]

They are various discussions among legal scholar in Indonesia about possible systems to establish the criminal liability of corporations. The systems that are discussed actually are the well-established system in the world such as strict liability, vicarious liability, identification theory, aggregation theory and combination of those theories.[241] From the discussions of those

[236] See the consideration paragraph of the Law on Stockpilling
[237] See, Dwija Priyatno et al., Kebijakan Formulasi Sistem Pertanggungjaban Pidana Korporasi Dalam Peraturan Perundangan-Undangan Khusus di Luar KUHP di Indonesia (Policy Formulation on Corporate Criminal Liability System in The Special Laws outside the KUHP in Indonesia). (Jakarta, Sinar Grafika, 2017), p.31.
[238] *Ibid*, p.29.
[239] *Ibid*, p.28.
[240] Mardjono Reksodiputro, *Kemajuan Pembangunan Ekonomi dan Kejahatan. Kumpulan Karangan Buku Kesatu* (Economic Development and Crime. Collection of Essays). (Jakarta, Pusat Keadilan dan Pengabdian Hukum Universitas Indonesia 1994), p.102.
[241] Various literature in corporate criminal liability in Indonesia discusses all those theories to explain the possible system in establishing the criminal liability of corporations. See for example: Remmy Sjahdeni, *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability)*, (Jakarta: Grafiti Pers, 2006), Muladi, Dwija Prijatno. *Pertanggungjawaban Pidana Korporasi*. (Bandung: Sekolah Tinggi Bandung1991), Mahrus Ali, *Asas-Asas Hukum Pidana Korporasi (Corporate Criminal Liability Principles)*, (Depok, Raja Grafindo Persada, 2013)

various system, legal scholars try to explain the implementation of the theories and offer solution which system that can be implemented in Indonesia.[242]

Combination theory was introduce by *Sjahdeini* because in his perspective establishing the criminal liability of corporations based only with one theory is inadequate. Even though it is called combination theory, this theory is actually based on identification theory which derives the *actus reus* and *mens rea* of corporations based on the directing mind of corporations.[243] He puts other criteria in order to make corporations criminally liable. The additional criteria are; the misconduct must give benefit to corporation and the misconduct committed within the scope of corporation is based on corporation charter. If the misconduct is committed by other than the directing mind of corporation, in order to make corporation criminally liable, that misconduct must be based on the order or the approval of the directing mind of corporation. The approval includes a failure to take reasonable care to prevent the conduct being performed.[244] In the most of the discussion Indonesian legal scholars concluded that the principle of no criminal liability without culpability or blameworthiness (*geen straf zonder schuld*) still valid for corporations.[245]

Apart from the discussions among legal scholars, in order to understand the corporate criminal liability regime in Indonesian Laws, there are two important elements that should be determined. Firstly, it needs to determine whether the subject of a certain Law is only natural persons or including corporations.[246] Then, if that Law recognizes corporations as its subject, the second question is concerned with how that Law stipulates the system in establishing the criminal liability of corporations.

The next paragraphs will use those two elements to discuss the different regulations on corporate criminal liability within several special criminal Laws and other Laws containing criminal sanctions. Not all Indonesian Laws that recognize corporate criminal liability will be discussed; but all Laws discussed will represent the various stipulations in recognizing corporate criminal liability among Indonesian Laws.

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[242] Remmy Sjahdeini even introduced his own system by combining several systems such as identification theory, vicarious liability and aggregation theory to establish the criminal liability of corporations. He named his theory "combined theory" see Remmy Sjahdeni, (2006) *Op.cit*, p.118.
[243] Remmy Sjahdeini (2017), p. 201.
[244] *Ibid*, p.199.
[245] See Dwija Priyatno., Sistem Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability System). (Depok, Kencana Prenadamedia Group,2017), p. 61
[246] Article 1 of every Law in Indonesia usually stipulates general provisions on the definition of terminologies used by the Law. In the Law, the recognition of corporation as the criminal law subject is by defining the word *"setiap orang"* (person) as both natural persons and legal persons.

1. The Former Emergency Law on Stockpiling

As mentioned above, the recognition and acceptance of corporate criminal liability outside the criminal code firstly occurred in 1951, only six years after the independence by a former regulation on the Stockpiling Law.[247] That Law was the earliest Law recognizing corporations as its subject. Therefore, it is important to know the reason for the recognition of corporate criminal liability in that Law.

This acceptance reflected the fact that the recognition of the criminal liability of corporations within the Indonesian criminal legal system was very pragmatic. The unstable economic conditions of Indonesia as a new country, which involved an independence war, lead to many stockpiles in the society. That condition worsened when corporations were involved in the misconduct. The government therefore needed an effective measure to deal with corporations.[248] Sanctioning corporations was an effective measure to fight against crimes that involved corporations at that time. Later in 1955, Indonesia used the same measure to deal with corporations in a broader scope by recognizing corporations as the subject in economic crime Law. After that, various Laws outside the *KUHP* adopted the principle of corporate criminal liability.

The recognition of corporate liability in the first article of the Stockpiling Law represented the first recognition of corporations both with civil legal status and non-civil legal status as the subject of the Law.[249] The system to establish the criminal liability of corporations in the Stockpiling Law is stipulated in Article 11, which stated that if an offence is committed by a corporation, the prosecution and the sentence can be instituted against and imposed on the corporation and/or the person. Paragraph 2 of Article 11 indicates whether a corporation has committed a certain offence or not. An act is a corporate act if the act is committed by one or more persons on behalf of corporation. However, this Law was not regulate further on how to establish the criminal liability of corporations. Consequently, it was difficult for law enforcers to implement this Law.[250]

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[247] The Law was Emergency Law Number 17 Year 1951 on Stockpiling Act, this Law has already been repealed in 1962 by Government Regulation in lieu of Law Number 8 Year 1962.
[248] See the consideration paragraph of the Law on Stockpilling.
[249] The terminology used in this law is *badan hukum* which literary means corporation with civil legal status but the Law broadens the meaning of *badan hukum* both with civil legal status and without civil legal status. S**ee** Article 1e of the Stockpiling Law.
[250] Remmy Sjahdeni, 2006 *Op.cit,, p. 134*.

The Stockpiling Law also regulated procedural law related to corporations in Article 12. One of directors of the corporation should become the representative of the corporation in a criminal process, who could also be appointed by the prosecutor.[251] Letters of summons related to the case should be submitted to the office address of corporations or to the residence of the director who becomes the representative of the corporation.[252] The Stockpiling Law did not contain any further regulations toward corporations, especially concerning procedural law to bring a corporation before the court. Moreover, at that time, the Indonesian criminal procedural law was still based on *HIR*, which also stayed far away from recognizing corporate criminal liability. The system of corporate criminal liability did not develop further based on this law, since legislators applied the law for a brief period before the Law was annulled in 1962.[253]

2. The Emergency Law on the Investigation, Prosecution and the Trial of Economic Crimes

After the first recognition of corporate criminal liability in 1951, the next essential stage occurred in 1955 when a newly independent Indonesia faced an economic crisis due to the decreasing world economy. Given the poor economic conditions, the Indonesian Government reacted by establishing the Emergency Law Number 7/Drt/1955 concerning the Investigation, Prosecution and Trial for Economic Crimes (hereinafter referred to as Economic Crime Law). [254] This Law aimed at unifying the rules governing the investigation, the prosecution, and the punishment for economic crimes. This Law applied only to the enforcement of economic offences, which are a group of regulatory offences, usually but not always, of an economic nature, that the legislators label as such. Historically, Indonesian Economic Crime Law was based on the Netherlands Economic Offences Act. Legislators at that time believed that Indonesian economic conditions after the war were similar to the Netherlands during the enactment of the Dutch Economic Offence Act in 1950.[255] The stipulation in Article 15 of Indonesian Economic Crime Law was similar to Article 15 of the Dutch Economic Offences Act (*Wet op de Economische Delicten 1950*), as both Laws regulate that corporations could commit economic crimes. Therefore corporations could be prosecuted and punished.

In Article 15, corporations are defined as the legal entity, company, union and foundation. To establish the criminal liability of corporations, Subsection 2 of Article 15 outlines some factors a criminal court should consider when determining whether a corporation has

[251] Article 12 Paragraph 1 Emergency Law Number 1 Year 1951.
[252] Article 12 Paragraph 2 Emergency Law Number 1 Year 1951.
[253] Annulled by Government Regulation in Lieu of Law Number 8 Year 1962.
[254] Andi Hamzah, *Hukum Pidana Ekonomi (Economic Criminal Law)*, (Jakarta: Erlangga, 1973), p. 5.
[255] *Ibid*, p. 7.

committed a certain economic offence. Subsection 2 of Article 15 mentions that an economic offence would be held against a corporation, if, for instance, the offence was committed by a natural person who acted within the scope of the corporation based on employment or other relationships, regardless of whether the offence was committed individually or collectively.

This Law was recently deemed an inapplicable regulation, meaning that almost the entire group of regulatory offences in Article 1e of the Economic Crime Law was repealed with new regulations that were no longer considered a part of Economic Crime Law. Consequently, the Indonesian law enforcers rarely refer to this regulation since there have been many new specific Laws related to economic activities. However, shortly after independence, the recognition of corporate criminal liability within the Economic Crime Law and the Stockpiling Law reflected the decision of Indonesian legislators to accept corporations as criminal law subject. The enactment of both Laws aimed to deal with the economic crimes that involved corporations as important actors. Sanctioning corporations were an effective measure to deal with crime in the economic sphere. Since then corporations were widely accepted as the subject in criminal offences in most of the Laws outside the *KUHP*. That acceptance is a logical consequence from the preservation of position of the *KUHP* which does not recognize corporations as its subject.[256]

3. The Law on Eradication of the Criminal Acts of Corruption

Law Number 31 Year 1999 as amended by Law Number 20 Year 2001 on Eradication of the Criminal Act of Corruption (hereinafter referred to as Corruption Law) contains the former stipulations in Chapter XXVII of the *KUHP* on Crimes Committed by Officials, as a part of corruption crime.[257] The Corruption Law is one of the many examples of how Indonesia developed its criminal legal system by revoking certain articles within the *KUHP* and setting the articles in Laws outside the *KUHP*. First Corruption Law was enacted in 1971 by the enactment of former Corruption Law Number 3 Year 1971.[258] However, in this Law, corporations were not recognized as the criminal law subject. Corporations have just been recognized as the criminal law subject by the new Corruption Law in 1999. In its consideration,

[256] In the perspective of Mardjono, the recognition of the criminal liability of corporations outside the criminal code is an effort to extent the criminal law subject since the criminal code only recognize natural persons as its subject. See subchapter 2.3.
[257] This Law replaced the Corruption Law Number 3 Number 1971 which also contained the former stipulations in *KUHP*.
[258] Several articles related to bribery by public official were revoked from the KUHP in 1971 by the former Corruption Law Number 3 Year 1971. The 1971 Corruption Law is then replaced by the Law Number 31 Year 1999 as amended by Law Number 20 Year 2001 on Eradication of the Criminal Act of Corruption.

Corruption Law mentions that the former Corruption Law was not suitable with the new development of corruption crime. Therefore, a new Corruption Law was needed. Based on general elucidation of Corruption Law, sanctioning corporation is important to ensure the effectivity to prevent and eradicate corruption crime.[259]

As special criminal law, the Corruption Law recognizes the criminal liability of corporations. The recognition begins with the definition of corporations in Corruption Law as an organized collection of people and/or wealth both in the form of legal entity or non-legal entity.[260] After recognizing and defining corporations as the subject in Corruption Law, the Law further stipulates how to prosecute corporations which are stipulated in Article 20.

> *1) In the event that the criminal act of corruption is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation* ***and/or*** *its board of directors.*
>
> *2) The criminal act of corruption is taken to be committed by a corporation in the event that the act is committed by people who are, based on work and other relations, act within the scope of corporation, both personally and collectively.*
>
> *3) In the event that the lawsuit is imposed on the corporation, the corporation is represented by the board.*
>
> *4) The board representing the corporation as referred to in number 3 above, can be represented by another person.*
>
> *5) The judge can order that the board of the corporation should be summoned to the court and he can also order that the board be brought to the court.*
>
> *6) In the event that the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board.*
>
> *7) The main sentence which can be imposed to a corporation is only the fine, with the understanding that the maximum fine is increased by one-thirds.*
>
> *8) The special additional sentences that can be imposed on the corporation are:*[261]
>
> *a. Whole or partial closing of company for a maximum period of one year,*
>
> *b. Confiscation of goods used for or obtained from a corruption act,*
>
> *c. Compensation to the state for a maximum up to the wealth obtained from the corruption act.* [262]

[259] See the consideration of Corruption Law point c and the general elucidation of the Corruption Law.
[260] Art. 1 para 1 Corruption Law.
[261] Article 18 Corruption Law.
[262] Complete English version of Corruption Act can be seen in http://assetrecovery.org/kc/node/b83089eb-a342-11dc-bf1b-335d0754ba85.html, accessed on 1 November 2016.

Drawing from the points mentioned above, the stipulations on corporate criminal liability in Corruption Law provide a sufficient basis to prosecute a corporation in corruption offences. The Corruption Law states that the corporation is the subject of criminal offences, provides several criteria to establish the criminal liability of corporations and stipulates the procedural law to prosecute corporations. In addition, that law also regulates several additional sanctions. The Corruption Law regulates that the criteria to determine that criminal act of corruption is committed by a corporation if the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively. The Law has given a basis for the judges in determining the criminal act of corporations but those criteria opens multi interpretations, such as the meaning of criteria "other relations" and "an act within the scope of corporation".[263]

In procedural law, the Corruption Law open the possibility for the board of directors as the representative of corporations represented by another person in criminal trial.[264] However, that Law does not further determine who can be the representative of the board of directors. To conclude, Regulation on the criminal liability of corporations within the Corruption Law still requires other detailed regulations due to the lack of corporate liability regulations in the general substantive and procedural criminal law in the Indonesian legal system.

4. The Law on the Prevention and Combating of Money Laundering

Indonesia enacted a Law concerning anti-money laundering in 2002. Then in 2010 Indonesia applied a new Law on anti-money laundering.[265] The Law Number 8 Year 2010 concerning the Prevention and Combating of Money Laundering (hereinafter referred to as Money Laundering Law)[266] has several important amendments, such as giving the investigation authority to anti-corruption officials and more severe sanctions for violations than stipulated in the previous Law.[267] In addition, the new Law has more comprehensive stipulations on the system of corporate criminal liability compared to the previous Law on money laundering.

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[263] R. Wiyono, Pembahasan Undang-Undang Pemberantasan Tindak Pidana Korupsi (Discussion of Anti-Corruption Law), (Bandung: Sinar Grafika, 2009), p. 153.
[264] Edi Yunara, Korupsi dan Pertanggungjawaban Pidana Korporasi (Corruption and Corporate Criminal Liability of Corporations), (Bandung: Citra Aditya Bakti, 2012), p. 120.
[265] Indonesia has first Law on Money Laundering in 2002 by the enactment of the Law Number 15 Year 2002 which was then replaced by the Law Number 8 Year 2010.
[266] Unofficial translation of Law Number 8 Year 2010 available at and accessed on 12 May 2017: http://www.flevin.com/id/lgso/translations/Laws/Law%20No.%208%20of%202010%20on%20Prevention%20and%20Eradication%20of%20Money%20Laundering%20%28MoF%29.pdf.
[267] The new Money Laundering Law gives the investigation authority not only to police but also to several civil service investigators including investigators from Eradicating Corruption Commission (KPK).

The Money Laundering Law defines corporations as an organized collection of people and/or wealth both in the form of legal entity or non-legal entity.[268] This is a broad definition because it uses the terminology "organized collection of people and or wealth" without mentioning specific legal entities. In the official elucidation of that article, the Law further explains that corporations shall also include the organized structured group consisting of three or more people that exist for a certain period. This Law also defines corporation control personnel, meaning that anyone who possesses the power and authority to determine the corporation's policy or the authority to implement the corporation's policy without requiring authorization from their superior.[269] The definition of corporation control personnel is important because the conduct of this subject determines the criminal liability of the corporation. Further regulations on corporate criminal liability found in Article 6 to 9 and 82 states:

> *Article 6*
>
> 1. *In the event that Corporation commits the crime of Money Laundering as set forth in Article 3, Article 4, and Article 5, the sentence shall be subject to the Corporation and/ or Corporation Control Personnel.*
> 2. *Sentence shall be subject to the Corporation in the event that the criminal action of Money Laundering:*
>   a. *is committed or ordered by the Corporation Control Personnel;*
>   b. *is committed in the framework of the objectives and purposes of the Corporation;*
>   c. *is committed in accordance with the function of the perpetrator or the person who give the order; and*
>   d. *is committed to give benefit for the Corporation*
>
> *Article 7*
>
> 1. *Primary sentence, which is sentenced to the Corporation, shall be the fine sentence for no more than Rp100.000.000.000, 00 (one hundred billion rupiahs).*
> 2. *In addition, other than fine sentence as set forth in section (1) above, the Corporation shall also be sentenced with additional sentence as follow:*
>   a. *announcement of the judge's verdict;*
>   b. *suspension on the overall or partial business activity of the Corporation;*
>   c. *revocation of the business license;*
>   d. *dissolution or restriction of the Corporation;*
>   e. *Confiscation of the Corporation's assets for the State; and/ or*
>   f. *Corporation takeover by the State.*

[268] Art.1 Number 10 Money Laundering Law.
[269] *Ibid*, Art 1 Number 14.

Article 9

1. *In the event that the Corporation is incapable to pay fine sentence as set forth in Article 7 section (1), such fine sentence shall be substituted with the confiscation of Corporation's Assets or Corporation Control Personnel's Assets whose value is equal to the fine sentence verdict which is imposed.*
2. *In the event that the selling of the confiscated Corporation's Assets as set forth in section (1) above is insufficient, the imprisonment sentence as a substitute fine sentence shall be imposed to the Corporation Control Personnel with consideration of the paid fine.*

The Money Laundering Law is the most comprehensive regulation on corporate criminal liability in Indonesia and therefore provides a sufficient basis and guidance in law enforcement. The arguments for that statement are as follow: the Law defines not only corporations but also the persons within the corporation that can be corporation control personnel. The definition is an important legal basis to determine what a corporation is and which persons within certain corporations can be the directing mind in criminal offence. In addition, the Money Laundering Law also stipulates the main and additional punishments for corporations and how to implement the punishments to corporations. Article 6 paragraph 2 of Money Laundering Law regulates several criteria before corporations can be criminally sanctioned. Those criteria are the most detailed criteria among the Laws that regulate what kind of criminal action in money laundering that can lead to punishment.

In addition, the first stipulation among the Laws on corporate punishment if a corporation is unable to pay the fine, is outlined in Article 9 of the Money Laundering Law. In the Money Laundering Law, criminal sanctions for corporations are not imposed only to the corporations itself. When the corporation is unable to pay the fine, the Law opens the possibility of imposing criminal sanctions to certain natural persons within corporations. Those natural persons' assets can be confiscated to pay the corporation's fine. Finally, the imprisonment in lieu fine will be imposed to natural persons when both the corporation and natural persons' assets are not sufficient to pay the corporation's criminal fine.

In procedural law related to the circulation of legal documents, Article 82 states that in the event the lawsuit is against the corporation, the court then submits the letter of summons to the residence of the board or the office of the board.

5. The Law on Environmental Protection and Management Law

The Law Number 32 Year 2009 concerning Environmental Protection and Management (hereinafter referred to as EPM Law) is a new environmental law regulation enacted on October

3 2009. The Law replaced the old Law Number 23 Year 1997 on Environmental Management. The recognition of corporate criminal liability has existed since the former 1997 Environmental Law and continues through EPM Law. Article 1 Number 32 of the General Provisions in EPM Law recognizes the corporation. It states that the means of "person" in that Law is a natural person or business entity which has legal personality or without legal personality. The use of the terminology "business entity" in that Law shows that the EPM Law limits the form of corporations which can be the subject of criminal punishment. The word "business" implies that only corporations that are involved in business and economic activities can be the subject of the EPM Law. Non-profit organizations and foundations which do not conduct business activities for example, based on that definition cannot become the subject of that Law. Article 116 stipulates further regulations in EPM Law in corporate criminal liability:

> *Article 116*
>
> 1. *If an Environmental crime is committed by, for, or in the name of a business entity, criminal charges and criminal sanction are imposed on:*
>   a. *The Business Entity and/or;*
>   b. *The Persons who give an order to carry out the criminal act concerned or who act as leaders in the carrying out of it.*
> 2. *If an environmental crime as provided for in Paragraph 1 is committed by persons, both based on employment and other relations, who act in the sphere of the business entity. The criminal sanctions can be imposed against those who give order or act as leaders regardless of fact whether the offence is committed individually or collectively.* [270]

Article 118 further stipulates the crimes involving corporations as referred in Article 116 Paragraph 1 letter a. This article regulates:

> *"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"*

The elucidation of the Article 118 further stipulates;

> *"The functional executives as referred to in this article is business entity and legal entity. Criminal offence charged toward executives of business entities and legal entities is functional crime; therefore, the penalty and sanction are imposed on those who having authority to the physical executor and receiving action of the physical executor. Receiving action meant in this article includes approving, letting or supervising inadequately the action of physical executors and/or having policies that make the crime possible."*

[270] The English version of EPM Law available at http://faolex.fao.org/docs/pdf/ins97643.pdf, accessed on 1 July 2015.

If we only read the stipulation in Article 118, the interpretation of criminal sanctions for corporations in the EPM Law will not be imposed to the corporation, but it will be imposed on the executives authorized to represent the business entity inside and outside the court in accordance with legislation as functional executives on behalf of the corporation. But, *Takdir Rahmadi,* Indonesian Supreme Court Judge and environmental law specialist, interpreted that stipulations in the Article 118 in EPM Law open the possibility to sanction corporations as well as the executives of corporations when the corporation is committing an environment crime.[271] Furthermore, in the *Kallista Alam* case,[272] which will be discussed later in Chapter 4, the Supreme Court sanctioned corporations for environment crime based on this Law. Therefore, corporations are also the subject to receive the criminal punishments as well as the natural persons. If the representatives of corporations are going to receive criminal sanctions on behalf of corporations, the corporation's directors will suffer most in environmental crime. This is because sanctions for both the corporations and natural persons can only be received by the corporation's directors. However, the Supreme Court has decided that corporations are the subject of criminal punishment.

The only possible criminal sanction corporations can receive is the secondary sanction as stipulated in Article 119. The sanctions are categorized as follows:

a. *seizure of profits earned from illicit activities of corporation;*
b. *liquidation of the corporation;*
c. *rehabilitation of the impact of the crimes;*
d. *order to perform the neglected obligations;*
e. *placing the corporation under guardianship for a maximum of three years.*

6. The Law on Fishery

In general, the stipulation related to the criminal liability of corporations within the Fishery Law is quite short. There are only two Articles that regulate the establishment of corporate criminal liability. The recognition of corporations as the subject of criminal punishment within the Fishery Law is found in the stipulation in Article 1 Paragraph 14, which states that the term "person" means natural person or corporation. Furthermore, Paragraph 15

[271] Supriyadi Widodo Eddyono (ed), Parliamentary Brief, *Tindak Pidana Lingkungan Hidup (Environmental Crime),* (Jakarta: Elsam& Walhi, 2016), Series 5, p. 12.
[272] Supreme Court Decision Number 1554 K/Pid.Sus/2015.

of that article defines corporations as a group of well-organized persons and/or assets both in the form of legal entity or non-legal entity.[273]

After recognizing the corporation as its subject, the Fishery Law further regulates in Article 101 by stating that when corporations commit crimes against the Fishery Law, prosecution and sanction will be imposed on its directors and the fine will be increased by one third.[274] Compared to the EPM Law, the Fishery Law has a clearer stipulation about what party will receive a criminal sanction when a corporation is committing a crime. The Fishery Law recognizes corporations as the subject of criminal law, but the prosecution and the criminal sanction (the fine) will be imposed to the directors of corporations.[275]

In addition, the Fishery Law does not further stipulate additional criminal sanctions for corporations. However, several administrative sanctions are regulated specifically for corporations, such as admonition, suspension of business activity and revocation of the business license.[276]

Another important stipulation is missing in the Fishery Law, namely the stipulation on procedural law related to corporations. That Law does not regulate how to bring corporations before the court. Since the subject of the prosecution and the punishment is only natural person which are the directors of corporations, the procedural law on this matter become not so important.

7. The Law on Capital Market

Law Number 8 Year 1995 concerning Capital Market (hereinafter referred to as Capital Market Law) [277] is an example of a Law containing criminal sanctions. The recognition of a corporation as a legal person started and ended in Article 1 Number 23. This article mentions that a person is a natural person, a company, a partnership, an association or any organized group. Criminal law provisions in Chapter XV of Capital Market Law from Article 103 to Article 109 use "a person" as a subject of criminal law provisions. Therefore, all capital market

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[273] The English version of the Indonesian Fishery Law available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=89345, accessed on 1 October 2015.
[274] Several crimes that can be committed by corporation based on Article 101 of the Fishery Law are stipulated in Article 84(1), 85,86,87,88,89,90,91,92,93,94,95,96.
[275] Hariman Satria, Pertanggungjawaban Pidana Korporasi Dalam Tindak Pidana Sumber Daya Alam (Corporate Criminal Liability in Natural Resources Crime), (Mimbar Hukum, Juni 2016) Vol.28, Nomor 2, p. 290.
[276] See for example Article 35a and Article 41 of the Fishery Law.
[277] The English translation of Capital Market Law can be accessed by the following link: http://www.bapepam.go.id/old/old/e_legal/law/CAPMARKETLAW.pdf

crimes as stipulated in the Capital Market Law, could be committed by a natural person, a company, a partnership, an association or any organized group.

The Capital Market Law does not further regulate how to implement the provision of corporate criminal liability in Capital Market Crime. Stipulating in that way may cause problems, as Indonesia has not generally stipulated corporate criminal liability in both the general criminal law (*KUHP*) and in Criminal Procedure Code (*KUHAP*).

Capital Market Law does not regulate specific criminal sanctions that corporations can receive. The criminal sanctions in that Law are imprisonment and fine. From that stipulation, the sanction for a legal person was only a fine. The alternative sanction for corporations lay in the field of administrative sanction. Capital Market Law rules that the Capital Market Supervisory Agency (BAPEPAM) has the authority to enforce an administrative sanction in the case of violation of Capital Market Law and/or its implementing regulations against every person that is licensed, approved, or registered with BAPEPAM (vide Article 102 (1) Capital Market Law). The administrative sanctions are related to corporations because it is possible to impose the administrative sanction to the corporations. The administrative sanctions are:

a. written admonition;
b. fines;
c. restrictions on business activity;
d. suspensions of business activity;
e. revocations of business licenses;
f. cancellations of approvals; and
g. cancellations of registrations.

8. The Law on Banking

Another example of the recognition of corporate criminal liability in Laws containing criminal sanction is the stipulation in Law Number 7 Year 1992 as amended by Law Number 10 Year 1998 on Banking (hereinafter referred to as Banking Law) [278]. Article 46 states:

> *1. Whoever collects funds from the public in the form of Deposits without an operating license from the Chairman of the Bank of Indonesia as referred to in Article 16, shall be imprisoned to a minimum of 5 (five) years and maximum of 15 (fifteen) years and fined to a minimum of Rp10.000.000.000,00 (ten billion rupiah) and maximum of Rp200.000.000.000,00 (two hundred billion rupiah).*

[278] Unofficial translation for Law on banking can be accessed on http://www.ica-ap.coop/sites/default/files/Indonesia%20Act%20ammended%20in%2098.PDF, accessed on 12 May 2017.

> 2. *If the activity as referred to in paragraph (1) is committed by a legal entity in the form of limited liability company, association, foundation, or cooperative, the charges against such entity shall be imposed on those who ordered such activities, or those who are responsible for the management of these acts, or against both.*

Banking Law has only one article which stipulates that corporations can be the subject of crime regarding the unlicensed funds collection from public. Furthermore, based on the stipulation in Article 46, corporations can commit crimes, but law enforcers can only prosecute the natural person. The stipulation on corporate criminal liability in the Banking Law, as outlined in one article, is more complete than in the Capital Market Law. In one article, the Banking Law firstly defines corporations as a legal entity in the form of Limited Liability Company, association, foundation, or cooperative. In the same article, the Banking Law stipulates that corporations can commit a crime, even though law enforcement can only impute criminal liability to people within the corporation who ordered such activities, or those who are responsible for the management of these acts, or both.

9. The Law on Narcotics

Law Number 35 Year 2009 on Narcotics (hereinafter referred to as Narcotic Law) [279] has two articles related to the criminal liability of corporations. The first article is the general provision, which defines corporations as any organized group of people and/or assets both in the form of legal entities or non-legal entities.[280] Secondly, Article 130 regulates the punishment for corporations as:

> 1. *In case of criminal conduct as referred in the Articles 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126 and 129 is committed by the corporation, besides the imprisonment and the penalty against the directors of the corporation, the corporation shall also be imposed with the fine three times the maximum fine found in those articles.*
> 2. *Other than penalty as referred to paragraph (1), corporation shall be charged with the additional punishment in form of:*
>
> *a. revocation of business permit; and/or*
>
> *b. revocation of corporate status.*

In Narcotic Law, corporations can commit 17 out of 19 criminal provisions, except for the narcotic abuser provision in Article 127 and the criminal provision on the failure of parents to report narcotic abuse of their children in Article 128, as those articles naturally can only be

[279] Indonesian version of Narcotic Law can be accessed on http://luk.staff.ugm.ac.id/atur/UU35-2009Narkotika.pdf
[280] See Art 1 para 21 Narcotic Law.

committed by natural persons. This law only stipulates criminal sanctions for corporations, which is three times the ordinary fine and possible additional sanctions without stipulating further on procedural law concerning how to bring corporations before the court. Multiplying the amount of fine and stipulating on additional sanctions to corporations is the adjustment for the characteristic of corporation.

10. The Law on Pornography

The stipulation on the criminal liability of corporations in Law Number 44 Year 2008 on Pornography (hereinafter referred to as Pornography Law) [281] starts with the definition of any person in Article 1 Number 3, which is a natural person or corporation which has a legal personality or without legal personality. Article 40 and 41 further stipulates how to exercise the criminal liability of corporations. In general, the stipulations in those articles are similar to the stipulations on Corruption Law. The stipulation regarding the corporate criminal liability in Pornography Law is as follows:

> *Article 40*
>
> 1. *In the event that the criminal act of pornography is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation and/or its board of directors.*
> 2. *The criminal act of pornography is taken to be committed by a corporation in the event that the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively.*
> 3. *In the event that the lawsuit is imposed on the corporation, the corporation is represented by the board.*
> 4. *The board representing the corporation as referred to in number 3 above, can be represented by another person.*
> 5. *The judge can order that the board of the corporation should be summoned to the court and he can also order that the board be brought to the court.*
> 6. *In the event that the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board.*
> 7. *The main sentence which can be commuted to a corporation is only the fine, with the understanding that the maximum fine is increased by one-thirds.*
>
> *Article 41*
>
> *In addition, other than fine sentence as set forth in Article 40 section (7) above, against the Corporation shall also be sentenced with additional sentence as follow:*
>
> *a. suspension on business license of the Corporation;*
> *b. revocation of the business license;*
> *c. Confiscation of proceed of crime and/ or*
> *d. Revocation the status as the legal entity*

[281] Indonesian version of Pornography Law is accessible: http://www.kemenag.go.id/file/dokumen/442008.pdf.

The Pornography Law broadly defines corporations to include corporations with or without a legal personality. In addition, the law regulates that corporations are criminally liable if the crime is committed by people who, based on work and other relations, act in the sphere of the corporation, both personally and collectively. The procedural law regarding prosecuting corporations is also stipulated, such as who can be the representative of a corporation and the address of corporation used in trial process. The sanction for a corporation in pornography crime is a fine as the main punishment and several additional punishments such as suspension or revocation of business licence, revocation the status as the legal entity and confiscation of proceed of crime. The Pornography Law does not regulate further regulations on the way if the corporation fail to pay the fine.

11. The Law on Traffic and Transportation

Law Number 22 Year 2009 on Law Traffic and Transportation (hereinafter referred to as Traffic Law) [282] does not define corporations in general provisions. The criminal provisions chapter directly stipulates the criminal liability of corporations. There are 2 two articles in the Traffic Law where corporations become the subject of criminal punishment. The first stipulation is in Article 315 Traffic Law. Based on that article, criminal offences in Traffic Law can only be committed by a public transportation company which can be owned both by a private business entity or state-owned enterprises.

> *Article 315*
>
> 1. *In the event a criminal act is committed by a public transportation company, the criminal responsibility shall be imposed on such public transportation company or its managing boards.*
> 2. *In the event that a criminal act is committed by a public transportation company, then in addition to punishment imposed on its managing board as referred to in paragraph (1), it shall also be imposed a penalty at the maximum of 3 (three) times than such penalty imposition determined in each article of this chapter.*
> 3. *In addition to penalty imposition, the public transportation company can also be imposed with an extra punishment in the form of temporary suspension or revocation of the transportation business license of the vehicle that it uses*

Second article in Traffic Law which can be considered recognizing criminal liability by corporation is Article 273.

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[282] The English translation on Traffic Law, accessed on 1 April 2015, available at http://www.ltpcenter.com/documents/18/44989/ANNEX+7_23TFWG_Indonesia+Law+22+year+2009_English.pdf.

Article 273

1. *Any road organizer who do not immediately and appropriately repair damaged roads which cause such traffic accidents as referred to in Article 24 paragraph 1 (one) resulting in minor injuries and/or damage to vehicles and/or goods shall be punished with imprisonment of the maximum period of 6 (six) months or penalty at the maximum amount of Rp. 12.000.000,- (twelve million rupiah)*
2. *In the event that such acts as referred to in section (1) causing serious injuries, the wrongdoer(s) shall be punished with imprisonment of the maximum period of 1 (one) year or a penalty of the maximum amount of Rp 24.000.000,- (twenty four million rupiah)*

In practice, Article 273 Traffic Law gives unclear stipulations, especially since Traffic Law does not define a road organizer in its stipulation. Law Number 38 Year 2004 concerning Road (hereinafter referred to as Road Law) provides a definition for road organizers. Road Law distinguishes the road organizer into three parties: the central government is as the national road organizer; the province is province's road organizer; and the municipality/city is the city's road organizer. Based on systematic interpretation, central, provincial and municipality/city governments can become the subject of Article 273 Traffic Law.

The recognition of corporations as the subject of criminal punishment in the Traffic Law is interesting to discuss, since this Law directly points public corporations as the subject of criminal punishment. The establishment of the criminal liability of public corporations in Indonesia will become the next level of discussion, since the discussion of "ordinary" corporations still have not developed well. However, later in chapter 5 there will be further discussion on the possibility to punish public corporations in Indonesia will be enriched by the lesson learned from the Dutch experiences.

2.4. The Position of the *KUHP* Draft on Corporate Criminal Liability.

In the early years of Independence, the Indonesian government decided to temporarily apply the concordance principle by stating in the Constitution's transitional provisions that all existing state institutions and laws are remain valid until new one come into effect.[283] In criminal law, the government and legal scholars at that time believed that the *KUHP*, which is based on the concordance principle from the Dutch criminal code, was somewhat unsuitable for Indonesian legal culture and also strongly protected the authority of the colonialists.[284] For

[283] Article II of the Transitional Provisions of the Constitution of the Republic Indonesia of 1945 before amendments.
[284] Mardjono stated that the majority of the new KUHP drafters realized that the criminal policy used as the basis of the KUHP could no longer be implemented in Indonesia as an independent country. See Mardjono

that reason, Indonesia needed a new criminal code based on its own moral value and legal culture. Then, in 1963, Indonesia struggled to reform the criminal law system in the *KUHP*.[285] The law-making process of the new Indonesian criminal code (hereinafter referred to as *KUHP* Draft) is the process of recodification of the *KUHP,* which reflects the religious and cultural values of Indonesia but still in line with modern and common values of the international standard.[286] In addition, the drafting of the new *KUHP* uses the right and good legal terminology in Indonesian language compared to the prior *KUHP* which is a translation from *WvSNI*.

The criminal legal reform process of creating the new *KUHP* have catalysed a long debate, both in parliament and society. After more than 50 years of discussion, the draft of the New Indonesian Criminal Code is still in the discussion process in parliament. [287] On that journey, to date, the draft of *KUHP* has changed several times.[288] The debate regarding several sensitive articles, such as the plan to recodify the Corruption Law into the new *KUHP* and criminalization of several decency acts, has not yet concluded. A consequence of the long debate is the fact that the criminal law reform in Indonesia developed through criminal Laws outside *KUHP*. Legislators have enacted many Laws outside the criminal code to deal with the new developments in criminal law, including the recognition of corporate criminal liability. However, in 2018 there will be positive progress related to the law-making process of the new

Reksodiputro, *Meninjau RUU Tentang KUHP Dalam Konteks Perlindungan HAM (Reviewing the Draft of KUHP in the Human Rights Perspective),* Lembaga Studi dan Advokasi Masyarakat (ELSAM), Discussion Paper (2006), p. 67.

[285] Barda Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru (Anthology of Criminal Law Policy: the Development of drafting a New KUHP Concept), (Jakarta: Kencana Prenada Media Group), p. 98.

[286] Muladi, *Beberapa Catatan terhadap RUU KUHP*, Lembaga Studi dan Advokasi Masyarakat (ELSAM), Discussion Paper (2006), p. 3. Accessed on 12 April 2016 and available at http://perpustakaan-elsam.or.id/opac/index.php?p=show_detail&id=2711.

[287] The *KUHP* Draft always becomes a priority to be completed under Parliament's national legislation program (prolegnas) every year, however, until now the discussion still happens in parliament. See http://www.dpr.go.id/uu/prolegnas.

[288] See Mardjono Reksodipuro, Arah Hukum Pidana Dalam Konsep RUU KUHP (The Direction of Criminal Law in The Concept of the Draft of KUHP), Lembaga Studi dan Advokasi Masyarakat, Discussion Paper (2006), p. 27. Available at http://perpustakaanelsam.or.id/opac/index.php?p=show_detail&id=2711, accessed on 25 July 2016.

Since the *KUHP* draft has changed several time, public often finds difficulty in trying to access the latest draft of the criminal code because there are many versions of the draft circulated in public. In this book, the Draft of *KUHP* used is version February 2018. For the elucidation of the draft of *KUHP*, the 2018 version is used. All drafts are provided by *Aliansi Nasional Reformasi KUHP* (National Alliance for *KUHP* Reformation) which can be accessed on http://reformasi*KUHP*.org/r-*KUHP*/.

KUHP. The Parliament and the government assure to finish the draft of the new *KUHP* and enact the new criminal code somewhere in 2018.[289]

The new Indonesian *KUHP* will only have two books, while the present *KUHP* has three books containing general stipulation, felony and misdemeanour. The draft will only have general stipulations in the first book and felony in the second book without the chapter on misdemeanour. The legal drafters believe that nowadays there are no significant differences between felony and misdemeanours. Felony is only considered to have a more serious nature than criminal acts designated in misdemeanours.[290] Furthermore, *Sahetapy*, a member of *KUHP* drafters, argues that the recent developments in criminology and victimology have given the strong argument to merge felony and misdemeanour in one book because in practice, the third book on misdemeanours is irrelevant, especially in the penology perspective.[291] The law-making process of the draft of the new *KUHP* is called recodification because several Indonesian criminal Laws outside the *KUHP* will be codified within the criminal code.[292] The legal drafters believe that the recodification of the *KUHP* is important because at this time Indonesia had so many criminal Laws spread outside the criminal code.[293] The draft of the new *KUHP* also has a chapter on elucidation of the code, which is missing in the present *KUHP*. The capital punishment still exists in the draft of *KUHP*, even though it is not the main punishment, but an alternative punishment.

Nonetheless, apart from the long drafting process, the future enactment of the *KUHP* will significantly change the criminal law system in Indonesia. One of the changes is the recognition of corporations as the subject of criminal law in criminal code. The *KUHP* draft accepts the

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[289] The Indonesian Parliament Speaker promised to prioritize finishing the *KUHP* Draft in 2018. See Kompas, 'Pemerintah dan DPR segera Rampungkan Revisi *KUHP* (The Goverment and Parliament Will Finish the Revision of the *KUHP* Draft)', *Kompas.Com* 19 January 2018, accessed 27 January 2018, available at https://nasional.kompas.com/read/2018/01/19/12360951/pemerintah-dan-dpr-segera-rampungkan-revisi-*KUHP*.

[290] Peter Mahmud Marzuki, *Op.Cit,* p. 196.

[291] J. E. Sahetapy, *Hukum Pidana Indonesia Suatu Perspective (A Perspective on Indonesian Criminal Law)*, Paper Presented in the Seminar of Indonesian Criminal Law and Criminology Community (MAHUPIKI) in Gajah Mada University Jogjakarta, 23-27 February 2014, p. 2., accessed on 12 March 2015, available at http://www.mahupiki.com/assets/news/attachment/08042014110810_08032014105155_1.%20Prof.%20Sahetapy.pdf.

[292] The Money Laundering Law and the Corruption Law are the example of Laws which will be recodified to the New KUHP.

[293] The Academic paper as an official cover document of the KUHP Draft mentioned that various special Laws outside KUHP are like 'weeds or illegal buildings' eating away the main structure of criminal law building (KUHP). See Academic Paper of the KUHP Draft, *Badan Pembinaan Hukum Nasional Kementrian Hukum dan Hak Asasi Manusia Republik Indonesia* (National Law Development Agency, Ministry of Justice and Human Rights Republic of Indonesia) Jakarta, 2015, p. 120, available at http://dpr.go.id/dokakd/dokumen/K3-26-2ea83388ece0ae0d13b3977bebb049c1.pdf, accessed on 3 April 2016.

criminal liability of corporations within several articles both in the book one and book two.[294] By recognizing corporations as the subject of the new *KUHP*, it will ensure Indonesian criminal legal system will have a comprehensive system to establish the criminal liability of corporations compared to present condition.

Based on the general elucidation of the *KUHP* Draft, the reason behind the recognition of corporations within the criminal code is the fact that in globalization era, corporations both national and multinational have grown rapidly in economic, finance and trade sector. To some extent, corporations can be used as an instrument to commit a crime and to gain illegal profit. Therefore, by recognizing corporations as criminal law subject, corporations can be held criminally liable for their misconduct.[295] Similar to that, *Arief Amrullah* also argued that the recognition of corporations as subject of criminal punishment varies among countries, depending on their history and experience. But, those countries have a common view that industrialization and economic development are the main factors to make corporations criminally liable.[296]

As a part of the law making process, based on Article 43 paragraph 3 Law Number 12 Year 2011 on the Establishment of Laws and Regulations, in legislative process, every Draft Law must be accompanied by an Academic Paper in order to give an insight of the considerations and reasons behind a Draft Law. In the Academic Paper of the *KUHP* Draft, the recognition of the criminal liability of corporations becomes one of several important issues in Indonesian criminal law reform. The increasing corporations' engagement in crimes in society, the global trend of the recognition of corporate criminal liability and the fact that Indonesia has already recognized the criminal liability of corporations within special Laws lead to the decision to recognize corporations as the subject of the new *KUHP*.[297] The Academic Paper also mentions that the recognition of the criminal liability of corporations within special Laws outside the criminal code often faces problems in implementation because as special Laws it is

[294] The draft of KUHP version February 2018 has 8 articles in book one specifically for corporations.
[295] See the general elucidation of the First Book of the KUHP Draft version February 2018, p. 158, available at http://reformasikuhp.org/r-kuhp/, accessed on 10 March 2018.
[296] Arief Amrullah, *Ketentuan dan Mekanisme Pertanggungjawaban Pidana Korporasi (Regulation and Mechanism of Criminal Liability of Corporations)*, Presentation Paper in Corporate Social Responsibility Workshop, Jogjakarta, 6-8 may 2008, p.10, available at http://pusham.uii.ac.id/upl/article/id_arief.pdf, accessed on 7 July 2015.
[297] See Academic Paper of the KUHP Draft, *Badan Pembinaan Hukum Nasional Kementrian Hukum dan Hak Asasi Manusia Republik Indonesia* (National Law Development Agency, Ministry of Justice and Human Rights Republic of Indonesia) Jakarta, 2015, pp. 43-119, available at http://dpr.go.id/dokakd/dokumen/K3-26-2ea83388ece0ae0d13b3977bebb049c1.pdf, accessed on 3 April 2016.

impossible to have detail stipulations related to corporations. Therefore, general recognition within the criminal code is important to be done.[298]

The recognition of corporations within the *KUHP Draft* is started by defining corporations. In Article 201 of the *KUHP* Draft, "*Setiap Orang* (any person)" as the subject of criminal punishment is defined as a natural person including a corporation.[299] Corporations, which can be the subject of criminal punishment, are then defined in Article 179 as the organized collection of people and/or wealth, whether as legal person in the form of Limited Liability Company *(Perseroan Terbatas)*, Foundation *(Yayasan)*, Association *(Perkumpulan)*, Cooperation *(Koperasi)*, Public/State Owned Enterprise *(Badan Usaha Milik Publik)*, Province/City Owned Enterprises *(Badan Usaha Milik Daerah)*, Village Owned Enterprises *(Badan Usaha Milik Desa)*, or similar entities, or business entities in form of Firm (Firma), Limited Partnership (persekutuan komanditer (CV)), or similar entities.[300] Further stipulations on corporate criminal liability in the *KUHP* Draft are placed in Book I Chapter II Concerning Criminal Act and Criminal Liability, Part 2 on Criminal Liability Paragraph 7 on Corporations. In general, there are six articles in this paragraph, which is Article 52 through Article 57. The stipulations are:[301]

1. Article 52 paragraph 1 rules that corporations are subject to criminal acts. The second paragraph of this article similarly defines corporations as outlined in the Article 179 mentioned above
2. Article 53 rules that a criminal act is taken to be committed by a corporation in the event that the act is committed by persons who hold a functional position in the corporation's organizational structure and act on behalf of the corporation or for the interest of the corporation, based on an employment relation or other relations, in the scope of corporation, both personally or collectively;
3. Article 54 stipulates that corporations can commit criminal acts based on the act of the person who gives an order or the corporate controller outside the corporation structure who in fact can control the corporation. Then, the second paragraph of this article stipulates further that the act of person who gives order or the corporate controller outside the structure of corporations is the act of corporation if;

[298] Ibid, p.119.
[299] Article 201 the draft of *KUHP* version February 2018.
[300] Article 179 the draft of *KUHP* version February 2018.
[301] Concluded and translated from the Articles 52 to 57 of *KUHP* Draft version February 2018 by the author.

   a. The act gives illegal benefit to the corporation,
   b. The act is committed within the scope of corporation or the activity of corporation and has been accepted as the policy of corporation
4. Article 55 rules if a criminal act is committed by a corporation, the criminal liability may be imposed on the corporation (legal person) and/or the board of directors, who order or Corporation Controller;
5. Article 56 rules that corporations can be criminally liable for criminal offences committed for and/or on behalf of the corporations, if such acts are included in the scope of business activities of corporations, as stipulated in the articles of association or other provisions applicable to the corporation concerned or if such acts are committed outside the scope of business activities of corporation which give benefit to the corporations or committed for the interest of corporations;
6. Article 57 rules that corporations can raise defences in a criminal law (justification and excuse) like a natural person, if the justification and excuse have a connection with the criminal act charged.

Analysis of the stipulations in Article 52 through Article 57 of the *KUHP* Draft produces several important remarks. Firstly, Book 1 (General Provision) of the *KUHP* Draft mentions the regulations of corporate criminal liability. As a result, in principle a corporation will be able to commit any criminal offence listed in the criminal code or other criminal laws outside the criminal code. The stipulation on corporate criminal liability in the *KUHP* Draft will act as general rule *(lex generalis)* in the Indonesian criminal legal system when this Draft applies. However, it is still unclear what the position of the *KUHP* Draft will be at the point of enactment, specifically related to various stipulations on corporate criminal liability within the Laws outside the *KUHP*. It is yet to be determined whether the new *KUHP* will abolish all stipulations on corporate criminal liability outside the criminal code or keep maintain them among the Laws. The lack of clarity occurs because there is no transitional stipulation related to the issue of a single system of corporate criminal liability within the *KUHP* Draft.[302] The transitional provision related to corporations only regulates that the terminology of "corporation", which is already defined in a broad sense within the draft of *KUHP*, includes all type of legal persons besides the criminal code.

[302] The transitional provision in the draft of *KUHP* will be stipulated in Book I Chapter XXXVIII Article 723 to 729. In the Draft of *KUHP* version 2017, the note of the legal drafters in that chapter mentions that the transitional provision will be stipulated separately within special Law on the enactment of the *KUHP*.

Secondly, Articles 53 and 54 of the *KUHP* Draft stipulate the system to determine the act of corporations. Based on Article 53, the act of corporation can be identified with the "identification theory" rather than vicarious liability.[303] The act of the corporation in Article 53 *KUHP* Draft is established based on the act of persons who hold a functional position in the corporation's organizational structure who act:

a. For or on behalf of corporation, or
b. For the interest of corporation.
c. Based on employment or other relationships, regardless whether the offence is committed individually or collectively.

The *KUHP* Draft gives further explanation to several criteria mentioned above. The elucidation part of the *KUHP* Draft states that the person who holds a functional position is identified as the person who has the authority to represent a corporation, to take decision on behalf of a corporation and to supervise a corporation.[304] In other words, the corporations' acts cannot be determined from the acts of low level employees.

Article 54 in the *KUHP* Draft broadens the way Article 53 determines the act of corporations by recognizing the act of persons outside the structure of corporations but in fact the persons can control corporations. This act is recognized as long as the corporation receives:

1. An illegal benefit, and
2. The misconduct correlates with the activities of corporations and the corporations accepted as the policy of corporation.

Those persons are the persons who order the misconduct and the persons as the corporate controller of corporations. The corporate controller of corporations is defined as every person who has the authority or power to determine corporations' policies independently.[305] The possibility of determining the act of corporations based on the act of the person outside the structure of corporation has just emerged in the 2018 version draft. Several previous version of

[303]Muladi *Op.Cit.*, p. 4. See also Supriadi Widodo Eddyono, ed, *Pertanggungjawaban Korporasi Dalam Rancangan KUHP (Corporate Criminal Liability in the Draft of the KUHP)*, Institute for Criminal Justice Reform (ICJR), (December 2015), p. 37.
[304] The draft of elucidation of the *KUHP* version 2018 can be accessed on http://reformasi*KUHP*.org/r-*KUHP*/.
[305] Elucidation of Article 54 in the draft of elucidation of the *KUHP* version 2018. the draft can be accessed on http://reformasi*KUHP*.org/r-*KUHP*/

the *KUHP* drafts only considered the act of corporations based on the identification theory as stipulated within the Article 53.[306]

Thirdly, after determining how to establish the act of corporations, through Article 56 of the *KUHP* Draft determines criteria to establish the criminal liability of corporations. Corporations, based on the Article 56 of the *KUHP* Draft, are only criminally liable for misconduct that is committed for and/or on behalf of corporation if:

1. The acts are committed within the scope or the activities of corporation as stipulated within the articles of association or other provisions applicable to the corporation concerned.
2. The acts are committed outside the scope of business activities of the corporation and benefit the corporations or are in the interest of the corporation.

Fourthly, after determining criteria to establish the criminal act and the criminal liability of corporations, Article 55 of the *KUHP* Draft determines four parties that can be prosecuted and punished when corporations are committing a crime. Those parties are: [307]

1. Corporation, and/or
2. Board of director,
3. The person who gives the order or
4. The Corporate Controller

Fifth, the legal drafters of the *KUHP* Draft go further in creating the corporate sanctioning regime within the criminal code by determining several factors that must be considered before sanctioning corporation. In Article 62 of the *KUHP* Draft, those factors are:[308]

a. The level of loss of society;
b. The level of involvement of the board of directors of corporation;
c. The duration of criminal act committed;
d. The frequency of the criminal offences committed by the corporation;
e. The criminal intention in committing a crime;
f. The involvement of public officer in the criminal offence;
g. The value of law and justice that living within the society;

[306] The *KUHP* Draft version 2017 and 2015 for example, did not stipulate the possibility to determine the act of corporation based on the act of the parties outside the structure of corporation. See the *KUHP* Draft version 2017 and 2015 on http://reformasi*KUHP*.org/r-*KUHP*/.
[307] See Article 55 of the *KUHP* Draft Version February 2018.
[308] Article 62 The *KUHP* Draft version February 2018

h. The track records of corporation's business activities;
i. The impact of sanctioning corporation; and/or
j. The cooperation of the corporation in the criminal process.

All those factors explicitly explain the position of the *KUHP* on sanctioning corporations. The obligation to consider the impact of sanctioning corporations before punishing them demonstrates that the *KUHP* Draft intendeds that criminal sanctions for corporations should be used only as the last resort (*ultimum remedium).* It is a kind of "admonition", which enable the law enforcers to fully understand that their decision to prosecute corporations will have extensive consequences to the employees, shareholders, consumers, and the state (in the term of taxation). Therefore, sanctioning corporations should be based on a solid consideration. This is related to the *ultimum remedium* principle in prosecuting corporations.

Lastly, the *KUHP* Draft also has a systematic stipulation to sanction a corporation by regulating specific articles related to the types of criminal sanctions that can be imposed to corporations and how to impose them.[309] In general, the *KUHP* Draft divides criminal sanctions into three main categories, which are primary sanctions, secondary sanctions and treatment. The primary sanction that corporations can receive is only a fine.[310] In imposing the fines, the *KUHP* Draft has a new system compared to the present *KUHP*. Similar to the system in the Dutch Criminal Code, this system uses several categories to determine the amount of the fine for certain offences. The fine in the *KUHP* Draft is divided into seven categories.[311] For corporations, the maximum fine imposed is one category higher than the original fine for the misconduct committed by natural persons.[312] If a corporation fails to pay the fine, the *KUHP* Draft stipulates that the assets or revenue of the corporation will be confiscated to pay the fine.[313] Then, revoking the corporation's licenses or liquidation of the corporation will be the final sanction in lieu of fine when the corporation assets are not sufficient enough to pay the fine.[314]

[309] Criminal sanctions to corporation and the way to implement the sanctions are stipulated in Article 130 to 136 of the *KUHP* Draft version February 2018.
[310] Article 131 *KUHP* Draft version February 2018.
[311] See Article 89 of the *KUHP* Draft Version February 2018.
[312] See Article 133 paragraph 2 of the *KUHP* Draft version February 2018.
[313] Article 134 paragraph 1 *KUHP* Draft version February 2018.
[314] Article 134 Paragraph 2 *KUHP* Draft version February 2018.

If the fine is the only primary sanction that corporations can receive, the stipulations on the additional sanctions in the *KUHP* Draft vary in possible routes to punishment. Article 132 Paragraph 2 stipulates that the additional sanction that corporations can receive are:

a. Compensation payment;
b. The order to perform the neglected obligation;
c. The obligation to fund job training;
d. Repair the damage resulted from the misconduct;
e. The deprivation of the assets or the profit resulted from the misconduct;
f. Paying the obligation based on the customary law;
g. Revoking certain licence;
h. Permanent prohibition in certain activities;
i. The publication of the court decision;
j. Full or partial shutdown of business activities;
k. Full or partial freezing of business activities; and
l. The dissolution of corporation.

The *KUHP* Draft also introduces the measurement that can be imposed on corporations, which are:

a. The acquisition of corporation;
b. Temporary closing of the corporation building;
c. Temporary restriction for certain corporate activities;
d. The order to restore certain condition;
e. Financing employment training;
f. Placing the corporation under supervision;
g. Placing the corporation under the guardianship;
h. Partial closing of business and/or activities of corporation; and/or
i. Partial freezing of the corporation's business.

2.5. Criminal Procedural Law related to the Corporate Criminal Liability

Since the *KUHP* has not recognized corporations as the subject of criminal punishment, the *KUHAP* has also been absent in stipulating the procedural way to deal with a corporation in a criminal trial. Therefore, the procedural law related to the establishment of corporate criminal liability depends on the stipulations within certain Laws that recognize corporations

as its criminal subject.[315] It will be a problem when specific Laws that recognize the corporation as its criminal subject do not stipulate on procedure. That will lead to a vacuum of procedural law because the *KUHAP* as the general law in criminal procedure does not have any procedural stipulation. The law enforcement process will face a difficulty in finding the legal basis in procedural law when prosecuting a corporation, since all stipulations regarding procedural law in the *KUHAP* are only dedicated to the natural persons. The examples of how Laws that recognize corporations as its subject stipulate procedural law related to the criminal liability of corporations is referenced below.

Table 2.2.

The Laws	***The Stipulations on Procedural Law Related to the Corporation***
Stockpiling Law	Article 12 Paragraph 1 regulated that the prosecutor appoints the representative of a corporation in a criminal process
Economic Crime Law	1. If the lawsuit is imposed on the corporation, the director represents the corporation; if there are more than one board members then it can be represented by one of them. The board representing the corporation as can be represented by another person 2. The judge can order to summon the board of the corporation to the court and they can also order the board to the court. (Art. 15 (3)) 3. If the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board (Art. 15 (4)) 4. The court jurisdiction is based on the domicile of the corporation or the office address of corporation. (Art. 39(2))
Corruption Law	1. If the lawsuit is imposed on the corporation, the board represents the corporation. (Art.20(3)) 2. The board representing the corporation as referred to in number 3 above, can be represented by another person. (4) 3. The judge can order to summon the board of the corporation to the court and they can also order the board brought to the court. (5) 4. In the event that the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board. (6)
Money Laundering Law	Art. 82 If the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board
EPM Law	No explicit stipulation on procedural law, but from Article 118 of the EPM Law it can be concluded that the representative of corporation are the executives authorized to represent the business entity inside and outside the court
Fishery Law	No stipulation on procedural law related to corporations
Capital Market Law	No stipulation on procedural law related to corporations
Banking Law	No stipulation on procedural law related to corporations

[315] Widyo Pramono, Pertanggungjawaban Pidana Korporasi Hak Cipta (Corporate Criminal Liability in Copy Rights), (Bandung: Alumni, 2012), p. 308-309.

Narcotic Law	No stipulation on procedural law related to corporations
Pornography Law	1. If the lawsuit is imposed on the corporation, the board represents the corporation. 2. The board representing the corporation can be represented by another person. 3. The judge can order that the board of the corporation to the court and he can also order that the board be brought to the court. 4. If the lawsuit is imposed on the corporation, the court then submits the letter of summons to the residence of the board or the office of the board
Traffic Law	No stipulation on procedural law related to corporations

All those examples on the table above reflect several ways the Indonesian Laws regulates the procedural laws on corporations. First is the Laws that do not stipulate at all on procedural law, such as in Traffic Law, Capital Market Law, and Banking Law. Second is the Laws that regulate procedural law to determine who will represent the corporation and the administrative of the letter of summons, such as Money Laundering Law. Thirdly, the Laws which give more detailed procedural methods to handle corporations in criminal case, such as in Pornography Law and Corruption Law.

Since the *KUHAP* does not recognize corporations as the legal subject, the important question is how to make a legal breakthrough to enforce the substantive Laws that recognize corporations as its subject. All stipulations in legal procedures and documents in investigation, prosecution, trial process and execution of court decisions within the *KUHAP* are only designated to the natural persons and their characteristics. Therefore, it will be a challenging duty for the law enforcers to adjust that condition when applying the applicable law to corporations. Even though several Laws already have stipulations on the procedural laws related to the corporations, the *KUHAP* as the general rule in procedural law is still important, since the Laws which recognize corporations as its subject have limited stipulations on procedural law.

Moreover, the problems will be more difficult when dealing with the Laws that do not regulate procedural laws at all in their stipulations. A legal breakthrough will give a legal basis for prosecuting corporations by using the applicable Laws in criminal procedure, especially on how to implement the *KUHAP* as the general rule in criminal procedural law to the corporations, even though the *KUHAP* does not recognize the corporations as its subject.

Therefore, further reform of the *KUHAP* as a general criminal procedural code is needed. In contrast to the *KUHP*, the *KUHAP* is a code enacted by Indonesia to replace the HIR. Indonesia succeeded in reforming their criminal procedural law by enacting the *KUHAP* in 1981. The law-making process of the New *KUHAP* began in 1999 and until now the draft of

the code is still being discussed in parliament.[316] Nonetheless, The *KUHAP* reform has the same problem as the *KUHP*, which is the long discussion in parliament without certainty about when those codes will be enacted.

One of the reasons to reform the *KUHAP* is to harmonize the regulations between the *KUHP* and the *KUHAP*. A consequence of the recognition of corporate criminal liability within the *KUHP* is that the *KUHAP* will also regulate procedural law related to corporations. By recognizing corporations within the *KUHAP*, the Law enforcement toward corporations will find a procedural law foundation. In the future, problems such as the difficulty to draft a bill of indictment for corporations is solvable. The *KUHAP* draft regulates the stipulations related to corporation in the Article 135 Paragraph 7 and 8.[317] Those two articles stipulate the obligation of the directors of corporations to represent corporations before the court and the procedure to submit a letter of summons to corporations. The Draft of *KUHAP* does not stipulate further on the specific procedural law related to corporations, especially the stipulation on the form of the bill of indictment specifically for corporations.

2.6. Problems in Regulating Corporate Criminal Liability in the Indonesian Legal System

From the elaboration on several Laws in Indonesia that regulate corporate criminal liability, the recognition of corporate criminal liability in Indonesian statutory can be categorized into three different categories, that is:[318]

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

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[316] In 2009 first official academic paper and the code draft was released by the government. That draft was drafted by a team which was chaired by Andi Hamzah. The academic paper of the *KUHAP* reform. Available at https://komite*KUHAP*.files.wordpress.com/2012/08/naskah-akademik-ruu-hukum-acara-pidana.pdf. Accessed 1 March 2017

[317] The draft of *KUHAP* available at http://ditjenpp.kemenkumham.go.id/files/doc/1008_RUU%20*KUHAP*.doc. Accessed on 27 August 2016.

[318] Mardjono Reksodiputro, *Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Korporasi* (the Criminal Liability of Corporations in Corporate Crime), Presentation Paper in National Seminar on Corporate Crime, FH UNDIP, Semarang 23-24 November 1989, p. 9.

The KUHP exemplifies a law in the first category which has not recognized corporations as criminal law subjects in its stipulation. All Laws outside the *KUHP* that do not have special stipulations on corporate criminal liability will follow the position of the *KUHP*, as the general rule in criminal law.

The example for the second category is the stipulation on Banking Law. Article 46 Paragraph 2 Banking Law regulates that corporations could commit crimes in unlicensed collecting of funds from the public. However based on that article the prosecution and the punishment could only be imposed to the natural person, in this case to those who ordered such activities, or those who are responsible for the management of these acts, or against both parties.[319] In addition EPM Law has also been included in this category. If we only read the stipulation in Article 116, we can directly conclude that the corporations can be held criminally liable and become the subject of criminal punishment based on EPM Law. However, if we read further, the stipulation in Article 118 EPM Law, the criminal punishment for corporations in EPM Law can only be instituted for natural persons on behalf of corporations.[320]

Lastly, Anti-Corruption Law, Anti Money Laundering Law, Pornography Law, Traffic Law, and Narcotic Law are examples of several special criminal Laws outside the *KUHP* which stipulate the criminal liability of corporations based on the third category. Anti-Money Laundering Law, for example, stipulates how corporations can commit a crime and be held criminal liable and also how to punish corporations. On the other hand, Anti-Corruption Law also has the same stipulation as Pornography Law, but both do not stipulate what to do in if the corporation fails to pay the fine.

The three categories of the recognition of criminal liability of corporations in Indonesia are the proof that the Laws outside the *KUHP* have various approaches to deal with the criminal liability of corporations. Those various approaches are the result of the position of the *KUHP* as the general law in criminal law, which has not recognized corporations as the subject of criminal law. This is also because the inconsistency of lawmakers to apply a single system of corporate criminal liability in legal drafting. Consequently, several problems then emerge from the present position on the recognition of corporate criminal liability.

The first problem is that all laws that recognize corporate criminal liability do not give complete stipulations to establish the criminal liability of corporations. The clear example can

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[319] Article 46 Banking Law.
[320] Aricle 116, 118 EPM Law, see subchapter 3.3 Number 5 for further elaboration.

be found in the Capital Market Law. That law only defines that the criminal provision in capital market could be imposed on both the legal person and the natural person without further stipulation. This stipulation will not lead to any problems if the *KUHP* and the *KUHAP* already have the system of criminal liability of corporations, but since *KUHAP* and *KUHP* do not recognize it, the corporate criminal liability stipulation in Capital Market Law is rendered inapplicable.

Secondly, the difference among the Laws in regulating corporate criminal liability hampers the ability of law enforcers to implement and develop corporate criminal liability in practice. The prosecutor should understand the different approaches to prosecute corporations based on the stipulation in certain Laws. In addition, the court will also face the same problems and cannot establish a decisive theory in the criminal liability of corporation. The differences in regulating corporate criminal liability among the Laws are shown in the table below.[321]

[321] As comparison, the table will also provide the future regulation on corporate criminal liability in the *KUHP* Draft.

Table 2.3.

The Laws	*The Definition of Corporation*	*The Special Stipulation on Criminal Sanction for Corporation*	*The Stipulation on The Way Corporation Can Be Criminally Liable*
Stockpiling Law	Corporation with legal entity or non-legal entity	If an offence is committed by a corporation, the prosecution and the sentence can be instituted against and imposed on the corporation and/or the person	If the act is committed by one or more persons on behalf of corporation
Economic Crime Law	Corporation is a legal entity, company, union and foundation	If a legal entity, company, union, or foundation commits an offence the prosecution and the sentence can be instituted against and imposed on the legal entity, company, union, foundation and/or those who ordered such activities, or those who are responsible for the management of these acts.	If the offence is committed by natural persons who acted within the scope of the corporation, based on employment or other relationships, regardless the offence was committed individually or collectively
Corruption Law	Corporation as organized collection of people and/or wealth both in form of legal entity or non-legal entity	1. The lawsuit and the sentence can be instituted against and imposed on the corporation and/or its board of directors 2. The main sentence that can be commuted to a corporation is only the fine, with the understanding that the maximum fine is increased by one-thirds	Corporations commit the criminal act of corruption if the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively
Money Launder-ing Law	1. Corporation as organized collection of people and/or wealth both in form of legal entity or non-legal entity 2. This law also makes the definition of the corporation control personnel which means anyone who possesses the power and authority to determine the corporation's policy or the authority to implement the corporation's policy in question without requiring authorization from their superior	1. The sentence shall be subject to the Corporation and/ or Corporation Control Personnel. 2. Primary sentence to the corporation, shall be the fine sentence for no more than Rp100.000.000.000, 00. 3. If the corporation is unable to pay fine sentence, such fine sentence shall be substituted with the confiscation of corporation's assets or Corporation Control Personnel's Assets whose value is equal to the fine sentence verdict of which is imposed. 4. If the selling of the confiscated corporation's assets is insufficient, the imprisonment sentence in lieu of a fine sentence shall be	Sentence shall be subject to the corporation if the criminal action of Money Laundering: a. is committed or ordered by the **Corporation Control Personnel**; b. is committed in the framework of the objectives and purposes of the corporation; c. is committed in according with the function of perpetrator or the person who give the order; and d. is committed to give benefit for the corporation

Table 2.3.			
The Laws	***The Definition of Corporation***	***The Special Stipulation on Criminal Sanction for Corporation***	***The Stipulation on The Way Corporation Can Be Criminally Liable***
		imposed to the Corporation Control Personnel with considering the paid fine.	
EPM Law	"Person" in EPM Law is a natural person or **business entity** which has legal personality or without legal personality	1. Criminal sanction is imposed on: a. The director of the corporation represents the Business Entity in this case and/or b. The Persons who gives an order to carry out the criminal act concerned or who act as leaders in the carrying out of it in this case the fine will be increased by one third	If an Environmental crime is committed by, for, or in the name of a business entity by persons, both based on employment and other relations, who act in the sphere of the business entity
Fishery Law	Corporation is a group of well-organized persons and/or assets both in the form of legal entity or non-legal entity	When a corporation commits crimes on Fishery Law, prosecution and sanction will be imposed on its directors and the fine will be increased by one third	Not specifically regulated
Capital Market Law	A person in EPM Law should be read as a natural person, a company, a partnership, an association, or any organized group	Not specifically regulated	Not specifically regulated
Banking Law	Corporation is a legal entity in the form of limited liability company, association, foundation, or cooperative	The charges against corporation shall be imposed on those who ordered such activities, or those who are responsible for the management of these acts, or against both	Not specifically regulated
Narcotic Law	Any organized group of people and/or assets both in form of legal entities or non-legal entities	If Narcotic Crime is committed by a corporation, other than imprisonment and penalty against the management, the corporation shall be charged penalty with 3 (three) times addition from penalty.	Not specifically regulated
Porno-graphy Law	Any person is defined as a natural person or corporation which has legal personality or without legal personality	If the criminal act of pornography is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation and/or its board of directors	The criminal act of pornography is taken to be committed by a corporation if the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively

Table 2.3.

The Laws	***The Definition of Corporation***	***The Special Stipulation on Criminal Sanction for Corporation***	***The Stipulation on The Way Corporation Can Be Criminally Liable***
Traffic Law	Corporation in Traffic Law are: 1. Public transportation company 2. Road organizers	1. In the event a criminal act is committed by a public transportation company, the criminal responsibility shall be imposed on such public transportation company or its managing boards 2. If a criminal act is committed by a public transportation company, then in addition to punishment imposed on its managing board, it shall also be imposed a penalty at the maximum of 3 (three) times than such penalty	Not specifically regulated
The *KUHP* Draft	The organized collection of people and/or wealth, whether as legal person in the form of: - Limited Liability Company - *(Perseroan Terbatas)*, - Foundation *(Yayasan)*, - Association *(Perkumpulan)*, - Cooperation *(Koperasi)*, - Public/State Owned Enterprise *(Badan Usaha Milik Publik)*, - Province/City Owned Enterprises *(Badan Usaha Milik Daerah)*, - Village Owned Enterprises *(Badan Usaha Milik Desa)* - or similar entities, or business entities in form of Firm (Firma), Limited Partnership (persekutuan komanditer (CV)), or similar entities	Subjects of criminal sanction are: 1. Corporation, and/or 2. Board of director, 3. The person who gives the order or 4. The Corporate Controller Criminal sanctions: 1. Primary sanction, 2. Secondary sanction, 3. Treatment	The acts of corporation are determined from: The act of persons who hold **a functional position** in the corporation's organizational structure's management who act; For or on behalf of corporation, or For the interest of corporation. Based on employment or other relationships, regardless whether the offence is committed individually or collectively. The act of the person who gives order of the misconduct or the act of corporate controller outside the structure of corporation as the act of corporation if the corporation get an illegal benefit from the misconduct or the misconduct has a correlation with the activities of corporation and accepted as the policy of corporation The criminal liability of corporation is determined from: The misconducts that are committed for and/or on behalf of corporation if: The acts are committed within the scope or the activities of corporation as stipulated within the articles of association or other provisions applicable to the corporation concerned. The acts are committed outside the scope of business activities of corporation which give benefit to the corporations or for the interest of corporations.

Thirdly, within the various stipulations on corporate criminal liability outside the general criminal code that lead to problems of law enforcement, Indonesia responds slowly when dealing with problems. The absence of regulations under the Laws that aim to fulfil the gap among regulations reflects this. Law enforcement offices often issue technical regulations to provide guidance and advice to their officers to deal with their judicial function. Long after the first recognition in 1951, the General Prosecutor Office just released the guidance for prosecutors only in 2001, which applied to the corruption crime by corporation. Then in 2014 the General Prosecutor Office finally issued the general guidance to prosecute corporations. On the other hand, the Indonesian Supreme Court has just issued similar guidance for judges at the end of 2016. The reason behind the enactment of the guidance and the stipulations within the guidance will be discussed later in Chapter 3 by elaborating the implementation of corporate criminal liability in Indonesia. However, the year of the enactment of the guidance both the General Prosecutor Office guidance in 2014 and the guidance from the Supreme Court in 2016 demonstrates the dynamic progress of the development of the criminal liability of corporations in Indonesia within the last 4 years.

2.7. Conclusion

The Indonesian criminal legal system adapts to new developments in criminal law is through regulating the new Laws outside its criminal code rather than stipulate it within the criminal code. Consequentially, there are so many special criminal Laws outside the criminal code. The various Laws creates various stipulations, including the stipulation on corporate criminal liability. In general, there are three different forms of stipulating among the Laws on corporate criminal liability. Firstly, the Laws that recognize a corporation as the criminal law subject but do not further regulate how to implement the system of the criminal liability of corporations. Secondly, the Laws that recognize a corporation as the subject and have detailed stipulations on the system of criminal liability of corporation. Thirdly, the Laws that recognize a corporation as the subject but do not have detailed stipulation on the system of criminal liability of corporation.

The absence of stipulations on corporate criminal liability within the general criminal law both in the Criminal Code and the Code of Criminal Procedure creates difficulties for the legal enforcers when trying to prosecute corporations. Legal enforcers should have a comprehensive understanding on all systems of the criminal liability of corporations among the Laws that recognize corporations as its criminal punishment subject. As a system, there is a missing link between the special Laws (*lex specialis*) and the general Law (*lex generalis*). The

implementation of the Laws that recognize the criminal liability of corporations will find difficulties when the system of corporate criminal liability is not comprehensively regulated. To deal with that problem, the amendment of the general criminal law both the Criminal Code and the Code of Criminal Procedure should be prioritized by recognizing and stipulating a comprehensive system of corporate criminal liability.

In addition, to improve the system of criminal liability of corporations within the Law, the minimum stipulation should recognize that both by natural persons and legal persons can commit criminal offences along with the clear definition of "corporation". Secondly, in case a corporation commits an offence, it should be clear who can be prosecuted and punished[322] and who can represent corporations before the court. The additional stipulation can be regulated as well, such as who can be considered as "the mind" of corporations and when an act of the mind of corporations can be considered as the act of corporations. The detailed stipulation concerning how to establish the criminal liability of corporations is important in the Indonesian criminal legal system, because it will give a sufficient legal basis to prosecute corporations. The numerous ways the court implements the criminal liability of corporations in several cases, which Chapter 3 will discuss, will answer the questions about the reasons for detailing the stipulations on corporate criminal liability, also on procedural law.

[322] Usually the parties that can be prosecuted and punished are the corporation and/ or the natural person who has instructed the offence, as well as actually given a guidance.

Chapter 3

The Law Enforcement of the Corporate Criminal Liability in the Indonesian Criminal Legal System

3.1. Introduction

The criminal law enforcement within a country's legal system cannot be separated from the involvement of the law enforcement authorities. In their hands, the investigations, the prosecutions, the trials and the sentencing of the criminal offenders are conducted in response to behavioural misconduct. The discussion of the general development of corporate criminal liability around the globe as discussed in Chapter 1 shows that, as a new concept in criminal law, the criminal liability of corporations has unique characteristics compared to the criminal liability of natural persons. Therefore, the establishment of corporate criminal liability often incurs challenging problems both in substantive and procedural law, since the basis of criminal law only deals with the natural persons as the subject of criminal law. The problems related to establishing corporate criminal liability have also emerged in Indonesia. As already discussed in Chapter 2, the Indonesian criminal legal system has recognized corporations as the subject of the criminal law since 1950s, but the recognition of the criminal liability of corporations is still regulated within the Laws outside the criminal code (*KUHP*) and the Criminal Procedure Code (*KUHAP*). Based on those Laws, many offences in the Indonesian criminal legal system could be committed both by the natural persons and corporations, except the offences regulated in the *KUHP*. It seems clear that the Indonesian criminal legal system already has the legal basis to prosecute corporations in certain criminal cases, even though the Laws that recognize corporations as the subject of criminal punishment have various stipulations.

In accordance with the fact mentioned above, it is important to know the implementation of the Laws recognizing the criminal liability of corporations on cases in the Indonesian criminal legal system and the problems surrounding it. This chapter will first elaborate on the implementation of corporate criminal liability in Indonesia by examining several cases that involved corporations as the subjects. Then, the opinion of the Indonesian Courts when establishing the criminal liability of corporations in those cases will be analysed including the discussion of the enactment of the Indonesian Supreme Court internal regulation (PERMA) as a way to solve the regulation problems on corporate criminal liability.

In addition, the problems faced by the prosecutors when prosecuting the corporations will also be discussed along with their efforts to deal with the regulation problems in prosecuting corporations by regulating internal regulation in prosecuting corporations (PERJA). The discussion on the law enforcement of corporate criminal liability in Indonesia through several criminal cases will provide an overview of the development of the criminal liability of corporations in criminal law practices in Indonesia.

3.2. Cases of Criminal Liability of Corporations in Indonesia

Even though Indonesia has had the legal basis to prosecute corporations as criminal offenders in certain criminal case since the 1950s, there are few cases that brought corporations before the court. The limited number of cases related to the criminal liability of corporation is highlighted in 1991 in the research of *Muladi* and *Dwija Prijanto's* where efforts to find a court decision related to corporate criminal liability was very difficult. They found several criminal cases that correlated with corporations, but in those cases, the corporations were not the prosecution subjects.[323] Later, in 2006, *Sjahdeini* still concluded that there weren't any criminal case decisions related to corporations.[324] In his opinion, the lack of procedural law and knowledge of the law enforcers are two main reasons behind the absence of corporate cases.[325] This opinion is in line with a survey conducted by *Harkristuti Harkrisnowo* and *David K Linman* in 2006 providing an introductory description of the condition of the system of criminal liability of corporations in Indonesia.[326]

The results of the survey reflect the current condition in Indonesia. One of the results of the survey was that Indonesia did not have an objective set of standards or criteria that are used by the judiciary to establish the criminal liability of corporations. As a consequence, similar cases may have different results, based on the knowledge of the officers of the courts, that is, the judges. Moreover, the survey also found that the debate related to the way to establish the criminal liability of corporations has not only happened in the court, but also among Indonesian legal scholars.[327] The survey also found that the Laws that already recognize the criminal

[323] Muladi, Dwija Prijatno, *Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability)*, (Bandung: Sekolah Tinggi Bandung, 1991), p. 128.
[324] Remmy Sjahdeni, Pertanggungjawaban Pidana Korporasi (Corporate Criminal Liability), (Jakarta: Grafiti Pers, 2006), p. 199.
[325] *Ibid*, p. 200.
[326] Harkristuti Harkrisnowo and David K. Linnan, *Op.Cit.*,p.5.
[327] In Indonesian criminal legal system, legal scholars have the important position in the trial process as the expert witness and their opinions are often used as the basic idea by the judge to decide the case.

liability of corporations were rarely applied and the legal enforcers simply brought the director or person in charge in the offence before court to be sentenced.[328]

Nowadays, the ability to find case laws related to corporations has improved. Several corporations have been brought to the criminal court and found guilty for various crimes over the last eight years.[329] Before that period, it was quite difficult to find cases where corporations were the defendants in criminal cases. The prosecutor office annual reports during the period of 2014 to 2016 shows a positive trend toward the prosecution of corporations. In the annual report of 2014, the report did not mention the number of cases which involved corporations that were handled by prosecutor office. However, in 2015, according to the annual report, the prosecutor office handled 15 cases and 19 cases in 2016 report.[330]

Despite the problems of regulating corporate criminal liability within the Indonesian Laws, case laws that emerged in the last decade are interesting to discuss, because of the way the prosecutors prosecuted corporations and the court examined those cases will significantly influence the development of the system of corporate criminal liability in Indonesia. The next subchapter will discuss several important cases which reflect the ways the Indonesian criminal legal system developed its system of corporate criminal liability.

3.2.1. The Newmont Minahasa Case as an Attempt to Prosecute a Corporation for a Criminal Offence

The *Newmont Minahasa Case* is an example of prosecutors trying to prosecute corporations. Although the defenders were acquitted, it is important to discuss this case since it is an early example of prosecutors trying to prosecute corporations. In 2005, *Newmont Minahasa Company*, the U.S.-based mining company operating in Minahasa North Sulawesi was brought before the court for polluting the Buyat Bay in the North Sulawesi with toxic tailing waste from mining activities.[331] The charges were based on the investigation that concluded that the company, without any legal permit, dumped potentially harmful amounts of mercury and arsenic into Buyat Bay, near its mining site in the Minahasa regency. Then, this action led to health problems for many local villagers, such as skin diseases and neurological

[328] Harkristuti Harkrisnowo and David K. Linnan, *Op.Cit.*, p. 4
[329] In 2010 the prosecutor office succeed prosecuting corporation in *Dongwoo case* which will be discussed later. After that several corporations have been brought before the criminal court for various crimes.
[330] See the Indonesian Prosecutor Office annual report (2014, 2015, 2016) on https://www.kejaksaan.go.id/home_kinerja.php
[331] Indonesian Court Acquits Newmont Mining, See the New York Time, April 25, 2007, available at http://www.nytimes.com/2007/04/25/world/asia/25indo.html?pagewanted=all&_r=0, accessed on 11 May 2017.

disorders. In that case, the prosecutor used one bill of indictment to prosecute both the corporation and the natural person. The first defendant was Newmont *Minahasa Company*, represented by Richard Ness as the director of the corporation. Then, Richard Ness was prosecuted as the second defendant for the violation of the Article 41 or Article 42 of the Environmental Management Law Number 23 Year 1997 (hereinafter referred to as Environmental Law).[332] Under Article 41 of the Environmental Law, anyone who intentionally pollutes the environment could face up to 10 years of imprisonment and could be fined up to 500 million Rupiah (equal to 31.250 Euro)[333]. Under Article 42 of the Environmental Law, anyone who negligently pollutes the environment could face up to three years of imprisonment and could be fined up to 100 million Rupiah (equal to 6.250 Euro).

The defendants consistently denied any wrongdoing, saying the waste was treated in accordance with Indonesian government regulations and suggested the Buyat villagers could have fallen ill due to malnutrition and poor sanitation. The defendants also said that the operations of thousands of illegal miners, who used mercury, could be to blame for any mercury-related illnesses. The evidence brought to the court by the defendants based on the research of Japan's Minamata Institute, the Australian Commonwealth Scientific and Industrial Research Organization, which concluded that Newmont did not pollute the bay. Meanwhile, the prosecutor had proof from the police investigation that found significant levels of mercury. Subsequent joint investigation by Indonesian government officials, university professors, activists and the police also concluded that the bay was polluted with excessive levels of arsenic and mercury.

The case ended with the acquittal of both defendants because the prosecutor failed to prove that Newmont's system of depositing mine waste at the bottom of the bay via a half-mile-long pipe had polluted the environment or caused health problems for local villagers.[334] The court was in favour with the evidence given by the defendants because the defendants used internationally accredited organizations to gather evidence. The prosecutor then filed cassation at the Indonesian Supreme Court, which was later also denied and declared the acquittal for the defendants.

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[332] The Law Number 23 Year 1997 on Environmental Management Law had recognized the corporation as the subject of the criminal punishment, at this time that Law has been replaced by the Law Number 32 Year 2009 on Environmental Protection and Management.
[333] 1 Euro = 16.000 Rupiah.
[334] The Manado District Court Decision Number 284/Pid.B/2005/PN.MDO.

Even though the prosecution did not succeed in getting a conviction, the way the prosecutor brought the corporation as the first defendant and the director as the second defendant in one indictment was as a positive start of prosecuting corporations. Unfortunately, the court did not successfully established the criminal liability of the corporation in that case. This is because before the court examined the corporation's conduct, the court found that the pollution, as the most crucial element of the case, did not happen.

However, from the formulation of the indictment and expert testimony in the case, several remarks can be shown. Firstly, in the indictment, the corporation was the first accused. This means that the prosecutor was confident enough when deciding that the corporation was the main actor of the misconduct. In the indictment, the prosecutor based their accusation on the fact that the misconduct was committed within the sphere of the corporation since the decision to dispose of the waste was made by the corporation.

Secondly, the president director was the second accused because they did not take any action to prevent the increased parameter of the pollution and did not ensure that the corporation possessed a permit to dispose of its waste. The second accused knew that the corporation had not obtained a permit to dispose tailing into the sea and had not been allowed or had not given any instruction to stop the disposal. In the prosecutor's opinion, Richard Ness as the president director, had the duty and bared the responsibility for supervising, controlling and instructing his subordinates within the corporation.

3.2.2. The Dongwoo Case

The Summary of the Case

The Indonesian Supreme Court Decision Number 862 K/Pid.Sus/2010 (hereinafter referred to as *the Dongwoo Case*) was the first Indonesian Supreme Court decision related to the criminal liability of corporations.[335] This case is regarding the alleged violation of the Environmental Law, especially the violation of the Article 41 of the Environmental Law which states that:

> *Article 41*
>
> 1. *Any person who in contravention of the law intentionally carries out an action which results in environmental pollution and/or damage, is criminally liable to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp.500,000,000 (five hundred million rupiah).*

[335] This case was decided by the Indonesian Supreme Court in April, 22nd 2011.

> 2. *If a criminal action as provided for in (1) above causes the death or serious injury of a person, the person who carried out the criminal action is criminally liable to a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp.750, 000,000 (seven hundred and fifty million rupiah).*

The Dongwoo Environmental Indonesia (DEI) was the foreign investment company from South Korea that specialized in hazardous waste management. The company was located in Bekasi, West Java Indonesia. The core business of this company was to collect the hazardous waste from other companies and then conduct several waste treatments before sending it to the final waste disposal facility. During the period of 2005 to 2006 this corporation collected 468.2 tons of hazardous waste, but only 58.2 tons were sent to the final disposal facility. The other 410.2 tons of hazardous waste was kept in the company's warehouse without any further treatment. The improper treatment of the hazardous waste caused the waste to leak into the ground and polluted the groundwater around the warehouse, causing several illnesses to the people around the company's waste warehouse after consuming the polluted water.[336]

Since the case mentioned above involved a corporation, the way the prosecutor brought that case before the court is an interesting issue to discuss. In response to the violation of the Environmental Law by *Dongwoo* Corporation, the prosecutor firstly prosecuted all natural persons within the corporation who were involved in the misconduct, including the President Director of the DEI, *Kim Young Woo* and the Director of the DEI *Kim Byung Seop*. Those two directors were found guilty for the violation of Article 41 of the Environmental Law and sentenced to 6 months imprisonment and were fined 100 million Rupiah (approximately equal to 6400 Euro).[337] Based on that decision, the prosecutor filed a new case against the same misconduct but with a different subject, this time against the legal person, which in this case was DEI. In the bill of indictment, the prosecutor accused the corporation for the violation of the Article 41 of the Environmental Law in conjunction with the Article 45 and 47 of the Environmental Law and the Article 64 Paragraph 1 of the *KUHP*.[338] In the District Court, DEI was found guilty for intentionally polluting the environment and fined 350 million Rupiah (approximately equal to 21,800 Euro). In case the corporation failed to pay the fine, the court also imposed six months imprisonment on the corporation. Unsatisfied with this Bekasi District Court's decision, the defendant appealed to the Bandung High Court. In its decision, the

[336] The chronology is based on the fact In the Indonesian Supreme Court Decision Number 862 K/Pid.Sus/2010.
[337] The Bandung High Court Decision Number 157/Pid /2009 /PT.Bdg, on 11th May 2009.
[338] The Article 45 of the Environmental Law regulates that the fine for corporations should be increased by a-third. The Article 64 Paragraph 1 of the *KUHP* regulates about the continuous act which may be resulted in the increasing of the criminal sanction.

Bandung High Court agreed with the decision of the Bekasi District Court. Filing the cassation to the Supreme Court was the last effort taken by the defendant. The Indonesian Supreme Court agreed with the former decision but changed the punishment for the defendant to a fine of 650 million rupiahs (approximately equal to 40,600 Euro) and if the defendant failed to pay the fine, the Supreme Court would also impose 6 months imprisonment. In addition, the court also imposed additional punishments by depriving the proceeds of crime, in this case 410 tons of sludge that came from the illegal activities of the corporation.

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the Dongwoo Case

The *Dongwoo Case* has several interesting issues when analysing the way the prosecutor and the court examined the case. Furthermore, this case was the first decision of the Indonesian Supreme Court in corporate criminal liability case.

In that case, the inconsistency of writing the defendant's identity led to confusion about who was the actual subject of the case (the defendant). The inconsistency began during the process in the District Court. In the bill of indictment, the prosecutor who wanted to prosecute the corporation, appointed *Kim Young Woo*, the director of the DEI, as a representative of the corporation and as the defendant in their indictment instead of directly pointing the corporation itself as the defendant. In the bill of indictment, the prosecutor mentioned the identity of *Kim Young Woo* as the representative of the corporation and as the defendant and did not mention the identity of the corporation at all. The prosecutor seemed to be confused about the subject in that case when formulating the bill of indictment for legal persons. Instead of mentioning the identity of the corporation as the defendant, the prosecutor mentioned that the defendant is *Kim Young Woo*, the director and representative of the corporation.

Surprisingly, the District Court accepted the method employed by the prosecutor to formulate the identity of the defendant. In its decision, the District Court formulated the identity of the defendant in equivalent way as the prosecutor. The District Court was not consistent in formulating the defendant's identity. In the judgment part of the district court's decision, the formulation of the defendant's identity changed. The District Court stated that the defendant was the corporation (DEI) and imposed a fine of 350 million rupiah.

The Indonesian Supreme Court didn't do anything with the inconsistency of the identity of the defendant and still followed the form of the lower court's decision. This is shown in the first page of the Supreme Court decision that mentioned the identity of *Kim Young Woo* as the

representative of the corporation and as the defendant as the natural person. Then, during the declaration of guilt of the accused, the Supreme Court declared that DEI was the defendant and convicted this corporation.[339] In the memory of cassation filed to the Supreme Court, the defendant mentioned that the decision was obscure because the subject meant by the prosecutor was a corporation but in the bill of indictment the prosecutor mentioned the natural person. However, the court denied that claim when examining the case. The court did not consider the importance of a correct formulation of the defendant's identity when the case involved the corporation as the defendant. The approvals of how the prosecutor formulated the identity of the defendant and then changed that formulation of the defendant's identity in the court decision is proof of acceptance of the court.

The second controversy in the *Dongwoo Case* is the decision of the court to impose imprisonment in lieu of fine if the corporation failed to pay the fine. Similar to the inconsistency of writing the defendant's identity, the imprisonment in lieu of fine was imposed based on the bill of indictment. That fact is further proof of the prosecutor's confusion in determining the subject of the case. The request to impose imprisonment in lieu of fine when the defendant is a corporation, leads to the theoretical question who should undergo the imprisonment, in case the corporation fails to pay the fine. If the director and representative of the corporation is imprisoned when the corporation fails to pay a fine, the director would be the party that suffers most from the criminal sanctions, since they would be sanctioned as the natural person as well as the representative of the corporation. Moreover, the decision to impose imprisonment as the subsidiary sentence if the corporation failed to pay the fine is an improper sanction for corporations since it does not fit with the characteristics of the defendant.

Even though the way the formulation of the defendant's identity and the requested sanction raised a question, the courts, from the District Court to the Supreme Court accepted the bill of indictment and imposed that sanction on the defendant. Even then, the court changed the way the prosecutor formulated the identity of the defendant. When the controversy of this case was inquired to the Supreme Court, the Chief of the Supreme Court Criminal Law Chamber, *Artidjo Alkostar*, stated that imprisonment as an alternative sanction is improper, since the subject of the decision is a corporation. However, considering the fact that the case was examined by other Supreme Court judges, he did not want to give further comment.[340]

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[339]The Indonesian Supreme Court Decision Number 862 K/Pid.Sus/2010, p. 95.
[340] Interview with Artidjo Alkostar (The Chief of Criminal Law Chamber, Indonesian Supreme Court), (Jakarta, October 22nd 2014).

In establishing the criminal liability of the corporation in *the Dongwoo case,* the Court at least based its decision on three facts. The first fact is that the misconduct was committed and ordered by Kim Young Woo, the director of the DEI. The second fact is that Kim Young Woo as a natural person was found guilty of causing the environmental pollution in an earlier trial, which became solid proof that the corporation could also be considered as the perpetrator in the misconduct. The third is that the court also based its decision on the fact that the misconduct of the corporation was committed within the daily activity of the corporation and was related to the business core of the corporation. Therefore, the court decided that the corporation intentionally committed the environmental pollution.

3.2.3. The Giri Jaladhiwana Case

The Summary of the Case

The Banjarmasin High Court Decision Number 04/Pid.Sus/PT.BJM (hereinafter referred to as GJW case) was the final and binding decision on a corruption case that involved the corporation *PT Giri Jaladhi Wana* (hereinafter referred to as PT GJW).[341] This was a landmark case for prosecutors, especially regarding the way they handled a corporation as the defendant and because it was the first corporate corruption case. The PT GJW case concerned a public-private partnership contract between the City of Banjarmasin and PT GJW, a general contractor company, was contracted to build 5,145 shops in Banjarmasin Market Centre in Banjarmasin South Kalimantan in 1998. The City of Banjarmasin was contractually obligated to provide the land for the project and facilitate all the licenses related to the project. On the other hand, PT GJW was also obliged to finance the construction process of the centre market. From that contract, PT GJW obtained the right to share profits with the government, the right to manage the sales of the shops and the use of the market for a certain period. To finance the project, PT GJW applied for loans at the Mandiri Bank, a state-owned enterprise, by using the Banjarmasin Centre Market land certificate, which was owned by the government as the guarantee.

In the construction process of the market centre, PT GJW built 900 additional shops within the market without permission from the Banjarmasin City and sold those shops for the benefit of the corporation. PT GJW also falsified reports to the government that mentioned that the centre market construction was incomplete to avoid paying the share to the Banjarmasin

[341] The Banjarmasin High Court Decision Number 04/Pid.Sus/PT.BJM is available at https://putusan.mahkamahagung.go.id/putusan/9918b5c5a0328019072a212e01279748.

City government. That conduct was also intended to delay the obligation to pay the debt to the Mandiri Bank. The misconduct of the PT GJW resulted in a 7.7 billion Rupiah (approximately equal to 4,800,000 Euro) state loss, or the loss of sharing profits for the Banjarmasin City. Since the Mandiri Bank was a state-owned enterprise, the non-performing loan by the PT GJW caused by the misconduct of PT GJW was also a loss to the state.[342] For this reason, the prosecutor brought the GJW before the court for violating the Law on Eradication of Corruption.

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the GJW Case

The prosecution method of the GJW draws parallels with the *Dongwoo Corporation* case. First, the prosecutor prosecuted the natural persons within the corporation. After the natural person was convicted in a final and binding court decision, the prosecutor filed a new case to prosecute the corporation. In the first trial of the GJW case, the Director of PT GJW was found guilty for the violation of Article 2 of the Law on Eradication of Corruption, which mentions:

> *Article 2*
>
> *"Anybody who illegally commits an act to enrich himself or another person or a corporation which may cause loss to the state finance or state economy, shall be sentenced to life imprisonment or minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years, and a minimum fine of Rp.200,000,000 (two hundred million rupiah) and a maximum fine of Rp.1,000,000,000 (one billion rupiah)."*

For his misconduct, the director of PT GJW was sent to prison for 5 years and fined 150 million Rupiah (approximately equal to 9,000 Euro). The court also imposed an additional sanction on the director of PT GJW to pay the compensation of the state loss of 24,8 billion Rupiah (approximately equal to 1,550,000 Euro).

After the final decision of the court to impose criminal sanctions on the director of the PT GJW, the prosecutor started to prosecute the corporation on the basis of the same Article 2. The final decision of this case was already reached in the Banjarmasin High Court, as both parties did not file cassation to the Supreme Court. In the trial, the court decided that the corporation was guilty for committing an act to enrich itself or another person and caused loss to the state's finances or economy. In the GJW case, to establish the criminal liability of the corporation, the court used several criteria based on the stipulation on Article 20 paragraph 2

[342] State loss is one of the important factor to establish the corruption offences in the Corruption Law in Indonesia.

of the Law on Eradication of Corruption and the testimony of the expert witness. Article 20 paragraph 2 mentions:

> *"The criminal act of corruption is understood to be committed by a corporation in the event that the act is committed by people who are, based on work and other relations, act in the corporate environment, both personally and collectively"*

In addition, the expert witness testified before the court to explain the theory of corporate criminal liability.[343] The expert stated that to establish the criminal liability of a corporation, several criteria should be met, i.e.:[344]

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

There are several important court opinions in the establishment of the criminal liability of corporation in that case. Firstly, the fact that the director of the PT GJW was found guilty for committing a corruption crime in the previous case was enough proof to decide that the corporation had also committed corruption because the director of the PT GJW is the directing mind of the corporation. Secondly, to determine that the misconduct is committed within the sphere of the corporation, the court used the *intra vires* doctrine. This means that the misconduct is committed within the scope of a corporation, when the misconduct is in line with the activities of a corporation based on their articles of corporation. Thirdly, the fact that the corporation benefited from the misconduct was a consideration of the court when sanctioning the corporation. Fourthly and lastly, the criteria mentioned by the expert witness were quoted by the judges to establish the criminal liability of the PT GJW. Even though those five criteria are not cumulative, the court found that the misconduct if the corporation met the criteria.

[343] The expert was *Remmy Sjahdeini*, a law professor from University of Indonesia.
[344] The opinion of *Remmy Sjahdeini* is often used by the Indonesian prosecutors to prosecute a corporation.

Even though the trial process between the *Dongwoo Case* and the *GJW Case* happened between 2010 to 2011 and has similarity in prosecuting the corporation after the natural persons, the GJW case is a better example of the implementation of corporate criminal liability for several reasons.

Firstly, in this case, the way the prosecutor formulated the bill of indictment was different with the formulation of the bill of indictment in the Dongwoo case. In the GJW Case, the prosecutor directly mentioned the PT GJW as the defendant in the bill of indictment as well its identity. Furthermore, in that case the prosecutor mentioned that the corporation was represented by its lawyer not by the director of the corporation.

Secondly, the sanction requested by the prosecutor and the sanction imposed by the court on the corporation was based on the characteristics of the corporation, because the fine was imposed without mentioning imprisonment in lieu of fine as the subsidiary punishment. Furthermore, the court also imposed a six months temporary closure on the corporation as an additional sanction. In this case, the prosecutor did not ask the court to impose an additional sanction on the corporation to compensate the state loss. The prosecutor did not request this because the sanction to compensate state loss had been already imposed on the director of the corporation in the previous case. Since the corporation was also found guilty of committing corruption, the decision to impose a sanction to compensate state loss only to the natural person is interesting.

The Law on Eradication of Corruption has a complete stipulation on sanctioning to compensate state loss if the subject is a natural person. The natural person, who fails to pay the fine to compensate state loss, shall be confiscated of all their assets to pay the sanction. Then, if the assets are not sufficient to pay the fine, an imprisonment in lieu of fine will be imposed on the natural person.[345] In contrast, if the defendant is a corporation, there is no further stipulation about insufficient corporate assets. That stipulation leads to an opinion that sanctioning the natural person with a fine to compensate the state's loss is easier to execute, because if the defendant's asset is not sufficient to pay the fine, the result of that sanction can be reached, which is imprisonment in lieu of fine. On the other hand, when a corporation is the subject, the prosecutor's options are still not clear.

[345] Article 18 Para 2 and 3 Indonesian Law on Eradicating Corruption.

3.2.4. The Suwir Laut Case

The Summary of the Case

The Supreme Court Decision Number 2239K/Pid.Sus/2012 was the final and binding decision related to tax crime which involved *Suwir Laut*. *Suwir Laut*, who was the defendant in this case was the tax manager of the Asian Agri Group, an Indonesian holding company, which became one of Asian largest palm oil producers. As a tax manager, *Suwir Laut*'s primary duty was to make the company's consolidated financial statements and submit the company's tax report. Between 2002 and 2005 *Suwir Laut* submitted false tax reports by reducing the profit of the company to avoid the tax of the 14 companies belonging to the Asian Agri Group. The act of *Suwir Laut* caused a state loss of around 1,25 trillion Rupiah (equal to 78,125,000 Euro). Suwir Laut was charged by the prosecutor for the violation of Article 39, Paragraph 1, Letter c, Law Number 6, Year 1983 regarding Taxation General Provisions and Procedures as already amended by Law Number 16 Year 2000. This article stipulates:

> *"Whosoever intentionally files a tax return and/or the information provided is false or incomplete; thus causing losses to the state revenues, shall be punished by imprisonment for a period not exceeding 6 year and shall be fined an amount not exceeding 4 times the amount of unpaid or underpaid tax"*

For the misconduct, the prosecutor requested that the Court impose a three year imprisonment followed by a fine of Rp. 5,000,000,000 (five billion Rupiah)[346] on *Suwir Laut*.

The Central Jakarta District Court decided to reject the prosecutor's bill of indictment against *Suwir Laut* because the criminal charge to the defendant was premature.[347] The opinion of the District Court was that in tax cases, the administrative law should be taken into account first before prosecuting the offender in criminal cases. Thus, the criminal prosecution should be the last resort *(ultimum remidium)* to deal with tax evasion.[348] Furthermore, the Jakarta High Court had the same opinion when the prosecutor appealed the District Court decision. They also declared that the prosecution of *Suwir Laut* was premature.[349]

[346] Equal to approximately Euro 333,000 (1 Euro equal to 15,000 Rupiah).
[347] The decision to reject the bill of indictment in the final process of the trial by the District Court because the prosecution was premature lead to controversy since the Indonesian criminal legal system only recognizes three types of the final court decisions namely conviction, acquittal and dismissal of the charge. The rejection of the bill of the indictment actually should be decided in the early beginning of the trial by an interlocutory decision. *See* the explanation of the types of the final decision by the Indonesian criminal court in the sub chapter 3.1.2.
[348] See the Central Jakarta District Court Number 234/Pid.B/2011/PN.JKT.PST.
[349] See Jakarta High Court Decision Number 241/Pid.2012/PT.DKI.

However, the Indonesian Supreme Court had a different opinion when examining the case based on the cassation of the prosecutor. The opinion of the Supreme Court was that the prosecution of *Suwir Laut* for falsifying tax reports to avoid the tax payment was not premature because the defendant did not show the good will to complete their obligation when the tax office investigators investigated the case. The court stated that the defendant had intentionally falsified the data, which was contrary to the Self-Assessment tax collection system whereby the tax subject has the right to calculate, pay, and report its own taxes. It was proven that the defendant filed bogus company liabilities data over four years for 14 companies, enabling the corporations to pay little to no tax. The Supreme Court decided that *Suwir Laut,* the tax manager of the group, was legally and convincingly guilty for committing tax crimes by submitting false or misleading notifications and/or information about the corporation's tax reports to avoid tax payment. The Supreme Court imposed a two year imprisonment sentence with three years' probation along with a special condition that *Asian Agri Group* must pay a fine of 2.5 trillion Rupiah (approximately equal to 156,250,000 Euro). That fine was two times the tax that should have been paid by the *Asian Agri Group* between the periods of 2002 to 2005.

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the Suwir Laut Case

The Suwir Laut case is an example of the contemporary position of the Indonesian Supreme Court that creates an opportunity to sanction corporations even though it is not the defendant of the case. In the *Suwir Laut case,* the Supreme Court believed that the conduct of *Suwir Laut* as tax manager of the Asian Agri Group was the personification of the corporation, and the corporation became the party that benefited the most from the misconduct. Based on those facts, the Supreme Court decided to only impose a probation sanction on *Suwir Laut* and sanctioned the corporation to compensate the unpaid tax. The imposition of fine from the Supreme Court to corporation was not based on the request of the prosecutor. In their bill of indictment, the prosecutor did not request the court impose a fine on the corporation. The prosecutor only requested a fine for *Suwir Laut*, a request that the Supreme Court satisfied.

The court stated the reasons for imposing the fine on the corporation.[350] The court realized that the corporation was not formally the defendant in the case. However, the Court found that the misconduct of *Suwir Laut* as tax manager was based on the will of the corporation and

[350] Supreme Court Decision Number 2239K/Pid.Sus/2012, 18 December 2012. P.472.

benefited the corporation. Therefore, it is unfair if only *Suwir Laut* should be criminally liable. In the view of the Supreme Court, in that case, individual liability should be simultaneously implemented with corporate liability based on the doctrine of *respondeat superior* or vicarious liability. The Supreme Court argued that the doctrine creates the possibility to impose criminal liability on corporations based on the misconduct of its employee. The Supreme Court said this theory is accepted in the modern criminal law system. Moreover, the court also gave an argument based on the development of the criminal liability of corporations in the Netherlands. The court said that tax law in the Netherlands has recognized the criminal liability of corporations. Since taxes have been reliable for state budget revenue, convicting corporations is in the practical interest of maximizing the enforcement of tax law. Therefore, it is important for Indonesia to consider to adopt the Dutch way. However, the court did not explain whether it is possible in the Netherlands to sanction a corporation, when the corporation is not the defendant within the case.

The argument used by the court to sanction the corporation is groundless. In Tax Law, corporations are recognized as legal subjects, just as natural persons. That recognition means that the corporation has the same rights and obligations as a natural person, including the right for a fair trial in criminal cases. The *Asian Agri* has the right to defend itself in the court before being sanctioned. In this case, *Asian Agri* did not have any opportunity to defend itself. In the District Court and the High Court, the decision only examined *Suwir Laut* as the defendant but suddenly, in final decision by Supreme Court, the corporation was sanctioned by the court. The corporation did not have any right to challenge the decision, because the corporation was not the party of the case who could file judicial review against the decision of the Supreme Court. So, the *Asian Agri* cannot do anything except comply with the Supreme Court's decision by paying the fine.[351]

3.2.5. The Indar Atmanto Case

The Summary of the Case

The Indonesian Supreme Court Decision Number 787 K/PID.SUS/2014 (hereinafter referred to as Indar Atmanto Case) is the most recent case related to the imposition of the criminal sanctions on corporations for violating the Law on Eradication of Corruption.[352] This

[351] The Indonesian Supreme Court Decision in that case is an executable decision, even though Asian Agri was not the subject of the case, the corporation must comply with that decision. See Romli Atmasasmita, *Hukum Kejahatan Bisnis: Teori dan Praktik di era Globalisasi, (Jakarta: Prenadamedia Group, 2014), p. 203.*
[352] The decision: https://putusan.mahkamahagung.go.id/putusan/dea98c30a2a67049aae553bd5b31ed64.

case reached the final decision by the Indonesian Supreme Court on July, 10th 2014. The defendant of this case was *Indar Atmanto*, the former director of Indosat Mega Media (IM2), a subsidiary of PT Indosat, a telecommunication services and networks provider company in Indonesia. The case is concerned with a cooperation agreement that allowed IM2 to use Indosat's resources in order for IM2 to provide internet services to the public. The prosecutor accused that by renting the frequency from Indosat, IM2 had unlawfully used the 2.1-gigahertz frequency and enjoyed the lower tax rate for a public company (Indosat) and did not pay the duties incurred by such use. That act resulted in a financial loss to the state.

The Corruption Court of the Central Jakarta District Court found *Indar Atmanto* guilty for corruption crimes by representing IM2 when entering into a cooperation agreement with Indosat, which lead to illegally enriching the company and creating a financial loss for the state. The District Court sentenced *Indar Atmanto* to four years imprisonment and fined him 200 million Rupiah (equal to 12,900 Euro). In its decision, the District Court had also ordered IM2 to pay 1.3 trillion Rupiah (equal to 81,250,000 Euro) to the state as a compensation for financial loss. The defendant then filed an appeal to the Jakarta High Court, which agreed with the District Court Decision but annulled the imposition of the sanction to the corporation (IM2) to pay the state compensation. The High Court stated that since the corporation is the subject of the Law on Eradication of Corruption, the imposition of any criminal sanction related to the corruption offences should include the corporation as the defendant. Therefore, in its decision, the Jakarta High Court only imposed the criminal sanction on *Indar Atmanto*, the defendant of that case. The High Court sentenced *Indar Atmanto* to eight years imprisonment and fined him 200 million Rupiah (equal to 12,500 Euro).

The case went to the Indonesian Supreme Court when both the prosecutor and the defendant filed the cassation. The prosecutor filed the cassation because the Jakarta High Court had annulled the imposition of the compensation of the state loss on the corporation. The final decision by the Indonesian Supreme Court accepted the cassation by the prosecutor by sentencing *Indar Atmanto* to eight years imprisonment and fined him 300 million Rupiah (equal to 18,750 Euro). The Supreme Court did not agree with the decision of the Jakarta High Court that annulled the imposition of the compensation of the state loss. The Supreme Court reinstated the sanction on the corporation. That means that IM2 had to compensate for the losses incurred by the State by paying a fine of 1,3 trillion Rupiah (equal to 81,250,000 Euro).

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the Indar Atmanto Case

The *Indar Atmanto* case is another example of the position of the Indonesian Supreme Court that opens the opportunity to sanction the corporation when it is not the defendant of the case. The prosecution of *Indar Atmanto*, the former director of the corporation, is the first prosecution related to the corruption offence that emerged from the contract between Indosat and IM2. Actually, the prosecutor's office will prepare the second prosecution directly to the corporation, in this case the IM2, for committing corruption since the corporation already became the suspect in the same case.[353] It seems the prosecutors intended to wait for the final and binding decision in the first case. The prosecutor uses that strategy to provide solid proof to establish the criminal liability of corporations by using the conviction of the director of the corporation. However, in the *Indar Atmanto* case, the prosecutor formulated the charge to *Indar Atmanto* in such a way that they did not only ask the court to impose the imprisonment and fine on *Indar Atmanto* himself as the defendant, but also sanction the corporation to compensate the state's loss from the corruption.

The prosecutor's opinion expressed in its bill of indictment was that Indar Atmanto's misconduct was committed in his capacity as a director of the corporation and for the benefit of the corporation; therefore, the corporation should compensate the state's loss from corruption. The way the prosecutor formulated the bill of indictment has led to questions about the requested sanction on the corporation, since the corporation was not the defendant in that case, but was in the latter case when the prosecutor filed a second prosecution against the corporation.

Surprisingly, the request of the prosecutor to sanction the corporation was accepted by The District Court. In their decision, the District Court stated, firstly, that the defendant committed the misconduct in his capacity as the director of the corporation when signing the contract between Indosat and IM2. The District Court said that based on vicarious liability theory, the corporation could be liable for the act of their employee during employment. In this case, the conduct of *Indar Atmanto* as the director of corporation could lead to the responsibility of IM2. Therefore, the District Court stated that both *Indar Atmanto* and IM2 were the subject of the case even though formally, the defendant was only *Indar Atmanto*. Secondly, the District Court

[353] Perusahaan Indosat dan IM2 Jadi Tersangka (Indosat and IM2 Became the Suspect), *Kompas.Com*, 5 January 2013. See https://nasional.kompas.com/read/2013/01/05/06291316/Perusahaan.Indosat.dan.IM2.Jadi.Tersangka.

found that all profits from the contract between IM2 and Indosat were enjoyed by the corporation; therefore, in the District Court's view it is fair for the corporation to compensate the state's loss.

The Jakarta High Court demonstrated a different opinion in their appeal decision. The court stated that a corporation is also a legal subject in the Law on Eradication of Corruption. Therefore, a corporation must become the defendant within the case if the court wants to impose a criminal sanction. Since the IM2 was not the defendant, the imposition of the sanction to the corporation in *the Indar Atmanto* case was improper. Moreover, the additional sanction is a type of sanction that follows primary sanction to the same subject. In that case, the primary sanction was imposed to *Indar Atmanto*, but the additional sanction was imposed on another subject, that is the corporation. The Jakarta High Court also mentioned that if the prosecutor wanted the corporation to compensate the state's loss, the prosecutor should prosecute the corporation itself as the defendant or file a case in civil court.

The decision of the Jakarta High Court related to the imposition of a criminal sanction on the corporation is the correct approach for punishing a corporation. Surprisingly the Supreme Court had a different view. In their cassation decision, the Supreme Court annulled the decision of the appeal court in favour of the argument of the District Court. The Supreme Court stated that the Law on Eradication of Corruption recognizes natural persons and legal persons as the legal subjects. Article 20 Paragraph 1 the Law on Eradication of Corruption states that if the criminal act of corruption is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation and/or its board of directors. In the view of the Supreme Court, that article has an alternative cumulative liability system in prosecuting and punishing corruption crimes conducted by or on behalf of a corporation. Thus, even though the prosecutor did not specifically or formally prosecute the corporation, since the defendant committed the misconduct on behalf of the corporation and in his capacity as the director of the corporation, the additional punishment to compensate the state's loss can be imposed on the corporation.

3.2.6. The Kallista Alam Case

The Summary of the Case

Kallista Alam is a palm oil company in Nagan Raya Regency, Aceh Province. This company has had a permit from the Aceh governor since 2011, to develop 1,600 hectares of palm oil plantations in Tripa forest in Leuser ecosystem. In their operation, this company is

illegally using fire to clear land before cultivating the palm oil trees (land clearing). The misconduct happened several times during the period of March 2012 to June 2012. Even though it is illegal, using fire to clear the land is often used by oil palm companies because it is a cheaper way to clear the land for new planting. Consequently, Indonesia and several neighboring countries often face serious problems related to the effect of illegal burning, such as air pollution.[354]

As a response to the misconduct, the prosecutor prosecuted the corporation for continuously burning land during the period of March 2012 to June 2012 based on Article 108 in conjunction with Article 69, Paragraph 1, Section H, Law Number 32, Year 2009 on Environmental Protection and Management. Article 69, Paragraph 1, Section H regulates that everyone is prohibited from opening land by open-burning and the violation of that article based on Article 108 is subject to imprisonment for three years at the minimum and 10 years at the maximum and a fine amounting to minimum three billion Rupiah and maximum ten billion Rupiah. Since the defendant was a corporation, the prosecutor also used the stipulation in Article 116, Paragraph 1, Section A, Article 118, and Article 119.[355] The fact that the misconduct was committed during the period of four months, the prosecutor also used Article 64, paragraph 1, *KUHP* about a continuing act (*perbuatan berlanjut*/*voorgezette handelingen*).

The Meulaboh District Court found PT *Kallista Alam* guilty for continuing to commit illegal burning of Tripa peatland during the period of March to June 2012.[356] For that crime, PT *Kallista Alam* was sentenced to pay a three billion Rupiah fine (190,500 Euro). After that decision, PT *Kallista Alam* filed an appeal to the Banda Aceh High Court. In the appeal decision, the high court was still in favour of the decision of the district court and restated the punishment to PT *Kallista Alam* to pay the fine.[357] Finally, in cassation which was filled by the defendant, the Supreme Court was also still in line with the position of Banda Aceh High Court to sanction the corporation using criminal sanctions which was still in line with the District Court decision.[358]

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[354] Singapore and Malaysia are the neighbouring countries which suffered most from the forest fire Sumatera and Kalimantan Island. See Indonesia's fires labelled a 'Crime Against Humanity' The Guardian Online 26 October 2015, available at https://www.theguardian.com/world/2015/oct/26/indonesias-fires-crime-against-humanity-hundreds-of-thousands-suffer, accessed on 20 December 2015.
[355] See the discussion of those Articles in Chapter 2.
[356] Meulaboh District Court Decision Number 131/Pid.B/2013/PN.MBO.
[357] Banda Aceh High Court Decision Number 201/Pid/2014/PT BNA.
[358] Supreme Court Decision Number 1554 K/Pid.Sus/2015.

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the Kallista Alam Case

The Kallista Alam case can be considered an important case related to the enforcement of the EPM Law. To deal with the illegal burning committed by PT *Kallista Alam*, the government used criminal law, administrative law and civil law action.[359] All those actions can be seen as the implementation of a "multi-door approach" in Indonesia to tackle environment-related crimes in forest and peatlands, including illegal forest burning, by using all possible legal actions.[360] Surprisingly, all those legal actions have positive results. In civil law for example, the lawsuit filed by the government got positive results. The Supreme Court ordered PT *Kallista Alam* to pay 366 billion Rupiah (23,238,100 Euro) in fines for illegally burning the peatland, which will be used as a recovery cost of the burned forest.

In criminal law, to deal with the crime, the prosecutor's office prosecuted both the natural person (*Subianto Rusid*, Director of PT *Kallista Alam*) the and legal person (PT *Kallista Alam*) through separate cases. The interesting fact from those cases is that the prosecution was conducted in parallel way, with separate indictments and different crimes. In other cases related to corporations, the prosecutors preferred to prosecute the natural person before prosecuting the corporation because it is easier to then prosecute the corporation once the natural person has been found guilty.[361] However, those two cases ended differently, which will be discussed as follow.

Related to forest burning by *PT Kallista Alam*, the prosecutor filed two different indictments. For the natural person, the prosecutor prosecuted the director of the company (*Subianto Rusid*) for the violation of Article 46 (1) in conjunction with Article 46 Paragraph2 Law Number 18 Year 2004 on Plantation Law. [362] Then, for the corporation, the prosecutor prosecuted *PT Kallista Alam* for the violation of the EPM Law. The District Court examined both cases and concluded their decisions on July 8th 2014. *Subianto Rusid* was found guilty for negligently running a plantation business without holding a plantation business permit based

[359] See http://www.thejakartapost.com/news/2015/09/13/record-fine-against-plantation-company-upheld.html

[360] See further discussion on multi-door approach on the following website and forum: http://www.id.undp.org/content/indonesia/en/home/presscenter/articles/2016/03/21/-blog-multi-door-approach-to-address-forest-related-crimes-in-indonesia.html.

[361] See for example Dongwoo case and GJW case.

[362] Article 46 of the Plantation Law stipulates the prohibition to carry on a plantation crop farming business without holding a plantation business permit. See the English version of the Plantation Law on http://portal.fiskal.depkeu.go.id/dbpkppim/index.php?r=dokumen/preview&id=192, accessed on 2 October 2015.

on Article 46, Paragraph 2, of the Plantation Law.[363] PT *Kallista Alam* was found guilty for continuing to commit illegal burning of Tripa peatland during the period of March to June 2012. Both cases went to appeal and cassation and ended in different results. In the appeal of the *Subianto Rusid* case,[364] the High Court believed that the criminal act was proven but all guilt was absence from the defendant; therefore, the case was dismissed.[365] The High Court found that the defendant actually had the permit to run the plantation business because the defendant already submitted the application to renew the permit but the government did not respond to the submission. Based on the law, when the government does not decide whether to accept or deny the submission of permit within 30 days, the permit submission is considered accepted. In cassation of *Rusdianto Rusid* case, the Supreme Court also agreed with the position of the Banda Aceh High Court and dismissed the case.

In contrast, the prosecution of the corporation had a different result. There are several interesting points related to the prosecution of PT *Kallista Alam*. Firstly, the conviction of a natural person within the corporation is not a decisive requirement to punish a corporation. In that case, even though the prosecutor did not successfully prosecute the director of the corporation, the prosecution towards the corporation had a positive result.

Secondly, *PT Kallista Alam* was found guilty for committing illegal burning, based on the fact for a palm oil company with large plantation areas, the company only had limited fire and rescue equipment. Moreover, the corporation did not have a single fire lookout tower to ensure the prevention of land burning. The court believed that based on the EPM Law, the company must implement the prudential principle when running the business. The fact that the fire was used to open land and the company failed to handle the land burning because of the limited equipment, established the criminal liability of corporation.

Thirdly, the court in this case denied the opinion of the criminal law expert who testified before the Meulaboh District Court. In his testimony, the expert stated that a corporation can only be criminally liable for land burning when the corporation has ordered or became the leader of the misconduct. In that case the expert stated that the corporation cannot be criminally liable because there is no evidence the corporation ordered the land burning.[366] Furthermore,

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[363] Maulaboh Distrct Court Decision Number 132/Pid.B/2013/PN.MBO.
[364] Banda Aceh High Court Decision Number 186/Pid/2014/PT BNA.
[365] In Indonesia this decision is called "*lepas dari segala tuntutan hukum*" (a judgment of dismissal of all charges). It also can be called as *AVAS (Afwezigheid van Alle Schuld)* which is derived from Dutch criminal law terminology.
[366] Meulaboh District Court Decision Number 131/Pid.B/2013/PN.MBO, pp. 132-133.

the expert also stated that the corporation should be prosecuted for the violation of the Plantation Law, not for the violation of the EPM Law because the Plantation Law is more specific than RPM Law.

Lastly, the court in this case accepted that the stipulation in the first book of *KUHP*, in this case the Article 64 on continuing act, can be implemented to the corporation, even though the criminal code has not recognized the corporation as its subject.

3.2.7. The Cakrawala Nusadimensi Case

The Summary of the Case

The *PT. Cakrawala Nusadimensi* case is a corporation corruption case related to the land procurement for a real estate project that involved public land owned by the Bekasi Municipality located in Sumur Batu, Bekasi, West Java Province. This corporation is a real estate developer company located in Jakarta, the capital city of Indonesia that runs several real estate projects within the Bekasi area. During the period of January 2012 to April 2012 the company was conducting land procurement to build their new real estate in Bekasi. In that process, the company was interested in the 10,882 square meters of land that they knew was public land, earmarked for a public cemetery by Bekasi Municipality. Then, *Gatot Sutedjo*, a civil servant of Bekasi Municipality who was responsible for administering that land, offered to help the company to get the land through a land swap.

PT *Cakrawala Nusadimensi* was asked by *Gatot Sutedjo* to prepare 11,080 square meters as a substitute land and also 5,464 square meters of land as his payment for helping the company, including 16 million Rupiahs (1000 Euro) as an administrative cost. As a response to that offer, the board of directors of the company held a meeting and decided to accept the offer and fulfilled all requests from *Gatot Sutedjo*. Since the land swap needs a complex procedure and an approval from city council, which was impossible in that case, *Gatot Sutedjo,* who has knowledge and experience in administering public land, committed forgery of public land documents. He did this in collaboration with other Bekasi Municipality officers who were in charge of making related documents to support the land swap process. Finally, the land swap process finished and the public land went to *PT Cakrawala Nusadimensi*. Bekasi Municipality received new land as a replacement for their asset. After receiving the land ownership, the corporation divided 10,822 square meters of the land into 120 land units and built houses on 79 land units. The corporation successfully sold 72 out of 79 housing units to consumers.

The Way the Legal Enforcers Implemented Corporate Criminal Liability in the Cakrawala Nusadimensi Case

The Cakrawala Nusadimensi case reached a final and binding decision just after the decision of the Bandung District Court, as both the defendant and the prosecutor did not file an appeal against the decision.[367] For the misconduct, *PT Cakrawala Nusadimensi* was prosecuted for the violation of the Law on Eradication of Corruption under Article 2, Paragraph 1, in conjunction with Article 18 and Article 20 and also in conjunction with Article 55 of *KUHP* on participation in criminal offence together with *Gatot Sutedjo*.[368] Later, in the District Court, the company was found guilty for illegally committing an act to enrich itself, causing loss to state finances by illegally swapping public land based on Article 2 of the Law on the Eradication of Corruption.

The company was sanctioned to pay a fine of 700 million Rupiahs (44,000 Euro) and in its decision, the court gave the company one month to pay the fine. If the company failed to pay the fine within that time, the company's assets would be confiscated and auctioned. In addition, the 10,882 square meters of public land that was the object of corruption was deprived by the state, but all houses on that land were given back to the company. Although this case is only a district court decision, the *Cakrawala Nusadimensi* case is important for several reasons.

Firstly, since the misconduct was committed with *Gatot Sutedjo*, who has not been prosecuted yet because he is still on the run, the prosecutor used Article 55 of the *KUHP* on

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[367] Bandung District Court Decision Number 65/Pid.Sus/TPK/2016/PN.Bdg.

[368] The Article 2 (1) of the Corruption Law stipulates:
Anybody who illegally commits an act to enrich himself or another person or a corporation which may cause loss to the state finance or state economy, shall be sentenced to life imprisonment or minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years, and a minimum fine of Rp.200,000,000 (two hundred million rupiah) and a maximum fine of Rp.1,000,000,000 (one billion rupiah).
Article 18 Stipulates
(1) In addition to the additional sentence as referred to in the Criminal Code, the additional sentences are:

- *a. confiscation of mobile goods or immobile goods or immobile goods used for or obtained from the criminal act of corruption, including the company owned by the accused, in which the criminal act of corruption is committed and any goods that have replaced the initial goods.*
- *b. the compensation paid shall be to a maximum of twice the wealth obtained from the criminal act of corruption.*
- *c. whole or partial closing of the company for maximum period of 1 (one) year.*
- *d. revocation wholly or partially of rights or abolishment wholly or partially of profits, which have been or can be given by the government to the accused.*

(2) In the event that the accused does not pay the compensation as referred to in paragraph (1) letter b in maximum period of 1 (one) month after the verdict of the court has obtained legal permanent power, the wealth can be confiscated by the prosecutor and auctioned to cover compensation.
(3) In the event that the accused does not have adequate wealth to pay the compensation as referred to in paragraph (1) letter b, the accused is merely sentenced to a period that does not exceed the maximum sentence the main crime, in accordance with the provision in this law, with the period of the sentence having been determined in the court verdict

participation in criminal offences. In its decision, the Court considered the corporation as the person who commit the offence *(pleger)* on the reason that tje corporation actively committed an act to swap land owning by preparing the replacement land and paying the administrative expenses together with Gatot *Sutedjo* (the fugitive). However, the prosecutor did not include the director of the corporation at all, not even in the separate cases. Compared to the *Kallista Alam* case where the prosecutor simultaneously prosecuted the natural person and the corporation, in this case the prosecutor directly prosecuted the corporation without involving the natural person since *Gatot Sutedjo* is still on the run and the directors of corporation were not prosecuted.

Secondly, to establish the criminal liability of the corporation, the District Court based their argument on the fact that the decision to accept the offer from *Gatot Sutedjo* to help the company to get public land through illegal land swapping was decided during the board of directors' meeting. That fact is the main reason to establish the criminal act and the criminal liability of corporations. The decision of the company was considered imprudent and unexamined. The court found that the company actually had known the status of the public land and the appropriate procedure to procure it, but they decided to take a short cut by hiring *Gatot Sutedjo.*

Thirdly, the District Court did not impose additional sanctions to compensate state loss based on Article 18 of the Law on Corruption Law because the Court was in the opinion that the public land had already been deprived and annulled in the swap transaction. The profit received by the company resulted from the house selling and it did not have any correlation with the state asset. Therefore, in that case the corporation was only fined and the deprived of the land. The interesting part of the decision is that the court also stipulated what was to happen if the company failed to pay the fine. It gave a clear guidance to the prosecutor in executing the sanction to the corporation.

3.2.8. Labora Sitorus Case

The Summary of the Case

Labora Sitorus (LS) is a low ranking police officer in Sorong District, West Papua Province. Besides being a policeman, LS has a sideline as a businessman who owned two companies which are the Rotua Limited Liability Company (PT Rotua), a wood working and general contractor company and the Seno Adhi Wijaya Limited Liability Company (PT SAW), a transportation and mining company. In their activities, even though in fact LS is the owner

of those two companies, LS tried to cover his involvement within the companies. He officially did not become a part of the companies. The companies were run by other personals including his wife. However, every decision making within the companies was always consulted to LS. Moreover, LS often gave orders to the directors regarding the activities of the companies. In addition, every transaction of the companies was conducted using LS' bank accounts.[369]

Different misconducts were committed by both companies in their business activities. Firstly, PT Rotua is a wood working company which had a license only to produce and trade secondary processed wood products. However, from 2011 to 2013 the company involved in illegal timber trade and illegal logging.[370] Within that period, PT Rotua illegally sold more than 10 million cubic meter of different types of wood. In 2013, police seized 115 containers of the protected rare tropical hardwood called *merbabu* which valued at approximately more than USD 20 million which would be shipped illegally from Sorong to China. In its illegal activities, all Rotua's business transactions were conducted by the directors, but all payments were transferred to LS' bank account. That misconduct violated the Article 78, subsection 5, in conjunction with the Article 50, subsection 3, point f, of the Law on Forestry.[371] Those Articles stipulate that no one shall receive, purchase or sell, exchange, receive consignment, keep or possess, forest products identified or reasonably alleged to be illegally taken or collected and the violation of that prohibition will be the subject to imprisonment for maximum ten years and a maximum fine of five billion Rupiah.[372]

Secondly, the misconduct involved another LS' company, PT SAW. This company was owned by LS since 2007 and ran trading and transporting oil fuel business. The company misused the oil fuel trading license by illegally transported and stockpiled oil fuel, using several different oil tanker ships during the period of 2012 to 2013. During the investigation process, the police found more than 900 tons of oil fuel in different oil tanker ships. Officially, LS was not involved in PT SAW, but all transactions used LS' bank account to pay and accept the payment from third parties. In addition, LS also got an authorization letter from the director of PT SAW to conduct activities on behalf of the company. That misconduct violated Law on Oil

[369] See Supreme Court Decision Number 1081K/Pid.Sus/2014.
[370] For detail modus operandi see press release in English version from The Enviromental Investigation Agency, a UK-based NGO on https://europa.eu/capacity4dev/file/14813/download?token=4oSNCKkX.
[371] Law Number 41 Year 1999 regarding Forestry as amended by the Law Number 19 Year 2004 regarding The establishment of Government Decree Substituting a Law Number 1 Year 2004 regarding Changes in Law Number 41 Year 1999 Regarding Forestry.
[372] Concluded from the Article 50 subsection 3 point 3 and the Article 78 subsection 5 on Law regarding Forestry. Unofficial english version of the Law is accessible via: https://theredddesk.org/sites/default/files/uu41_99_en.pdf, accessed on 12 May 2017.

and Gas Article 53, point b, which stipulates that transportation of oil and gas without any business license shall be subject to imprisonment for maximum four years and a maximum fine of forty billion Rupiah.[373]

The Way The Legal Enforcers Implemented The Corporate Criminal Liability on The Labora Sitorus Case (LS Case).

In 2013, the LS case got a lot of public attention because the case involved a lower ranking police officer who owned more than one trillion Rupiah (approximately 62 million euro). Even though corporations were not the subject of the prosecution, it is important to discuss the LS case because this case is considered as the landmark decision in establishing the criminal liability of a corporate controller outside the structure of corporation in a crime within the sphere of corporation.

To deal with the misconduct, instead of prosecuting the corporations, the prosecutor decided to prosecute only the director and LS using the participation in crime in separate cases.[374] LS was prosecuted because the prosecutor found an active involvement of LS in the activities of both corporations. The prosecutor implemented the multiple-door approach by combining all possible Laws violated by LS. This approach is used especially in the law enforcement toward environmental crimes, such as forestry-related crimes. In the LS case, the Law regarding Forestry and the Law on Oil and Gas was used as the foundation for the first and second charge as the predicate crime. Then, different Money Laundering Laws were used as the foundation for the third and forth charge. Different Money Laundering Laws were used because the crimes were committed within two different regimes of Money Laundering Laws.[375] All those four charges are:

a. Together with Imanuel Maribo, one of the directors of PT Rotua, intentionally received, purchased or sold, exchanged, received consignment, kept or possessed, forest products identified or reasonably alleged to be illegally taken or collected which violates the

[373] Concluded from the Article 53 point b in conjunction with the Article 23 and the Article 5 paragraph 2 of the Law Number 22 Year 2001 concerning Oil and Gas. The unofficial English translation of the Law can be accessed on http://www.wkmigas.com/wkcbm/wp-content/uploads/2009/10/01.Law_Of_The_Republic_Of_Indonesia_Number_22_Of_2001.pdf.

[374] The prosecutor used participation in crime based on the Article 55 Paragraph 1 point 1 of the KUHP : 'As principals of a punishable act shall be punished: 1st. those who perpetrate, cause others to perpetrate, or take a direct part in the execution of the act."

[375] The Law Number 15 Year 2002 as amended by the Law Number 25 Year 2003 on the Crime of Money Laundering was applicable within the period 2002 to 2009 and the Law Number 8 Year 2010 on the Prevention and Eradication of the Crime of Money Laundering is applicable since 2010.

Article 50, subsection 3, point 3, and the Article 78, subsection 5, on Law regarding Forestry.

b. Together with Jimmi Legessang, one of the directors of PT SAW, transported oil fuel without legal permit which violates the Article 53, point b, of the Law on Oil and Gas.
c. Intentionally disbursed or spent assets known or reasonably suspected by him to constitute proceeds of crime, either on his behalf or on behalf of another party, with the purpose of hiding or disguising the origins of assets known or reasonably suspected by him to constitute the proceeds of crime, which violates the Article 3, paragraph 1, point c, of The Law Number 15, Year 2002 as amended by the Law, Number 25, Year 2003 on the Crime of Money Laundering.
d. Placed, transferred, diverted, purchased, paid, donated, placed into custody, took abroad, changed the form, exchanged with currency or securities, or other acts on assets known or reasonably suspected to be proceeds of criminal acts which violates the Article 3, Law Number 8, Year 2010 on The Prevention and Eradication of the Crime of Money Laundering).

In the trial process, the Sorong District Court in their decision found LS guilty for the first and second charge and denied the charge related to the money laundering crime for a reason that LS was not a part of the official of the corporations and the money in his bank account was considered as the corporations' money.[376] The district court then sanctioned LS with 2 years of imprisonment and a fine of 50 million Rupiah (3,125 Euro). In the appeal court, the judges changed the district court decision by accepting all four charges for LS and sanctioned LS with 8 years of imprisonment and a fine of 50 million Rupiah. The case was ended in cassation when the Supreme Court increased the sanction to 15 years of imprisonment and a fine of 100 million Rupiah (6,250 Euro).

If we look at the LS case, it can be seen that all misconducts actually were committed within the sphere of corporates' activities. All illegal transactions are the result of the decision of the corporations (both PT ROTUA and PT SAW) through its directors. However, in that case, there were two significant involvements of a natural person, in this case was LS. Firstly, LS was not the organ of the corporations, but he had power to influence the policy of the corporations since he was the person behind the establishment of the corporations. The court found the fact that the directors always asked for guidance from LS in every decision making

[376] The Sorong District Court Decision Number 145/Pid.B/2013/PN.Sorong p. 581-596.

within the corporations, decisive. Moreover, LS can be said as the decision maker in every corporation step and decision.[377] Secondly, the court also found that the LS's bank account was used in every transaction of both corporations. By using LS's bank account, LS had full access to the corporations' money, which in this case was illicit money from crimes. Therefore, LS was considered as the person who actually controlled the misconducts of the corporations.

All three Laws which become the foundation of the prosecution of LS, do not regulate clearly about how to sanction a party who was actually behind the screen of a crime.[378] The term of corporate controlling personnel can only be found in the Money Laundering Law. However, this term in the Money Laundering Law is limited to the organ of corporations who has a functional position within the organizational structure of corporations.[379] The Supreme Court in their decision considered the fact that LS had a huge power to influence the activities of corporations and controlled the corporations' finance, as solid proofs to sanction LS, even though LS was not part of the organ of corporations.

3.3. The Indonesian Prosecutor Service in Prosecuting Corporations

1. The Prosecutors' Problems in the Prosecution of Corporations

As demonstrated above, the Indonesian Prosecutor Service plays an important role in developing criminal liability of corporations in Indonesia. A criminal trial is always based on the bill of indictment from the prosecutor; therefore, the decision to bring the corporation as the defendant before the court is solely based on the opinion of the prosecutor.[380] After the first recognition of criminal liability of corporations within the Indonesian criminal legal system in 1951, the decision to bring corporations before criminal court should be appreciated. Since 2010 the prosecutors have prosecuted more corporations than ever before. From the successful prosecution of the corporation in the DEI case in 2010 to the prosecution of corporation in the *Cakrawala Nusadimensi* 2016 case, it can be seen that the strategy and the quality of prosecution is improving. The most important fact is the willingness of the Indonesian prosecutors to start prosecuting corporations before the criminal courts.

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[377] Ibid., p. 439.

[378] Budi Suhariyanto, Urgensi Pemidanaan Terhadap Pengendali Korporasi Yang tidak Tercantum Dalam Kepengurusan: Kajian Putusan Nomor 1081K/Pid.Sus/2014 (Urgency of Sentencing the Unregistered Corporate Controller in Deceptions: an Analysis of Court Decision Number 1081K/Pid.Sus/2014), (December 2017) Jurnal Yudisial Vol.10 No. 3. pp. 235-255.

[379] Remmy Sjahdeini (2017), *Op.Cit,* p. 251. See also the discussion on the Money Laundering Law on Chapter 2.

[380] Article 143 Section 1 KUHAP states: A public prosecutor shall bring an action before a district court with a request that the case be promptly adjudicated accompanied by a bill of indictment.

The reasons for the rarity of prosecutions conducted against the corporations by the prosecutors are explained by two general problems. Firstly, the lack of the general procedural law to prosecute corporations has resulted in a barrier for the prosecutors.[381] Even though most of the Laws in Indonesia have recognized corporations as subject of criminal sanctions, general and technical regulations to handle the corporate case, have not been stipulated clearly. Hence, the prosecutors often face difficulties when trying to prosecute corporations, so they decide to only prosecute the natural persons. For the prosecutors and the investigators, the technical regulations guidance and the standards to prosecute corporations in the investigation and prosecution process, are important aspects that need to be regulated clearly. In practice, the defendants and/or their lawyers, often use those unclear regulations to challenge the measures taken by the investigators or the prosecutors.[382]

Secondly, not all Indonesian prosecutors have an equal capability to understand the system of the criminal liability of corporations and how to bring corporations as the defendant.[383] As a big organization with offices spread around the islands of Indonesia, the Indonesian Prosecutor Service had 10.412 prosecutors in 2016.[384] All those officers are spread around the country and it becomes a challenge for the prosecutor's service to ensure that their prosecutors have an equal capability and find ways to enhance the capability in handling corporations in criminal cases.

2. The Way the Prosecutor Prosecutes the Corporation

The attempts to prosecute corporations by the prosecutors and resulting landmark cases are important for the future of corporate criminal liability in the Indonesian criminal legal system. In the context of the problems faced by the prosecutors in the procedural law to prosecute corporations, prosecutors have tried to deal with the problems using several methods.

The first method is by using different strategies in prosecuting corporations. Firstly, the prosecutor prosecutes the natural persons within the corporations, especially the directors

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[381] Arminsyah (Deputy Attorney General for Special Crimes), Penuntutan Tindak Pidana Korupsi Yang Dilakukan Korporasi Pasca PERJA No.28 Tahun 2010 dan PERMA No.13 Tahun 2016 (Prosecution toward Corruption Crime by Corporations After PERJA No.28 Tahun 2010 dan PERMA No.13 Tahun 2016), Presentation Paper in the National Seminar: the Potency and the Prospect of Sanctioning Corporation, Airlangga University Law Faculty, Surabaya, 2017. p.4.

[382] See how the defendant challenged the bill of indictment in the GJW case for a reason that the bill of indictment did not fulfil the formal requirement.

[383] Remmy Sjahdeni (2006), *Op.Cit*, p. 200.

[384] See the Indonesian Prosecutor Service 2016 annual report p. 24 on https://www.kejaksaan.go.id/upldoc/laptah/2017-Laporan%20Tahunan%202016%20Kejaksan%20Republik%20Indonesia-id.pdf accessed on 2 February 2017.

before prosecuting the corporations. For the prosecutors, that strategy can be beneficial when prosecuting corporations. The prosecutors can easily prove the criminal act and the criminal liability of corporations by identifying the directors as the directing mind of the corporations. This can be seen in the DEI case in 2010 and the GJW case in 2011. In those two cases the prosecutor firstly prosecuted the director of the corporations before prosecuting the corporations and both corporations were found guilty for the misconducts. Secondly, in recent years, a different strategy was applied in *Kallista Alam* case in 2015 and in *Cakrawala Nusadimensi* case in 2016. The prosecutor directly prosecuted the corporations without waiting for the result from the prosecution of the natural persons. This last prosecution strategy can be seen in *Labora Sitorus* case. In that case, the prosecutor decided to only prosecute the directors of the corporations together with the corporate controller person outside the structure of corporations in a crime within the sphere of corporations without prosecuting the corporations. All those different prosecution strategies demonstrate the progressive ability of prosecutor office to seek the way out in establishing the criminal liability of corporations.

Secondly, to deal with the difficulty in understanding the system of the criminal liability of corporations when handling the cases, the prosecutors often use the expert witnesses' opinion as important evidence in establishing the criminal liability of corporations. Almost all of the cases discussed in the previous subchapter, involved the expert witness testimony about the theoretical arguments to establish the criminal liability of corporations and its correlation with the case. However, the courts did not always accept the expert opinions. In the *GJW case* for example, several criteria that can be used by the court to establish the criminal liability of corporation was presented by the expert in his testimony and the court implemented those criteria in its decision.[385] In contrast, in *Kallista Alam* case, the court had different opinions to the expert and denied the expert opinion.[386]

Thirdly, the prosecutors have tried to deal with the technical problems in prosecution, such as the form of the bill of indictment or other legal documents that are only intended for the natural persons, by adjusting the characteristics of the corporations to the formal requirements of the legal documents. The bill of indictment in the GJW case, which did not mention the gender and the religion of the defendant as formal requirements of the bill of indictment, shows how the prosecutors deal with the problem in technical regulation when prosecuting corporations. The prosecutors often face challenges from their counterparts before

[385] See the criteria which were discussed by the expert in *GJW* case in subchapter 3.2.3.
[386] See the discussion on the *Kallista Alam* case on subchapter 3.2.6.

court when they try to adjust the legal documents. The lawyers of corporations often file objections to the non-fulfilment of the formal requirements as stipulated on the Law on Criminal Procedure. The courts are on the prosecutors' side. The courts always deny the objection of lawyers when using formal requirements of bill of indictments as the reason. However, in *Cakrawala Nusadimensi* case, the adjustment of the formal requirements of the identification of the defendant is improper because the religious identification of the corporation was filed as "a non-sharia (non-Islamic) company". By that adjustment consequently corporations can have two possible religions which are Islamic corporation or non-Islamic corporation. Even though that adjustment is inappropriate, surprisingly the court (Bandung District Court) accepted that adjustment by restating that identity in their decision. Since the decision was already final and binding in the district court, the position of the Supreme Court toward that adjustment is unknown.

Besides those several methods, the Attorney General has an authority to issue an internal guidance in specific issue and it only binds the officials within the General Attorney institution.[387] Based on Article 8, section 1, Law Number 12, Year 2011 on the Establishment on Laws and Regulations, the Indonesian General Attorney regulation is considered part of the hierarchy of laws and regulations in Indonesia. To have a uniform approach when prosecuting corporations, a legal guidance for the prosecutors to handle corporate criminal cases is important. Therefore, the Attorney General of Indonesia has made two important regulations overcoming the problems of prosecuting corporations in criminal cases.

The Attorney General first took action in 2009 by issuing the Indonesian Attorney General Circular Number B-036/A/Ft.1/06/2009 on the Guidance in Prosecuting the Corporations as the Suspect or the Defendant in Corruption Cases (further: corruption circular).[388] The enactment of the corruption circular in 2009 was a positive development in handling the corporate cases, even though it was taken as the first measure to deal with the difficulties to prosecute corporations, long after the first recognition of corporations as the criminal law subject in 1951.

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[387] For further discussion on the Indonesian Hierarchy of Laws and Regulations see *OECD Review of Regulatory Reform: Indonesia, Government Capacity to Assure High Quality Regulation*, September 2012, available at https://www.oecd.org/regreform/chap%202.%20Capacity%20for%20High%20Quality%20Regulation%20in%20Indonesia.pdf, accessed on 15 May 2015.

[388] See on https://kejaksaan.go.id/ph_hukum_detil.php?id_uu=219&id=3&id_prod=&jud=PIDANA%20KHUSUS.

The corruption circular states that the fine in a corruption case can be the source of the state revenues; therefore, it is important for the prosecutors to prosecute corporations since the fine for corporations in corruption cases is the fine which is increasable by one-thirds. The Circular stipulates several directions as the internal guidance to the prosecutors when prosecuting the corporations in corruption cases. Those directions are:

1. The criteria to bring corporations as the suspects in corruption cases must be based on the stipulation on the Article 1, Paragraph 1, and the Article 20, Paragraph 2, of the Law on Eradication of Corruption.
2. The prosecution of corporations in corruption cases shall not make the natural persons within the corporations free from the prosecution. The prosecutors shall not use the concept of participation in crime when prosecuting corporations and the natural persons within the corporations.
3. Based on the Law on Eradication of Corruption, the corporations in criminal cases may be represented by the board of corporations or other persons. In practice, often the representatives of the corporations do not know anything about the case. Therefore, the availability of the documents of investigation minutes of the corporation as the suspect is not an absolute requirement.
4. It is important for the prosecutors in the investigation stage to seize the corporate charter to be used as the basis to write the identity of the corporations.
5. The minimum requirements of the corporation's identity in the bill of indictment are: 1) the name of the corporation; 2) the number and the date of corporate charter when the corporation was established; 3) the number and the date of the corporate charter when the crime was committed; 4) the official address of the corporation and the core business of the corporation.
6. The prosecutors may only ask the court to impose the fine which is increasable by one-thirds at the uppermost to the corporations in corruption cases without the possibility to impose the alternative sanction in case the corporation fails to pay the fine. The prosecutors also cannot ask the court to impose the obligation to compensate the state loss as the additional sanction to the corporations in corruption cases, because the obligation to compensate the state loss shall only be replaced by imprisonment in case the convict fails to pay the compensation to the court. The other additional sanction on the Law on Eradication of Corruption and the *KUHP* may be imposed to the corporation, namely the revocation of certain rights and the deprivation of illicit asset.

Even though the corruption circular is limited to the corruption cases, it is a positive change in the development of the criminal liability of corporations in Indonesia. The corruption circular gives the basic guidance to the prosecutors in the middle of the unclear general stipulation on the procedural law of corporate criminal liability. The prosecutors are responsible for the rarity of cases of corporate criminal liability since they rarely prosecute the corporations as the defendants. Therefore, by that circular, the prosecutors are encouraged to prosecute corporations in corruption cases.

After releasing the circular in 2009, the first corruption case involving a corporation brought before the court was the GJW case in 2011. The prosecution process of the GJW was used by the prosecutor as the trial case to develop the best way to prosecute corporations. That case is the model for the prosecutors when prosecuting corporations, and also a reference for other parties such as judges and legal scholars.[389] After the decision of the GJW case, the prosecutor service seemed confident in prosecuting corporations in criminal cases because their way to formulate the bill of indictment and to establish the criminal liability of corporations has been accepted by the court. For example, in *Indar Atmanto* case, after the court decision was final and binding, the prosecutor started an investigation to file a new case against the IM2 Corporation and other *Indosat'* directors.

On 1st October 2014 the Indonesian Attorney General enacted the Attorney General Regulation Number 28 Year 2014 on the Guideline to Handle Criminal Cases Involving Corporations (Further PERJA guidelines).[390] This regulation aims at giving general guidance to the prosecutors to handle corporations as the suspect, the defendant or the convict in criminal cases. This new regulation is a big step in the development of the criminal liability of corporations in Indonesia since it is applicable to all criminal cases that can be committed by corporations. Based on the PERJA guidelines, the corruption circular remains valid as long as it does not contradict with the PERJA guidelines.

In the consideration of the PERJA guidelines, the Indonesian Attorney General states that there is an upward trend in the number of crimes involving corporations in society. The Laws have already recognized corporations as the perpetrators in the crimes, but the Attorney

[389] Arminsyah, the Deputy Attorney General for Special Crimes mentioned that the GJW case was the first case handled by the Attorney General related to the corruption on corporation. See Arminsyah, *Op.Cit*, p. 12.
[390] Available link: https://kejaksaan.go.id/upldoc/produkhkm/perja%2028%20th%202014%201.pdf(1331).pdf, accessed on 7 June 2015.

General admitted that prosecutors often find it difficult when investigating and prosecuting the corporations in criminal cases because of the complexity to investigate and prosecute. Therefore, the Attorney General believes that guidance in investigating and prosecuting the corporations should be given to the prosecutors. This regulation also aims at enhancing the way prosecutors prosecute criminal cases. The prosecutors have only used the conventional approach by simply prosecuting the natural persons in criminal cases.

By this general regulation, the prosecutors may have a new paradigm to consider corporations as the defendant if there is convincing evidence. However, this regulation is just an internal regulation that is only for prosecutors. Several stipulations in the regulation have answered the questions of the prosecutors when finding difficulties in prosecuting the corporations. In general, the regulation stipulates several important chapters, which are:

a. The subject of the prosecution in corporate criminal cases

Based on the regulation, when prosecuting criminal cases involving corporations, the prosecutors can file charges to several subjects, such as to the corporation itself, the organ of the corporation or both.[391] For corporations that do not have legal personality, criminal liability shall be imposed on the organ of the corporation and the additional criminal sanction and or measurements shall be imposed on the corporation.[392] If the Laws do not recognize the corporation as a legal subject, the organ of corporation is the subject of the prosecution.[393]

The stipulation that separates a corporation with a legal personality and a corporation without a legal personality, is interesting. Most of the Laws that recognize corporations as the subject, define a corporation in a broad way without distinguishing whether the corporation has a legal personality or not. This means that all legal entities can be the subject of prosecution. This regulation interprets the scope of corporations by making a guidance for prosecutors when prosecuting corporations without a legal personality. It is only the organs of corporations that are the natural persons that can be brought before the court and not the corporation itself. The corporations without legal personality can be sanctioned with additional punishment based on the prosecution of the organ of corporations. In other words, corporations without a legal personality cannot become the subject of prosecution but subject to be sanctioned.

[391] The annex of the PERJA guidelines Point E Number 1.
[392] *Ibid*, Point E Number 3.
[393] *Ibid*, Point E Number 2.

By distinguishing how to prosecute corporations based on its legal personality and opening the possibility to sanction non-legal personality corporations, even though those corporations are not the defendants of the cases, the regulation wants to create their own interpretation of corporations. This leads to the question of whether the court will accept the interpretation of the prosecutor or rule their own interpretation on that issue.[394]

b. The criteria used when handling crimes by the corporations

The PERJA guidelines regulates several criteria to determine the acts that can lead to the criminal liability of corporations. The prosecutors can use these criteria to decide whether a corporation can also be the subject of prosecution, the criteria are:[395]

a. The applicable Laws related to the cases. Since the Indonesian Criminal Legal System has not recognized the criminal liability of corporations in its general criminal law, to establish the criminal liability of corporations, the prosecutors should refer to the criteria stipulated on the Law related to the case.
b. Besides the criteria mentioned on the related Laws, the prosecutors should also consider several other criteria to establish the criminal liability of corporations, those are:
    - The misconduct is committed based on the decision of the organ of the corporation that committed or participated in the crime.
    - The misconduct is actively or passively committed by people who, based on work and other relations, act within the sphere of the corporations.
    - The misconduct involves the corporation's human resources, capital resources, and/or other corporation's facilities or support.
    - The misconduct is committed by a third party based on the order of the corporations and/or the organ of the corporations.
    - The misconduct is committed within the sphere of the daily business activities of the corporations.
    - The misconduct benefits the corporations.
    - The misconduct is accepted or normally accepted by the corporations.
    - The corporations possess the proceeds of crimes, and/or

[394] Until now, the corporations brought before the court are always the corporations that have their legal personality, such as Limited Liability Company see. *GJW case, Asian Agri case, Kalista Alam case, Suwir LAut case.*
[395] The annex of the PERJA guidelines Chapter II Point A.

- Other acts that may be imputed to the corporations based on the Laws.

When the prosecutors decide to prosecute the natural persons within the corporations, the regulation provides the criteria to establish the criminal liability of natural persons within the corporations, which are:[396]

a. Anyone who commits a criminal offence personally or with others, causes others to perpetrate or takes a direct part in the execution of the act or any person who intentionally provokes the execution of the act by gifts, promises, abuse of power or of respect, force, threat or deception or by providing an opportunity, means or information or anyone who deliberately aids in the commission of the crime, deliberately provides opportunity, means or information for the commission of the crime (accomplice to the crime);
b. Anyone who has the control and the authority to take measures to prevent the misconduct, but does not take any action to prevent the misconduct, and is aware of the risks of such misconduct;
c. Anyone who understands the significant risk if the corporation, commits the misconduct.

The stipulation on the criteria in establishing the criminal liability of corporations mentioned above is a detailed guidance for prosecutors when determining the misconduct that can be committed by corporations. The regulation does not only provide criteria based on the Laws but also provides additional criteria that have more detail characteristics.

c. The Preliminary Investigation and the Investigation of Corporations

Besides regulating the criteria to establish the criminal liability of corporations, the regulation stipulates the procedural method to prosecute corporations. In the chapter of the preliminary investigation and the investigation, several guidelines are given:[397]

a. The prosecutors have the authority as the investigators in corruption cases, money laundering cases or other cases based on the applicable Laws.
b. The preliminary investigation and the investigation to the corporations can be done simultaneously with the investigation of the natural persons.

[396] The annex of the PERJA guidelines Chapter II Point B.
[397] *Ibid*, Chapter III.

c. The investigation to the corporations does not negate the criminal responsibility of the organs of the corporations.
d. If the organs of the corporations refuse to represent the corporations in criminal cases, the prosecutors should make refusal minutes.
e. In the investigation stage, the prosecutors must seize the corporations' charter documents.
f. The investigation to the corporations should be separated from the investigation of the natural persons.
g. In the investigation stage, the prosecutors should conduct the seizure of the assets of the corporations and organs of the corporations.

d. The Prosecution of the Corporations

In this chapter, the regulation provides the guidelines to the prosecutors for handling the case in pre-trial and in the trial process. The most important guideline in this chapter is the stipulation on the standard requirements of the bill of indictment for the corporations and the list of the required documents to support the prosecution. Since the general procedural law has not stipulated it yet, the guideline to draft the bill of indictment is important for the prosecutors. The bill of indictment for the corporations should mention:[398]

1. the name of the corporation,
2. the number and the date of the updated deed of the corporation,
3. the address of the corporation,
4. the nationality of the corporation,
5. the core business of the corporation,
6. the corporation's taxpayer registration number, and
7. The complete identity of the natural person who becomes the representative of the corporation.

The regulation also mentions that the acquisition or merger, or the process of bankruptcy of corporations, cannot prevent the prosecution of the corporation.[399] The prosecutors may only request that the court imposes a fine, the additional punishment and the measurement to the corporations. The additional punishments that can be imposed on corporations are:[400]

[398] The annex of the PERJA guidelines Chapter IV Point B.
[399] The annex of the PERJA guidelines Chapter IV Point D Number 1.
[400] *Ibid*, Chapter IV Point D Number 3.

a. The compensation of the state loss,
b. The deprivation of the proceeds of crime,
c. The obligation to recover the lost caused by the criminal act,
d. Setting the corporations under guardianship,
e. Permanent or temporary closing of the corporations,
f. Deprivation of certain corporations' rights,
g. The revocation of the corporations' business license, or
h. The corporations' asset forfeiture.

The PERJA guidelines stipulates that the charges for corporations should also mention the alternative sanctions if the corporation fails to pay the fine, which is the deprivation of the corporate assets.[401] The additional sanction in corruption cases, which is the obligation to compensate the state's loss in corruption cases, should also be complemented with the deprivation of the corporate assets as the alternative sanction when corporations fail to pay the compensation.[402] If the corporation does not have sufficient assets to compensate the state's loss, the prosecutors should also charge the corporations with other additional sanctions. In the prosecution of corporations that do not have a legal personality, the prosecutors should charge the imprisonment, the fine and the additional punishment to the organs of the corporations.[403]

e. The Execution of the Court Decisions on the Corporations

The important guidelines to the prosecutors when executing convicted corporations are the stipulations on the execution of the fine to the corporations.[404] A corporation has a period of one month to pay the fine, which can be extended for another month. If the corporations cannot pay the fine within those period, its assets shall be confiscated and sold to cover the fine. Then, if the additional sanction to the corporations is the deprivation of the movable assets of the corporations, the prosecutors only have a period of three months to execute the assets. For money laundering cases, the regulation stipulates if the assets of a corporation are inadequate to pay the fine for the corporation, the imprisonment can be imposed on the organs of the corporation. That stipulation is in line with the stipulation on Money Laundering Law.

The regulation to execute the criminal sanction for the corporation mentioned above gives a new perspective on the prosecutors as the executor of criminal sanctions. In practice, prior to

[401] *Ibid*, Chapter IV Point D Number 5.
[402] *Ibid*, Chapter IV Point D Number 4.
[403] *Ibid*, Chapter IV Point D Number 6.
[404] *Ibid*, Chapter V.

the regulation, several Laws and the *KUHAP* do not stipulate a definitive period to execute the fine for corporations. The *Suwir Laut* case is an example, as the *Asian Agri* did not initially show the good will to pay the fine. Therefore, the prosecutor confiscated the assets of *Asian Agri* as the guarantee of the fine. Eventually, the *Asian Agri* negotiated with the prosecutor to pay the fine in instalments starting on January 28th, 2014. The prosecutor agreed to give the Asian Agri time for paying the fine by instalments. On September 17th, 2014, the *Asian Agri* paid off the fine after three instalments.[405]

The execution of the fine on the *Asian Agri* by instalments was conducted by the prosecutor, because the prosecutor considered the future of the *Asian Agri* as it had a lot of employees. The success of executing the fine on the *Asian Agri* followed in the process of the execution of the fine on the Indosat in *Indar Atmanto* Case. The prosecutor warned *the Indosat* that if they refused to pay the fine, the prosecutor would confiscate the *Indosat* office.[406] Then, in October 2014, the *Indosat* promised to pay the fine by instalments. The way to pay the fine by instalments has not been regulated yet, but the prosecutor service decided to accept the request from the corporation because of the economic consideration that the corporation had a significance influence in the daily activities of society.

The executions of the fine in the *Suwir Laut* and the *Indar Atmanto* Case, which gives the opportunity to corporations to pay the fine by instalments, should be appreciated. The limitation period in executing the fine for corporations according to the Attorney General will pose risks to society, especially for the future of the employees. The flexibility is needed in executing the sanction to the corporations if the corporations show their good will to pay the fine. However, since the guidance has determined the time to pay the fine, the prosecutors should obey the guidance.

3. The Future Prosecution of Corporations

The issuing of the PERJA guidelines as the general guidelines for prosecuting corporations in October 2014 answers the prosecutors' regulations problem on how to treat corporations before the court in criminal cases. The prosecutors already understood that corporations could commit many criminal offences, but to treat a corporation as a criminal has

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[405] Asian Agri Group Akhirnya Lunasi Cicilan Denda 25 Trilyun (Asian Agri finally paid the fine 25 trillion rupiah by instalment), *www.liputang.com* 23 September 2014. Available at http://news.liputan6.com/read/2109403/asian-agri-group-akhirnya-lunasi-cicilan-denda-rp-25-triliun.

[406] Kejagung Ancam Sita Gedung Indusat Jika tak Lunasi Hutang (Prosecutor will confiscate the Indosat Office if Indosat Refuse to Pay the Fine), Merdeka.com, 3rd October 2014 Available at https://www.merdeka.com/peristiwa/kejagung-ancam-sita-gedung-indosat-jika-tak-lunasi-hutang.html.

become a problem. Several attempts to prosecute corporations have been conducted by the prosecutors by using the applicable Laws. Several court decisions on the corporate cases show the different standards used by the prosecutors when treating corporations as criminals, because of the absence of guidelines from the prosecutor service. The way the prosecutors handle corporate cases is often based on the individual experience of the prosecutors, whereas the prosecutors who have that experience are still limited.[407]

The enactment of the PERJA guidelines to prosecute corporations is providing a better future for the law enforcement. The prosecutors cannot use the lack of regulations as a reason for not prosecuting corporations before court when the evidence exists. The regulation expectantly creates a comprehensive understanding among the prosecutors about the system of the criminal liability of corporations and makes the prosecutors more familiar with the corporations as the subject of criminal law.[408] The guidelines are detailed and cover most important questions in procedural law. The important thing to consider is the legal position of the PERJA guidelines. The PERJA guidelines are just the internal regulations used to give guidelines to the prosecutors when treating a corporation as a criminal. That regulation is not legally binding to other law enforcers. It is possible in practice that the court will deny the system used by the prosecutors. Moreover, at the end of 2016 the Supreme Court released the same guidance for its judges, which will be discussed later. The next issue will be the harmonization between those two regulations.

Nonetheless, in the midst of the lack of Laws which regulate the procedural law, this internal regulation is a temporary solution. Furthermore, this can be the basis of the future Laws. The internal regulation should be consistently applied by the prosecutors, and consequently, this will create a system that will be accepted by other institutions. For example, the police investigators will automatically follow the system of the prosecution service when conducting investigations and preparing investigation documents in corporate cases.

The stipulations in the PERJA guidelines are not hugely different from the system that has already been implemented by the prosecutors in practice. For that reason, hopefully the courts will accept the way the prosecutors treat corporations in the prosecution process before the court. The drafting process of the General Attorney Regulation is based on the experiences

[407] Based on the interview with Mr. Nana, the prosecutor of the Attorney General Task Force against Terrorism and Human Trafficking who has a lot of experience in prosecuting a corporation, Jakarta, 24th October 2014.
[408] After the enactment of the PERJA guidelines in 2014, until mid-2017, the General Prosecutor Office has been handling five corporation cases, See. Arminsyah, *Op.Cit*, 408.

of the prosecutor service when prosecuting corporations, so that huge differences can be avoided. The difference is only in the way the prosecutors execute the criminal sanctions to corporations by determining the limitation period.

3.4. The Indonesian Courts and the Criminal Trials of Corporations

From an interview at the very beginning of this research in 2014, the Indonesian Supreme Court Judge, *Artidjo Alkostar*, who is also the Chief of the Criminal Law Chamber of the Indonesian Supreme Court, stated that the Indonesian Supreme Court found that even though corporations have been recognized as the subject of criminal law, the regulations related to the criminal liability of corporations in the Indonesian legal system are still unclear.[409] The Supreme Court stated that the unclear stipulation can be found in the criminal procedural law related to the procedural way to try corporations before the criminal court. This circumstance leads to difficulties for legal enforcers to prosecute corporations. To deal with that problem, at the time the interview was conducted, the Supreme Court was preparing a regulation to give guidance for the judges in the trial process of corporations that was enacted later in 2016.[410] The Indonesian Supreme Court's opinion, which is derived from the opinion of the Chief of the Criminal Law Chamber of the Indonesian Supreme Court above, can be seen as an acknowledgement of the problem in implementing the criminal liability of corporations in the Indonesian legal system by the authority. That opinion is in line with the vision of several legal scholars and with the aforementioned research findings of *Harkristuti Harkrisnowo* in 2006.[411]

Many countries have positive experiences with their courts' role in the development of corporate criminal liability systems by establishing the criteria or the standards to impute criminal liability to corporations through their decisions.[412] Similarly, the Indonesian courts also play an important role in developing the corporate criminal liability system. The discussion on several case laws related to the criminal liability of corporation mirroring several important opinions of the Indonesian courts on development of the criminal liability of corporation.

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[409] The opinion of the Indonesian Supreme Court in this subchapter is based on the interview held on October, 22nd 2014 with the Supreme Court Judge Artidjo *Alkostar* who was also the Chief of Criminal Law Chamber of the Indonesian Supreme Court. This is in line with his opinion on http://www.hukumonline.com/berita/baca/lt51f89d8e32530/ma-menilai-aturan-pidana-korporasi-belum-jelas. (the Supreme Court considers that the regulations on the criminal liability of corporations are still unclear)

[410] This interview was conducted in 2014, then in the end of 2016 the Supreme Court finally enacting the Supreme Court Guidance. The elaboration of the Supreme Court regulation related to the corporate criminal liability will be discussed later in this chapter.

[411] See the opinion of the *Sjahdeini, Dwija,* and *Harkristuti* research finding in Subchapter 3.2.

[412] The positive influence of the Supreme Court in the development of the criminal liability of corporation in several countries can be seen in the first and second chapter.

Therefore, in the next subchapter those important opinions will be discussed along with the discussion about the decision of the Supreme Court to enact the regulation to solve regulations problem related to the criminal liability of corporation.

3.4.1. The Indonesian Supreme Court's Perspective

In the Indonesian criminal law procedure, based on Article 182, Section 3 and Section 4, of the *KUHAP*, to reach a decision, the judges shall hold a final consultation and the decision must be based on the bill of indictment and all facts that have been proven in the examination trial.[413] Based on those Articles, the criminal court cannot impose criminal sanctions on the party which is not the subject of the bill of indictment. That fact is the main reason behind the rare court decisions related to corporations in Indonesia. Since the Indonesian prosecutors rarely bring corporations as the defendant, the court cannot impose the sanctions even though the court has found the involvement of the corporations when examining the case.

Artidjo Alkostar argued that the condition previously mentioned is because the prosecutors seem unfamiliar with the system of the criminal liability of corporations. Consequently, the prosecutors in many cases only prosecuted the natural persons even though the crimes were conducted in the sphere of the corporation. The Chief of the Criminal Law Chamber of the Indonesian Supreme Court, *Artidjo Alkostar*, stated that the court does not have any difficulty dealing with the corporate criminal liability in criminal cases, provided that the prosecutors in their bill of indictment include the corporation as the defendant. The huge discretionary power of the judge when examining the case becomes the tool to find the law (*rechtsvinding*) in the various Laws related to the criminal liability of corporations in Indonesia. Moreover, *Artidjo Alkostar* stated that the discretionary power can also be used when corporate criminal liability is unclearly stipulated on the Laws or have not been stipulated.[414]

The example of the implementation of the discretionary power of the judge can be seen in the *GJW* case. The prosecutor accused the corporation and mentioned the corporation in the bill of indictment. Since the *KUHAP* has not recognized the corporation as the criminal subject, the form of the bill of indictment for the corporation in that case could not meet the formal requirements of the bill of indictment based on the *KUHAP*. In accordance with Article 143 *KUHAP*, the bill of indictment must contain a full name, date and place of birth, gender,

[413] See Article 182 section 3 and section 4 of the *KUHAP*. The English version of the *KUHAP* can be accessed on https://www.unodc.org/res/cld/document/idn/law_number_8_year_1981_concerning_the_criminal_procedure_html/I.2_Criminal_Procedure.pdf.
[414] Interview with *Artidjo Alkostar* in Jakarta on 2nd October 2014.

nationality, address, religion and occupation of the defendant. A bill of indictment that does not meet those requirements is void by operation of law. The defendant then raised an objection to the court and argued that the bill of indictment for the corporation did not fulfil the requirements of the Article 143 *KUHAP*, specifically, in the part of gender and religion. Fortunately, the judges in that case rejected the defendant's objection and declared that the bill of indictment was formulated correctly. The decision of the judges of the *GJW case* to reject the objection from the defendant is the implementation of the discretionary power which is possessed by the judges. The judges in that case were not trapped in the formalistic method when interpreting the Law and created a legal breakthrough in law enforcement. Related to that case, *Artidjo Alkostar* commented that judges should use their common sense when facing problems in implementing the law.[415] He said further that in the Banjarmasin Case, the judges already used their common sense to decide that the bill of indictment was formulated correctly even though it did not meet several formal requirements based on the *KUHAP*, which were gender and religion of the defendant. The judges should not use technical reasons, such as the lack of the procedural law stipulated in the *KUHAP* or other Laws, as obstacles to prosecute corporations.

From several cases which have been decided by the Supreme Court, the way the courts examining the corporate crime cases differ from one to another. Therefore, the Supreme Court's approaches toward corporate criminal liability can be concluded as follows:

1. The Way the Supreme Court Establishes the Criminal Liability of Corporations

From several criminal cases related to the corporations which have been decided by the Supreme Court, it can be concluded that the Indonesian Supreme Court has two approaches in establishing the corporate criminal liability.

The first approach is based on the identification theory, which is influenced by the method used by the prosecutors in prosecuting corporations.[416] When prosecuting a criminal case that involves a corporation, the Indonesian prosecutor prosecutes the natural person(s) first, in this case the director(s) of the corporation. After the director(s) in the corporation are found guilty by the court, the prosecutor then prosecutes the corporation. Since the director of the corporation, as the directing mind of the corporation, has been found guilty in the previous decision, the court uses that decision as solid proof to establish the criminal liability of the

[415] Interview with *Artidjo Alkostar*, October 22nd 2014.
[416] This approach is based on the Dong Woo Case and the GJW Case.

corporation. The Supreme Court identifies the misconduct of the director of the corporation as the misconduct of the corporation (identification theory).[417]

In addition, this approach does not only uses the fact that the natural persons (directors) within the corporation are found guilty, but also uses additional criteria in establishing the criminal liability of corporations, which are:

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

The criteria based on the *GJW case* mentioned above do not originate from the opinion of the court when examining the case. It is based on the stipulations within the Law on Eradication of Corruption and the opinion of the expert witness who testified before the court explaining the general system of the criminal liability of corporations.[418] When explaining the general system of the criminal liability of corporations, the expert witness based his opinion on the development of the criminal liability of corporations in several countries, including the Netherlands. The Court combined those two sources to establish the criminal liability of the *GJW* as a corporation.

The second approach to criminal liability of corporations used by the Supreme Court is totally different with the previous approach. In this approach the conviction of a natural person within the corporation is not a decisive requirement to punish corporation. In *Kalista Alam case*, even though the prosecutor did not successfully prosecute the director of the corporation, the prosecution toward the corporation had a positive result. The corporation was found guilty based on the circumstances within the corporation which is the fact that the company failed to implement the prudential principle when running the business. In the *Kalista Alam* case, the

[417] See the Dong Woo Industry case.
[418] See the discussion of the Law on Eradication of Corruption in Chapter 2.

company failed to handle the land burning because the company only had limited fire and rescue equipment. Also, the corporation did not have a single fire lookout tower to ensure the prevention of land burning.

The third approach to criminal liability of corporations used by the Supreme Court can be seen in the *Suwir Laut Case* and the *Indar Atmanto Case*. In those two cases, the Supreme Court opened the possibility to impose the criminal sanction on a corporation even though it is not the defendant in a certain case. The approach toward the criminal liability of corporations in those cases, has led to controversy in society. The question that emerges is; is sanctioning corporations when the defendant of the case is only the director of corporation a legal breakthrough or a violation of due process of law principle?[419] On the other hand, the party who agrees with the decision of the Supreme Court argued that the case was a legal breakthrough because the Supreme Court implemented the vicarious liability doctrine by imposing the criminal liability to the corporation based on fact that the act of employees was actually on behalf of a corporation.[420]

The Supreme Court decisions can be considered beyond the request (*ultra petita*) because in the bills of the indictment as the basic of the prosecution in criminal law, the prosecutors did not prosecute the corporations. However, the Supreme Court has its own argument when deciding to use this approach when examining the cases, which is that the misconduct was committed within the sphere of the corporations and in the interest of the corporations. Therefore, it was unfair to only sanction the natural person.[421]

The decision of the Supreme Court to impose a criminal sanction on a corporation even though it is not the defendant, both in the *Suwir Laut* Case in 2012 and the *Indar Atmanto Case* in 2014, represents the consistent opinion of the Supreme Court that it is not required that the corporation is the defendant within the case for it to be punished. The criterion used by the Supreme Court to punish a corporation in a criminal case, even though the corporation is not the defendant within the criminal case, is that the misconduct of the natural person who becomes the defendant is committed purely for the benefit and the purpose of the corporation.

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[419] Romli Atmasasmita*," Kejahatan Korporasi"* (Corporate Crime), Opinion, Kompas Newspaper, 21 January 2013.

[420] Budi Suhariyanto, " *Putusan Pemidanaan Terhadap Korporasi Tanpa Didakwakan Dalam Perspectif Vicarious Liability"* (the Corporate Criminal Liability without Charges in the Perspective of Vicarious Liability), (April 2017) *Jurnal Yudisi*al Vol.10, no.1: 17-38.

[421] See the discussion on the way the courts establish the criminal liability of corporation in the IndarAtmanto case and Suwir Laut case.

In the *Suwir Laut Case* for example, the Supreme Court Judges found that what had been done by *Suwir Laut*, the Tax Manager of the Asian Agri Corporation when falsifying the tax report of the Asian Agri, had purely benefited the corporation. For that reason, the judges decided that because the corporation had been the largest beneficiary of that misconduct, it was unfair to only impose the criminal sanction on the natural person (*Suwir Laut*). In that decision the Supreme Court realized that formally the corporation was not the defendant. However the Supreme Court based their argument on the doctrine of the vicarious liability, which creates the possibility of imposing criminal liability on the corporation based on the misconduct of its employee, in this case the misconduct of *Suwir Laut*. This also occurred in the *Indar Atmanto* case, when the act of *Indar Atmanto* signing a contract as the director of *IM2* and benefited the corporation led to the imposition of a sanction on the corporation even though the corporation was not the defendant. The Supreme Court is in the position that to apply the theory of vicarious liability in sanctioning corporations when examining natural persons in criminal cases the corporations do not need to be the defendant.

Artidjo Alkostar made a comment about the decision of the judges to impose the criminal sanction on the corporation, even though the corporation was not the defendant in a criminal case. He said that the decisions were a legal breakthrough in those rare cases involving corporations that are brought before the court, as long as the judges could find the strong connection between the misconduct of the natural persons and the benefit of the corporations. Furthermore, he stated that what had been decided by the Supreme Court in the *Suwir Laut case* was not beyond request *(ultra petita)* but a legal breakthrough. Both the *Suwir Laut case* and the *Indar Atmanto* case are related to state loss (tax fraud and corruption), so the Supreme Court decisions were made to protect the state or public interest from the misconduct of the corporations.[422]

2. Criminal Sanctions to Corporations

The types of criminal punishment imposed by the court on corporations, based on the several cases related to the corporations can be divided into two types, those are:

a. The Primary Punishment

Theoretically, the fine is the only possible sanction that can be imposed on corporations. The court imposed the fine as the primary sanction on corporations in most cases related to the

[422] Interview with *Artidjo Alkostar*, October 22nd 2014.

corporations in Indonesia. The problem with the imposition of the fine as the primary sanction on the corporations emerges when a corporation fails to pay the fine. Several Laws already stipulate how to execute a fine for corporations. But Indonesia does not have a general regulation on the sanction that can be imposed on the corporations when the corporations fail to pay the fine. This leads to unclear measure if the corporation fails to pay the fine. In the *Dongwoo* case the Supreme Court used the imprisonment in lieu of the fine as the sanction when the *Dongwoo* Industry as the defendant had failed to pay the fine. The way the Supreme Court formulated the imprisonment in lieu of fine was an improper sanction to be imposed on the corporation because it raises the question about who will be imprisoned in case the corporation fails to pay a fine. The other way to formulate the sanction to the corporation can be seen in the *GJW* case. The court only mentioned the fine as the primary sanction to the corporation without stipulating further about the type of sanction that shall be imposed when the corporation fails to pay the fine. This becomes the general standard in formulating the sanction to the corporations. But, Anti-Money Laundering Law stipulates more detail compare to other Laws by regulating the way to execute the fine when corporations fail to pay the fine.

b. The Additional Punishment

In court decisions, especially in decisions when the court imposed a criminal sanction on corporations when the corporations were not the defendants, the type of the criminal sanction imposed is not categorized as a primary sanction. In the *Suwir Laut* and the *Indar Atmanto* case, the court imposed the sanction categorized as an additional sanction. For example, in *Indar Atmanto* case, the sanction to the corporation was to compensate the state's loss which had occurred from the misconduct of *Indar Atmanto* as the director. That sanction is categorized as an additional sanction in Law on Eradication of Corruption. The same sanction can also be seen in the *Suwir Laut* case. In this case, the corporation was sanctioned with the additional fine of two times the amount of tax that should be paid by the *Asian Agri Group* during the period of 2002 to 2005. Both in the *Indar Atmanto Case* and the *Suwir Laut Case* the primary sanctions were only imposed on the natural persons. The primary sanctions in those cases were an imprisonment and a fine.

In contrast, in an ordinary case when the defendant is a corporation, the additional punishment is imposed to complement the primary punishment. In the *GJW* case for example, the Court imposed the fine as the primary punishment and the temporary closing for six months for the corporation as the additional punishment.

In the Indonesian criminal legal system, the additional punishment must be imposed along with the primary punishment. The court decisions in the *Suwir Laut* and the *Indar Atmanto* case show that the court imposed the additional punishments on the corporations without imposing the primary sanction on the corporations. The reason for imposing the additional sanctions on the corporations in those cases was that the defendants in those cases were only natural persons and therefore the court could not impose the primary sanction on the corporations. The decision to impose additional sanctions on the corporations was because the misconduct was committed by the defendants on behalf of the corporations, and the corporations had benefited from the misconduct of the defendants. Therefore, the corporations were sanctioned to return the illicit benefits.

3. Corporations as the Defendant in Criminal Cases

The decision of the Supreme Court to impose criminal sanctions on the corporation in the *Suwir Laut* Case and the *Indar Atmanto* Case when the corporations were not the defendants, created a new perspective in the development of the criminal liability of corporations in Indonesia. The development of the system of criminal liability of corporations is in the hands of the judges who examine the case. The Supreme Court expects that a decision of the court that is already final and binding, can be used by other judges in examining the cases in the future. The various approaches among the decisions of the court in corporate criminal cases, according to *Artidjo Alkostar,* should be seen as the process of finding the best system for the criminal liability of corporations. Furthermore, the way the court examined the *GJW* case has been the model for judges when examining corporations in criminal cases.[423]

The Criminal Law Chamber of the Indonesian Supreme Court has an important role in ensuring the consistency of the decisions to give legal certainty to society. In this chamber, the Supreme Court Criminal Law judges discuss the criminal cases. During the discussion and the consultation among the criminal law judges, it is expected that the general system of corporate criminal liability can be reached. Compared to the recent condition, in the middle of the various Laws related to the criminal liability of corporations, the Supreme Court believes that since the judges have huge discretionary power in finding law when examining case, the judges have no difficulties handling cases. However, the judges have not had the same perception about the system of criminal liability of corporations, which then leads to various models to establishing the criminal liability of corporations.

[423] Interview with *Artidjo Alkostar*, October 22nd 2014.

The possibility to impose a criminal sanction on a corporation even when it is not the defendant within the case creates a controversy in Indonesia. A corporation may be a subject to a criminal sanction without the opportunity to defend itself before the court. Moreover, the corporation cannot use legal remedies such as appeal and cassation to the higher court since the corporation is no official party. As a legal subject with the same position before the law as natural persons, sanctioning a corporation without being given the opportunity to defend itself, violates its right to have a fair trial in the criminal procedure. Since good reputation for a corporation is very important, both *Asian Agri* and *IM2* cannot do anything except pay the fine that has been imposed to them based on the trial of their employees. Therefore, the big question now is how to ensure the protection of the right of the corporation as a legal subject to a fair trial, in the midst of the controversial position of the Indonesian Supreme Court that opens the opportunity to sanction a corporation even when the corporation is not the defendant of the case.

Even though the definition of suspect, defendant and convicted person within the *KUHAP* literary point to the natural persons, the *KUHAP* has been already implemented to the criminal cases which involved corporations with several adjustments. Several cases which have been discussed in the previous subchapter, show that as the criminal law subject, in procedural law, the corporations are also treated equally similar to natural persons.

The consideration chapter of the *KUHAP* mentions that as a nation which is governed based on the Pancasila and Constitution, Indonesia upholds human rights and guarantees all citizens shall have equal status before the law and government and shall be obligated to respect law and government without exception. Even though the Indonesian Constitution does not specifically provide that human rights obligations apply to corporations,[424] the recognition of the criminal liability of corporations also means the protection of the right of corporations to be treated equally before the law and to get fair trial. It is in line with the customary international law and treaty which gives protection to economic entities' rights such as non-discrimination, property protection and due process standard.[425] The key legal texts on fair trial are also to be found in article 14 of the International Covenant on Civil and Political Rights

[424] See the Brief on Corporations and Human Rights in the Asia-Pacific Region for the exclusive use of the United Nations Special Representative of the Secretary General for Business and Human Rights (UNSRSG) prepared by Allens Arthur Robinson (AAR) in 2006 pp.72-89. The document can be accessed on https://www.business-humanrights.org/sites/default/files/reports-and-materials/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf

[425] Marius Emberlands, The Human Rights of Companies: Exploring the Structure of ECHR Protection, (New York: Oxford University Press 2006) p.1.

(ICCPR) which has been ratified by Indonesia since 2005 through the Law Number 12 Year 2005 on the Ratification of the ICCPR.

3.4.2. The Future of Corporate Criminal Liability after the Indonesian Supreme Court Regulation

Over the last few years the Indonesian Supreme Court has examined several cases on corporate criminal liability. The position of the courts in criminal cases are passive and depend on the prosecutors to determine the subject of prosecution. Therefore, the decision of the Prosecutor Office to start prosecuting corporations should be appreciated. In fact, the Law enforcement process of prosecuting corporations faces many challenges, especially among Indonesian Laws that recognize corporations as its subject. In realizing that there are many problems in the regime of corporate criminal liability, the Indonesian Supreme Court has finally enacted the *Peraturan Mahkamah Agung* (Internal Regulation) Number 13, Year 2016 on the Procedure to Handle Corporation in Criminal Case (hereinafter referred to as PERMA guidelines).[426]

To further explore the PERMA guidelines, it is important to understand the PERMA in general as well as its significance to the Indonesian legal system. Historically, the PERMA, Number 1, Year 1954 on Regulation Related to the Unclear Regulation on Procedural Criminal Law was the first PERMA enacted by the Supreme Court (on 18th March 1954).[427] As a newly independent country, the procedural laws were considered incomplete since Indonesia still applied different procedural laws that were the *Herziene Indishe Reglement* for courts within Java and Madura islands and *Reglement Buiten-gewesten* for courts outside Java and Madura islands.[428] Therefore, the former Article 13,1 Law Number 1, Year 1950 on the Structure, Authority, and Administration of the Indonesian Supreme Court stipulated that the Supreme Court was given the authority to fill a legal vacuum in procedural law when facing incomplete stipulations in the judiciary process. [429] The new Law on the Supreme Court still maintains that authority by the stipulation in Article 79 of the Supreme Court Law, which stipulates that the Supreme Court may set forth further matters required for the smooth administration of justice

[426] The Supreme Court Regulation was enacted on 29 December 2016, see https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=fileinfo&id=3871.
[427] See the chronological list of PERMA from 1954 to 2014 on H. M. Fauzan, PERMA dan SEMA: Mengisi Kekosongan Hukum di Indonesia Menuju Peradilan yang Agung (Filling the Legal Void in Indonesia toward Gret Judiciary) (PERMA 1954-2014 dan SEMA 1951-2014), (Jakarta: Prenada Media Group), p. 3.
[428] See the short discussion related to the history of the early Indonesian procedural law in Chapter 2.
[429] Ronald S. Lumbun, PERMA RI: Wujud Kerancuan Antara Praktik Pembagian dan Pemisahaan Kekuasaan, (Jakarta:Rajawali Press, 2011) p. 4.

if there are any matters not yet sufficiency regulated. [430] Since 2016, the Supreme Court has released 73 PERMA on various subjects.[431] *Harahap* stated that the authority given to the Supreme Court to issue the PERMA is legal and realistic. He argued that objectively it means that there is no Law that can always provide answers for a highly dynamic society's problems. Therefore, the PERMA is important as one of the instruments to ensure the effectiveness of law enforcement.[432] *Farida* also mentioned that the Supreme Court does not have a legislative power to make Laws, since its authority is to make regulations that are only internally binding.[433]

PERMA is a special internal regulation issued by the Supreme Court as a guidance for the courts under the Supreme Court in procedural law. The PERMA has internal binding power limited only to all courts under the Supreme Court. [434] Since all courts will apply PERMA within the criminal trial, other law enforcers such as the prosecutor office and the national police usually make PERMA an important consideration when handling criminal cases. Therefore, PERMA is effective in solving procedural problem in the trial process.

However, the enactment of PERMA can also be considered a weakness of the Supreme Court decisions in the law-making instruments to solve legal problems that emerged within society.[435] *Pompe* further explained that when the Supreme Court cannot assure that their decisions will become an effective instrument to assure a uniform implementation of the law by the lower courts, the Supreme Court tends to use its other functions by giving regulation and supervision to the judges under its authority when they exercise their professional duties.[436] Despite that critique, the PERMA is a fast and effective tool to deal with problems related to the incomplete procedural law related to the criminal liability of corporations since the amendment of the *KUHAP* is a time consuming process. *Sjahdeni* also mentioned in his conclusion of his book that in the midst of the incomplete stipulations in the criminal procedural

[430] The Law Number 1 Year 1950 on the Indonesian Supreme Court has been replaced by the Law Number 14 Year 1985 on Supreme Court as amended by the Law Number 5 Year 2004 in conjunction with the Law Number 3 Year 2009 (further Supreme Court Law).
[431] See the list of PERMA on the official website of the Supreme Court on the following website https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=select&id=14.
[432] M Yahya Harahap, Kekuasaan Mahkamah Agung Pemeriksan Kasasi dan Peninjauan Kembali Perkara Perdata, (Jakarta: Sinar Grafika, 2008), pp. 163-173.
[433] Maria Farida Indriati S, *Ilmu Perundang-Undangan, Jenis, Fungsi, dan Materi Muatan*, (Yogjakarta: Kanisius, 2007), p. 104.
[434] Henry. P. Panggabean, *Fungsi Mahkamah Agung Dalam Praktik Sehari-hari*, (Jakarta: Sinar Harapan, 2001), p. 144.
[435] Sebastian Pompe, *the Indonesian Supreme Court: a Study of Institutional Collapse*, Southeast Asia Program Publications, Ithaca, (NY: Cornel University Press, 2005), p. 251.
[436] Ibid.

law related to the corporation, the Supreme Court should issue a PERMA to supplement gaps in the law of procedures of corporation prosecution.[437]

In the consideration chapter in the PERMA guidelines, the Supreme Court admits that there are many Laws that recognize corporations as subject of criminal sanctions, yet there are still limited number of cases against corporations. The Supreme Court finds that one of the reasons for the limited number of cases brought before the court, is the unclear procedural law to handle corporations among the Laws.[438] Therefore, the Supreme Court, through the PERMA guidelines, aims to provide a guidance for law enforcers to handle criminal case which involves corporation, filling a legal vacuum and optimizing law enforcement toward corporations.[439] This PERMA guidelines seems to try to solve possible problems faced by law enforcers when they prosecute corporation. It can be seen from the huge coverage of the PERMA guidelines. The PERMA guidelines do not provide guidance on procedural law, such as a guidance to draft an indictment for corporations; how to determine the representative of corporation in criminal case; the procedure to submit a letter of summon to the corporation; and procedure to execute fine to corporation. But also provides several criteria to determine the *actus reus* and *mens rea* of corporations. Furthermore, the PERMA guidelines also give definitions on several essential elements in determining the criminal liability of corporations. The important stipulation on the PERMA guidelines will be discussed as follows.

a. PERMA guidelines on different forms of corporations

In general, the PERMA guidelines has 7 chapters and 37 articles that cover several important regulations related to the criminal liability of corporations. In Chapter I, on general provisions, the PERMA guidelines give several important definitions related to the types of corporations. The PERMA guidelines do not only generally define which corporation can be criminally liable,[440] but also defines a parent company,[441] a subsidiary company,[442] a merger, an acquisition and separation of corporations. All those definitions are stipulated because the PERMA guidelines do not only determine the way to establish the criminal liability of

[437] Remmy Sjahdeni (2006), *Op.Cit*, p. 201.
[438] Paragraph c of Consideration Chapter on PERMA guidelines.
[439] Article 2 of the PERMA guidelines.
[440] The PERMA guidelines defines corporation as an organized collection of people and/or wealth both in form of legal entity or non-legal entity. Vide Article 1 paragraph 1.
[441] Parent company is a corporation with legal entity which has two or more subsidiary company. Vide Article 1 paragraph 2 PERMA guidelines.
[442] Subsidiary company is a corporation with legal entity which is owned or controlled by parent company. Vide Article 1 paragraph 3.

corporations in general, but also the criminal liability when corporations involved in criminal cases change their forms through merger, acquisition or separation.

The PERMA guidelines stipulate that when a corporation committed a crime that involved its parent company and/or subsidiary company, then each corporation has its own liability depending on its own misconduct.[443] Even though the business perspective between parent company and subsidiary company has a strong connection, each company has its own criminal liability. Furthermore, when mergers or acquisition happens to certain corporation after committing a crime, the liability of corporations is limited to the assets that are placed on the new corporation.[444] When separation of a corporation happens after committing a crime, the liability of the corporation can be imputed to all separated company based on each new company role in the misconduct.[445]

When a corporation is closed or dissolved after committing a crime, the PERMA guidelines stipulate two different ways to deal with that company. Firstly, when a corporation is going through the closing process, that corporation still can be criminally liable.[446] Investigators or prosecutors can ask the Court to suspend the closing process of the corporation until the end of criminal trial.[447] Secondly, if a corporation is closed after committing a crime, that corporation cannot be criminally liable, but the PERMA guidelines make it possible to sanction the misconduct by using civil lawsuits against corporate assets.[448] The civil lawsuit can only be done by the government against ex-directors, inheritors or third parties who control the assets of corporation.[449]

b. Criteria In Establishing the Criminal Act And the Criminal Liability Of Corporations

Important stipulations in the PERMA guidelines are the criteria made by the Supreme Court to determine the *actus reus* and *mens rea* of corporation. Firstly, it should be based on stipulations within the Law that recognizes corporations as its subject.[450] If the Law has limited or unclear stipulations, the PERMA guidelines can be used. The PERMA guidelines determines that a criminal act is taken to be committed by a corporation in the event that the act is committed by people who work or have other relations both personally and collectively, and

[443] Article 6 of the PERMA guidelines.
[444] Article 7 paragraph 1.
[445] Article 7 Paragraph 2.
[446] Article 7 Paragraph 3.
[447] Article 16 Paragraph 1.
[448] Article 8 Paragraph 1.
[449] Article 8 Paragraph 2.
[450] See Article 1 Paragraph 8 and Article 4 Paragraph 1.

act within the scope of corporation or outside the scope of corporation.[451] From those criteria, the PERMA guidelines offers further definitions which are;

1. Management of corporation is an organ of corporation that runs the management of corporation based on article of association or Laws that is authorized to represent the corporation, including those who do not have the authority to make a decision, but they can control or influence the corporate policies or take part in a corporate policy decision that might be qualified as a criminal offence.[452]
2. Working relationship is the relationship between corporations with its workers or employees based on an agreement that has element of works, wages, and / or command.[453]
3. Other relation is a relationship between the directors of corporations and / or corporations with people and / or other corporations to make the other parties act on behalf of the first party based on the agreement, both written and unwritten.[454]
4. Within the scope of corporation is the business scope of the corporation or the scope of work of corporation which includes and / or support the business activities of corporation either directly or indirectly.[455]

By defining several elements, the PERMA guidelines wants to make guidance as clear as possible for the law enforcers. Several elements of these criteria have been stipulated in several Laws that recognize the criminal liability of corporations, but the Supreme Court makes these criteria more understandable to implement. Furthermore, from those definitions, the Supreme Court gives a broad definition for several elements, for example, by adding indirect support in business activities as activities within the scope of corporation and broadening the definition of management of corporation. One element, "outside the scope of corporation", is undefined. This element is important because the activities of corporations outside their scope can be considered a criminal act by the corporation. Based on *a contrario* interpretation, the outside the scope of corporation is all corporate activities outside their scope of business or outside their daily activities based on article of association. It is possible that a corporation can commit criminal acts when conducting activities which are totally different from their daily activities.

[451] Article 3.
[452] Article 1 Paragraph 10.
[453] Article 1 Paragraph 11.
[454] Article 1 Paragraph 12.
[455] Article 1 Paragraph 13.

To what extend those activities outside the scope of the corporation can be counted as criminal acts still needs to be explained by the courts in the future.

After providing criteria to determine the act of corporation, the PERMA guidelines also stipulate several criteria to determine *mens rea* of corporation. The mental element of corporation can be determined from; [456]

1. The Corporation gained profit or benefit from misconduct or the misconduct committed on behalf of corporation,
2. The corporation accepted the misconduct or,
3. The corporation did not take necessary measures for the prevention, preventing greater impact and to ensure compliance with applicable Laws and regulations to avoid the misconduct.

Those criteria mentioned above are formulated alternatively, meaning that the judges may choose one criterion to determine the criminal liability of the corporation. Before using the criteria in establishing the *actus reus* and *mens rea* of corporations based on the PERMA guidelines, the judges should first refer the Laws that recognize corporation as the subject. Then, when certain Laws do not clearly regulate certain subjects, the PERMA guidelines can be used as a guidance to fill the unclear part of those Laws.[457] That stipulation is important because the Laws have a higher position compared to the PERMA. Law enforcement for corporations should be based on the stipulations within the Laws and the PERMA should only fill the legal gap caused by unclear or no stipulations on corporate criminal liability within the Laws.

c. Procedural Law Toward Corporations

Another problem on corporate criminal liability in Indonesia is the lack of procedural law, since the Code of Criminal Procedure only recognizes natural person as its subject and the laws that recognize the criminal liability of corporation do not stipulate clearly. The PERMA guidelines have a complete stipulation in procedural law related to corporations. The stipulations on procedural law covers:

1. Procedure to handle corporation in the investigation process.

Even though the PERMA guidelines are an internal corporation within the courts, it also gives a guidance for the investigation process. The Supreme Court gives a detailed stipulation

[456] Article 4.
[457] See Article 4 Paragraph 1 and 2.

about who can be the representative of corporations in investigation process, how to deliver the letter of summons to the corporation and the content of the letter.[458] The letter of summons must include the name of corporation, the address, the nationality of corporation, the status of corporation (as a witness or a defendant) and the time and place of examination and the summary of alleged crime.

2. Procedure to handle the corporation in the prosecution and trial process.

The PERMA guidelines provide a guidance to the prosecutor office to formulate the bill of indictment for a corporation. In the past, the way the prosecutors formulated the bill of indictment was often the exception object by the defendant's lawyer in the trial because of the lack of legal basis. The PERMA guidelines stipulate that the bill of indictment should be formulated based on the *KUHAP* with several adjustments based on the characteristics of corporations. The bill of indictment must include the name of corporation, place and the date of the establishment of corporation, the number of the article of association, the address of corporation, the nationality of corporation, the business type of corporation, and the identity of the representative of corporation.[459] The representative of corporation in the investigation process must be the representative of the corporation in the trial process, which can be replaced by another representative for sufficient reasons.[460] The Supreme Court added an additional type of evidence, which is the testimony of corporation, before the court through this PERMA.[461]

3. Procedure to execute criminal sanctions to the Corporation.

Another important procedural law concerning corporations is the guidance to execute criminal sanctions to corporations. The PERMA guidelines want to ensure that the criminal sanctions corporations receive is executable only for the corporation and not the natural person within corporation. The fine is the only possible primary sanction to the corporation and the additional sanction will be based on the Laws as long as the characteristic of the sanction is suitable for the corporation.[462] After the decision is final and binding, the corporation has one month to pay the fine and additional sanctions. The time can be prolonged for another month.

[458] Article 9, 10 and 11.
[459] Article 12.
[460] Article 13.
[461] Article 14.
[462] Article 25.

If the corporation fails to pay the fine and additional sanction, corporation's assets will be confiscated and auctioned to pay the sanctions.[463]

The decision of the Indonesian Supreme Court to provide guidance for establishing the criminal liability of corporations should be appreciated. The PERMA guidelines can be a direct answer to problems faced by law enforcers when they prosecute corporations. The law enforcers that always questioned the legal basis in substantive and procedural law for handling corporations in criminal case, now should be confident enough to prosecute corporation. The definition of several important elements in establishing the *actus reus* and *mens rea* of corporation and complete guidance in procedural law is sufficient guidance for the law enforcers. The PERMA guidelines are formulated based on two sources. Firstly, from the Laws that recognize corporations as its subject. Secondly from the criteria which have been used by the Supreme Court when examining corporate criminal cases.

The decision of the Supreme Court to issue the PERMA guidelines can also be seen as a weakness of that institution to make a decision that can be a legal precedent in the development of the regime of corporate criminal liability in Indonesia. The Supreme Court has decided several cases on corporate criminal liability, but the PERMA guidelines are more effective as a guidance for law enforcers than the opinion of the Supreme Court within their decisions.

3.5. Conclusion

The effort of the Indonesian Prosecutor Office to prosecute corporations in the context of different stipulations among the Laws on the corporate criminal liability in the Indonesian criminal legal system, should be appreciated. In fact, that effort has provided a learning experience for the prosecutors handling corporations in criminal cases and the prosecutors can use that experience when handling other cases. The issuing of the PERJA guidelines are used to solve regulations problem faced by the prosecutors when handling a corporation as a defendant in criminal cases. Moreover, the issuing of that regulation is proof that the Prosecutor Office recognizes a corporation as a possible subject of criminal law.

The Indonesian Court also plays an important role, especially in the way they interpret the law since the system of the criminal liability of corporations in Indonesia is still unclear. Their interpretation resulted in several approaches in establishing the criminal liability of corporations along with the interpretations on procedural law field, such as the form of legal

[463] Article 28.

documents for corporations. The implementation of corporate criminal liability in Indonesia, raises a question about the position of the Indonesian Supreme Court to accept the criminal liability of corporations without requiring the corporation to be the defendant when imposing a criminal sanction. As a legal subject, a corporation has a right to a fair trial. Currently, corporations have to just to comply with the court's decision. The enactment of the PERMA guidelines hopefully will solve the problems faced by the law enforcers in establishing the criminal liability of corporations. As a guidance, the PERMA guidelines have detailed and sufficient stipulations in substantive and procedural law to handle corporations in criminal cases. The harmonization between the PERJA guidelines and the PERMA guidelines would make the implementation of the system of criminal liability of corporations more. However, since all those regulations are only internal, they still do not answer the main problem in the system of the criminal liability of corporations in Indonesia. The problem can only be solved by legal reform in the Indonesian general criminal law and criminal procedure. The present system of corporate criminal liability, which has been develop by the Prosecutor Office and the Supreme Court, should be an important consideration in the law reform.

Chapter 4

Corporate Criminal Liability in the Netherlands

(A Lesson from the Root of the Indonesian Criminal Law)

4.1. Introduction

Indonesia, based on concordance principle, inherited its civil law legal system from the Netherlands since its independence in 1945. It is different with the neighbouring countries such as Singapore and Malaysia, which are influenced by the common law system (the UK). Therefore, discussions on the Indonesian criminal legal system should include the exploration of the Dutch criminal system. Until nowadays, the Indonesian legal system still relies on *the Wetboek van Straftrecht voor Nederlands Indie (WvSNI)* and *Burgerlijk Wetboek (BW)* as the foundation of the criminal law and civil law system. Dutch literature, especially on criminal law before 1950s, and literatures discussing *Nederland Indie* criminal Law are also still commonly used in law faculties (some of those books have been translated to Indonesian language). [464] New literature written by Indonesian criminal law scholars still discuss and refer to Dutch literatures. Furthermore, Dutch criminal law terminologies are still used in both academic and court practices. In addition, cooperation on criminal law training between the two countries still continues until now.[465]

From January 1th 1918, the *WvSNI* became the criminal code that was applied in Indonesia (formerly known as *Nederlands Indie*) which was a part of the Dutch colony.[466] The *WvSNI* essentially replicated the Dutch Criminal Code (hereinafter referred to as the DCC), notwithstanding several adjustments related to the protection of colonial interests.[467] After

[464] The examples are: Leerboek Van Het Nederlanches Strafrecht by Prof. D Simon translated by Prof Lamintang, Handboek Van Het Nederlands Indisch Strafrecht book 1 and 2 by Mr. .J.E. Jonkers, Hukum Pidana (criminal law) by Prof. Dr. D. Schaffmeister, Prof. Nico. Keijzer, and Mr. E. PH. Sutorius, Inleiding tot de Strafrechts dogmatiek by Prof. Mr. W.H.A Jonkers, Hukum Pidana (criminal law) by Jan Remmelink and Hazewingkel Suringa.

[465] The example of the cooperation is the project of "Common Roots, Separate Development in Indonesia and Dutch Criminal Law" in 1997. This resulted several criminal law trainings and the translation of Dutch book *"inleiding tot de Studie van het Nederlandse Strafrecht"* by *Derkje Hazewingkel-Suringa and jan Remmelink* to Indonesian language. Before 1993 there was a project called *Nederlandse Raad voor Juridische Samenwerking met Indonesie* which initiated experts' assistance for legal reform in Indonesia.

[466] Staatsblad 1915 No.732.

[467] The example of the adjustments was the type of criminal sanction stipulated in the code. In 1870, the Netherlands had abolished death penalty in their criminal code, yet the death penalty still applied according to *WvSNI* in *Nederland Indie* in 1918. The death penalty, on one side, was considered as the proper punishment to be implemented in *Nederlands Indie* because the large geographical area and the heterogeneous society in

independence, Indonesia adopted its own way of developing its criminal law, through the development of criminal law regulations and doctrine as well as through the decisions of the Indonesian Supreme Court.

The Indonesian government used the Concordance principle to manage the vacuum of law after independence, which then became the basis for the enactment of the *WvSNI* as the Indonesian Criminal Code (*KUHP*). Even though several adjustments in the *KUHP* were made to manage the condition of Indonesian independence, the basic principle and the spirit of the *WvSNI* still exists in the *KUHP*, including its characteristics. The DCC, which was the source of the *WvSNI*, has several characteristics, namely: simple, practical, faith in the judiciary process, follows the egalitarian principle, is not based on certain religious values and recognizes the autonomous legal consciousness.[468] Furthermore, *Tak* stated that the practicality of the DCC leads to an important position and a strong influence of the courts, especially the Dutch Supreme Court, in developing the criminal law doctrine.[469]

The Netherlands courts have historically held an important position in solving problems that cannot be solved through only the stipulations within the criminal Laws and the existing criminal law doctrine. The Dutch Supreme Court's decision in electricity theft (*elektriciteits arrest*) in 1921[470] exemplifies the authoritative role of the courts in developing criminal law doctrine in the Netherlands. The extensive interpretation that was used by the Dutch Supreme Court to interpret the word "property" in Article 310 of the DCC (Article 365 of *KUHP*) was the landmark decision to handle a new form of criminal offence without changing the stipulation within the law.[471] Since Indonesia inherited the Dutch criminal legal system, the Indonesian courts also have an important role in the development of the Indonesian criminal legal system.

Nederlands Indie made a harsh punishment need to be applied to ensure the public order. On the other side, at that time, the death penalty also had the function to protect the colonial government interests from the resistance of *Nederlands Indie* people. It can be seen in several articles in the *WvSNI* related to crimes against the state or the authority which set capital punishment as the criminal sanction. See J.E.Sahetapy, *Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, (Malang: Setara Press, 2009). The position of capital punishment as a part of criminal sanctions has not changed until now. Indonesian legislators still believe that the capital punishment is required to protect the society.

[468]P. J. P. Tak, *The Dutch Criminal Justice System*, (Nijmegen: Wolf Legal Publisher, 2008), p. 27.

[469]Ibid.

[470] HR 23-05-1921, NJ 1921, 564.

[471]In the past, the word "property" in Article 310 DCC in the theft offence was only defined as the tangible good, then the Dutch Supreme Court in the Electricity Case 1921 reinterpreted the word "property" in that article including the electricity although it had a different nature from the former definition of the property. After that decision, the electricity theft can be punished based on Article 310 of the DCC.

The development of basic principles of Indonesian criminal law is also based on the development in the Dutch criminal legal system, especially the Dutch Supreme Court's decisions before 1945. The Indonesian Court still refers to several Dutch Supreme Court decisions before 1945, such as the Electricity Case (*elektriciteits arrest)*, the Milk and Water Case (*Melk en Water Arrest*) and the Veterinarian Case *(Huizense Veearts Arrest)*.[472]

In the context of contemporary problems in the development of corporate criminal liability that Indonesia is facing, this chapter will discuss how the Netherlands developed its system and what can be learned from developments in regulations and case laws. Comparative legal study will be used as an instrument to enrich the discussion on the Dutch experience in the development of corporate criminal liability. It is imperative for Indonesia to understand this, as the Dutch criminal law system is the root of Indonesian criminal law. Both countries were previously in the same general position in the recognition of corporate criminal liability and it is important to know what has happened in Dutch criminal law, both within their Laws and case laws after this country left Indonesia in 1945.

Even though Indonesia is currently in the process to reform its criminal code, the position of the Dutch criminal law principles is still important. The Indonesian criminal code reform will not success without good understanding about the principles in present KUHP that are originally from Dutch law. Moreover, the law making process of both the new KUHP and the KUHAP still considers the development of the Dutch criminal legal system as an important lesson to enrich the substance of the new Drafts.[473] In addition, as a part of international community, the law reform in Indonesia has also considered several international conventions which have been ratified by Indonesia to be accommodated in its criminal code such as United Nation Convention against Corruption (UNCAC), International Convention against Torture and International Covenant on Civil and Political Rights (ICCPR). Since the Netherlands has also ratified those conventions, a comparison with the Dutch Law is very valuable for the development of Indonesian criminal law.

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[472] Melk en water-arrest (HR 14-02-1916, NJ 1916, 681) and Huizense veearts (HR 20-02-1933, NJ 1933, 918).

[473] There are various meetings between Indonesian legal drafters' and Dutch delegations to discuss the development of the Dutch criminal law system. In the official academic paper of the KUHAP draft, the legal drafters mentioned about the visitation to *Rechtercommissaris* in Den Haag and discussed with *Mr.P.A.M. Verrest* about the Dutch criminal procedural law. See the official academic paper of the *KUHAP* reform, p.2. Available at https://komite*KUHAP*.files.wordpress.com/2012/08/naskah-akademik-ruu-hukum-acara-pidana.pdf. Accessed 1 March 2017. See also the report from *Chairul Huda*, a member of KUHP legal drafters about the visitation of KUHP legal drafters to several Dutch institutions such as Dutch National Police, Dutch Prosecutor Office and Leiden University. Available at http://huda-drchairulhudashmh.blogspot.com/2015/06/laporan-kunjungan-ke-negeri-belanda_10.html accessed 1 March 2017.

4.2. The Development of Corporate Criminal Liability in the Dutch Criminal Laws

The early development of corporate criminal liability in the countries that adopted the European Continental System (civil law system), which included the Netherlands, followed the opinion that only the natural person could be criminally liable.[474] The maxim *"societas delinguere non potest"*, which means that a corporation cannot be held criminally responsible, was the basis of the France Criminal Code 1810 and the Dutch Criminal Code 1886, excluding the possibility of sanctioning corporations.[475] At that time, based on a civil law doctrine, a corporation was considered a legal fiction. A German jurist, *Carl Friedrich von Savigny*, developed the "fiction doctrine", which stated that the recognition of a legal person was based on the fiction that the will of the natural persons as the representative of the corporation was regarded as the will of the legal person. *Savigny* posited that employing the concept of a legal fiction could lead to civil liability of corporations but never to criminal liability.[476]

In general, the development of Laws on corporate criminal liability system can be divided into three development stages. The first stage happened during the process of codification of the DCC from 1881 to 1886. In this stage, actually the concept of criminal liability of corporations was already familiar within the Dutch law system. This is demonstrated in the possibility of prosecuting a corporation based on tax law, customs law and in several crimes related to import duty.[477] That recognition can be seen as a pragmatic approach of the Dutch criminal law system toward the possibility of sanctioning corporations (legal fiction) especially for crimes related to state revenue (tax and custom law). However, the position of the Dutch legislators with respect to the general rule on criminal law in the DCC still reflected *Savigny's* opinion, which then became the general opinion for European Continental legal system countries. Moreover, the Dutch legislators did not want to accept that the fiction doctrine from civil law could apply in the criminal law doctrine.[478]

The position of the DCC legislators that only the natural persons could be held criminally liable is highlighted in most articles in the DCC, which only referred to the natural person as the subject of criminal law.[479] In addition, several offences in the DCC directly mentioned a

[474] Guy Stessens, *Op. Cit.*, p. 495.
[475] *Ibid.*, p. 496.
[476] Thomas Weigend, *Op. Cit.*, p. 930.
[477] De Doelder, 1996, *Op. Cit.*, p. 290.
[478] Ibid.
[479]The example of the words used is :"*hij die"* which can be translated as "anyone who" *see* the English version of the Dutch Penal Code in : the Dutch Penal Code, *American Series of Foreign Penal Code*, translated by Louise Layer *et al*, Littleton CO: Rothman, 1997

personal quality of the offender as a natural person, such as "mother" (Articles 255-259 DCC) or "civil servant" (Articles 355-380 DCC).[480] To deal with the existence of the corporation, the legislators of the DCC in 1886 created Article 51 on the possibility of sanctioning criminal offences in the sphere of corporate activities. The regulation became the general stipulation in criminal law because it was outlined in the First Book of the DCC on General Provisions. Article 51 stated that in case a criminal offence was committed by the director or the member of a board of management or commissioners, no punishment shall be pronounced against the director or commissioner who evidently did not take part in the commission of the offences.[481] Even though the regulation in the old Article 51 of the DCC was designated to the criminal offences related to corporate activities, the stipulation in that article still confirmed the DCC legislators' opinion that only a natural person could be held criminally liable.

The second stage of development happened between 1965 and 1976. In 1965, the Netherlands added Article 50a to improve the DCC provision regarding crime in the sphere of corporations.[482] This article extended the types of natural persons that could be held criminally liable when a crime was committed within the sphere of corporations. The only natural persons who could be subject to a criminal sanction when a corporation had committed a crime were members of the board of managers or directors, the person who had ordered the offence and those who had given a guidance to the criminal offence. By extending the types of the natural persons, this article tried to distribute the liability for all persons who involved in the misconduct, not only the organs of corporations, but also persons who ordered or gave a guidance although he was not the organs of corporations. Although that stipulation broadened the subject of the criminal punishment, the stipulation in the old Article 50a of the DCC still reflected the position that only recognized the natural persons as the subject to criminal liability.

During the 20th century, corporations played an influential role in daily activities worldwide. Corporate activities are the primary driver of globalization and the emerging modern world. National and Multinational Corporations gain a huge profit from their businesses. The corporation can survive for more than a hundred years and require many generations of people to run it. Generations may change, but the corporation will continue. The existence and the important role of corporations in post-industrial revolution society and during

[480] De Doelder1996., *Ibid*., p. 289.
[481] This article has the similarity with the Article 59 of the *KUHP*.
[482] De Doelder, 1996., *Op.cit*., p. 291.

the 20th century created the idea that corporations can be the subject of criminal law; therefore, it is reasonable to argue that corporations can be held criminally liable. The previous opinions of the Netherlands and several countries from the common law system and the civil law system, that corporations could not be held criminally liable, has gradually changed.

The third stage in the development of corporate criminal liability in the Netherlands started by the first broad recognition of corporate criminal liability in 1951 through the acceptance of corporations as the subject of criminal prosecutions in economic crimes. The recognition was within The Economic Offences Act *(Wet op Economische Delicten*, hereinafter referred to as the EOA).[483] This Law applied specifically to the enforcement of several economic crimes.[484] However, the recognition was still in the special criminal regulation outside the general rule of criminal law. Importantly, the enactment of the EOA occurred in the context of the economic depression and the bad economic condition in the Netherlands after the Second World War; therefore that special Law was needed to adjust with the characteristics of white collar economic crime.[485] To ensure the effectiveness of law enforcement in economic crimes, the Law stipulates a single system in the investigation, the prosecution and the punishment of economic crimes.[486] Moreover, the recognition of the criminal liability of corporations in economic crimes is shown in an important stipulation in the EOA, because corporations usually become an important actor in economic activities. Therefore, the possibility to punish corporations through the EOA became another way to ensure the effectiveness of the law enforcement in economic crimes.

Since EOA Law is a special criminal law and given the fact that at that time the DCC did not recognize corporations as its subject, the articles related to corporations within EOA Law were comprehensively stipulated through four subsections in Article 15. The articles stated that corporations could be criminally liable and determined how to establish the criminal liability of corporations. Article 15 of the EOA states that a legal person could commit economic crimes; therefore, prosecution and punishment in economic crimes could also be imposed to a legal person. Then, subsection 2 of that Article further regulated that a corporation could commit an economic offence if the offence was actually committed by a natural person who

[483] Stb.1950, K 258.
[484] The types of economic offences based on this Law can be seen in Article 1 of the EOA.
[485] B.F. Keulen & E. Gritter, *Op. Cit.*, p. 2.
[486] See the preamble of the EOA on http://wetten.overheid.nl/BWBR0002063/2017-08-01#Aanhef , accessed on 10 May 2016.

acted within the scope of the corporation.[487] Determining whether the offences were committed within the scope of corporations was assessed on the basis of employment disregarding the offence, committed by a single person or collectively.[488] The stipulation in subsection 2 of Article 15 of the EOA explicitly regulated that the act of corporations in economic offences was determined by the act of the natural person within the scope of the corporation; therefore a corporation as an entity could not commit an economic offence. In that case, a legal fiction doctrine was used to connect the act of a natural person within a corporation with the act of the corporation.[489]

The milestone event of the recognition of the criminal liability of corporations in the Netherlands happened on June 23rd 1976 when Dutch legislators decided to finally rewrite the Article 51 of the DCC.[490] That decision was important because it changed the approach to recognizing corporate criminal liability that was maintained by the Netherlands since the first enactment of DCC in 1886. The old Article 51 provided the legal basis that only a natural person could be criminally liable. The new stipulation changed to recognizing that corporations could be criminally liable as well. The Dutch legal scholars also welcomed the recognition of the criminal liability of corporations through Article 51 DCC, even since a decade before the stipulation was enacted.[491] The three steps in recognizing criminal liability of corporations, which were discussed above, show that the efforts to make corporations liable for their misconducts had been done long before the enactment of Article 51 DCC (and before Article 15 EOA). Therefore, the enactment of Article 51 DCC is a logical next step in criminal law after all of those efforts.

In the explanatory memorandum (*memorie van toelichting)* of Article 51 of the DCC,[492] the Dutch legislators mentioned several important explanations related to the amendment of the Article 51 of the DCC. Firstly, that corporate criminal liability was not new for the Dutch legal system, since the possibility to prosecute corporations for several offences was recognized since the 19th century. Therefore, the process of recognizing corporate criminal liability within

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[487] English translation of former Article 15 of the EOA is based on B.F. Keulen, *Op.cit*. p.1-2. The original text of former Article 15 of the EOA can be seen *on Kamerstuk Tweede Kamer 1948-1949 kamerstuknummer 603 ondernummer 7.*
[488] *See* Article 15 Subsection 2 of the EOA.
[489] De Doelder, 1996., *Op.Cit*., p. 292.
[490] Stb.1976, 377.
[491] See for example in D.Hazewinkel-Suringa/J.Remmelink, *Inleiding tot de studie van het Nederlandse strafrecht*, Arnhem: Gouda Quint 1995, p.137-144 and Noyon-Langemeijer-Remmelink (A.J.Machielse), *Wetboek van Strafrecht*, note 14 on Article 51 DCP (online, last upfate may 30th 2016).
[492] Kamerstuk Tweede Kamer 1975-1976 Kamerstuknummer 13655 ondernummer 3, p.1-20.

the Dutch criminal legal system using special laws outside the criminal code was a logical step for the development of a corporate criminal legal system. The stipulation of the new Article 51 of the DCC was the last step in that process. Secondly, the recognition within the criminal code will simplify the rules that were previously incomplete and different from each other and improve the development of case laws in corporate criminal liability for all criminal acts. Lastly, the legislators believed that the criminal liability for corporations was neither a supplementary or complementary *(aanvullend*) law within the Dutch criminal legal system. Based on that explanatory notes on Article 51, there is no theoretical discussion on the acceptability of criminal liability of corporations. It was indeed a step in the development of criminal law, which was taken in a pragmatic way instead of a theoretical debate in its process.

> *Article 51*
>
> 1. *Offences can be committed by natural persons and legal persons*
> 2. *If an offences has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:*
>   a. *The legal person; or*
>   b. *Those who have ordered the offence, as well as on those who have actually controlled the forbidden act, or*
>   c. *the persons mentioned under 1) and 2) together*
> 3. *For the application of the former subsections, equal status as a corporation is given to corporations without civil legal status, partnerships, firms of ship owners, and properties gathered for a special purpose.* [493]

The above stipulation in Article 51 of the DCC generate several insights. Firstly, the new Article 51 of the DCC served as the legal basis for recognizing corporate criminal liability in the Netherlands' general criminal legal system. Theoretically, natural persons and/ or legal persons (corporations) could commit all criminal offences within the DCC since the stipulation is outlined in the First Book of General Stipulations of the DCC.[494] By that stipulation, all criminal provisions containing the words "anyone who" *(hij die)* within the articles may be applied to corporations as well as the natural persons. In contrast, several crimes within the DCC, which require special qualification for the offender, cannot be committed by

[493] The translation of the Article 51 of the Dutch Penal Code based on translation in De Doelder, H., 'Criminal Liability of Corporations: A Dutch Update', in: Sieber, U., Dannecker, G., Kindhäuser, U., Vogel, J. & Walter, T. (eds.), *Strafrecht und Wirtschaftsstrafrecht – Dogmatik, Rechtsvergleich, Rechtstatsachen*, Köln/München: Carl Heymanns Verlag, 2008, p. 566. Another translation version of the Ditch Penal Code can also be found in Netherlands, Louise Rayar, Stafford Wadsworth, and Hans Lensing. 1994. *the Dutch Penal Code*. Littleton, Colo: F.B. Rothman.

[494]Based on Article 91 of the DCC, the stipulation in the Article 51 of the DCC also applicable to acts that are punishable under other Laws or ordinance, unless determined otherwise in a Law.

corporations, such as civil servant (Articles.355-380 DCC) and mother (Articles 255-259 DCC).

Secondly, when Dutch legislators introduced Article 51 of the DCC, they made an importance decision to abolish Article 15 of the EOA in order to make a single system on corporate criminal liability within the Netherlands' criminal law.[495] Without annulling Article 15 of the EOA, the EOA would keep its own system in prosecuting corporations in economic offences. By making a single stipulation on the regulation related to the criminal liability of corporations, the legislators intended to give a single basis for the courts to establish the criminal liability of corporations. If legislators did not abolish the stipulation on Article 15 of the EOA, the Netherlands would have two different systems to establish the criminal liability of corporations. However, the abolishment of the Article 15 of the EOA marked the end of the legal fiction approach to prosecute corporations based on the act of the natural persons within the scope of corporations, which Article 15 Subsection 2 EOA stipulated. This ended because Article 51 of the DCC recognizes that a corporation can commit a criminal offence by itself.[496]

Third, the stipulation in Article 51 of the DCC still reflects the characteristics of the DCC, which are simple, practical and the faith in the judiciary process. This is shown in Article 51 of the DCC, which generally stipulates how to recognize corporate criminal liability. Article 51 states that only the natural persons and the legal persons can commit offences without further stipulation on how to determine the act of corporations in criminal offences. The formulation of that article gives space for judges to freely interpret the law based on fact and characteristic of the case. The former stipulation of Article 15 of the EOA had more comprehensive stipulations compared to the DCC, as the approach to determine the act of corporations was stipulated in Article 15 paragraph 2 of the EOA. Looking at Article 51 Paragraph 2 of the DCC, there is no further stipulation about how to determine whether the prosecution, the punishment and the measures can be imposed on the legal persons, the natural persons who have ordered the offence and/or the persons who controlled the forbidden act. Based on the Dutch approach to criminal law, the Dutch Supreme Court has an important task of answering all questions mentioned above through the interpretation of Article 51 of the DCC within the case law.

[495] De Doelder, 1996, *Op. Cit.*, p. 292.
[496] Ibid.

Fourthly, Article 51 Paragraph 2 of the DCC reflects the stipulation in the former Article 50a of the DCC by opening the possibility of prosecuting and imposing sanctions to corporations as the criminal offender when an offence is committed by a corporation. It also creates the possibility of sanctioning the natural person(s) who instructed the offence or to the person(s) who controlled the commission of the offence. The stipulation of Article 51 Paragraph 2, which regulates the possibility of prosecuting both the legal persons and the natural persons if a corporation commits a crime, in practice, gives the opportunity of the legal enforcers to prosecute all possible natural persons who were involved in the crime. This can be done without using the participation doctrine in Article 47 or the aiding and facilitating doctrine in Article 48 of the DCC. The use of the complicity doctrine, to some extent leads to the complexity of prosecution, because the various categories and characteristics of participation require prosecutors to prove the exact activity committed by offenders (the natural persons and the legal persons), and the time and place of the offence.[497] However, since the legal person and the natural person is already the subject of criminal law, Article 47 and 48 of the DCC could also be implemented to the legal persons.

Fifthly, the definition of legal persons or corporations in Article 51 Paragraph 1 and 3 of the DCC are broadly stipulated. Article 51 Paragraph 1 of the DCC uses the word "legal person" *(rechtpersoon)* as the subject of criminal law.[498] The civil law regime also uses that terminology. Therefore, the classification of the entity as a legal person in that Article is based on the regulation in civil law. The organization or entity that can be classified as a legal person is also found in the Dutch private law. In the Civil Code of the Netherlands (hereinafter referred to as the CCN),[499] the stipulations on legal persons in private law are mentioned in Book 2 Legal Person article 2:1, 2:2, and 2:3. The examples of legal persons in these articles are: limited company, public limited company, and state organs such as provinces, municipalities and others. Furthermore, through the stipulation in Article 51 Paragraph 3, the concept of a legal person is broadened to include corporations without a civil legal status, a partnership, a firm of ship owners and a separated property.[500] In summation, the definition of a legal person

[497] De Doelder, 2008, *Op. Cit.*, p. 570.
[498] The Dutch version of the Dutch Criminal Code can be accessed on http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht.html#646.
[499] English version of The Civil Code of the Netherland can be read in "Hans Warendorft, Richard Thomas, Ian Curry-Summer, *The Civil Code of the Netherlands*, Wolter Kluwer, 2009.
[500]De Doelder stated that the firm of shipowner was added to Paragraph 3 of Article 51 DCC just in 1990 after the Dutch Civil Code defines a firm of ship owners as not having legal personality. Then it can be concluded that the recognition of the types of the corporation in the DCC is based on the recognition of the corporation both with civil legal status and without civil legal status in the Civil Law (Civil Code). See De Doelder., 1996., p.293.

(rechtpersoon) in the DCC differs from the conception of a legal person *(rechtpersoon)* in civil law because in the DCC all types of corporations are included in the criminal term of corporations, whether it has civil legal status or not. However, in the Netherlands, a one-person business or sole proprietorship (*eenmanszaak/zelfstandige zonder personeel*) is an exception, because the characteristics of this business is unity between business-property and private property of the owner or the manager. In practice, when a one-person business is prosecuted for an offence, law enforcers will prosecute the natural person that is the manager or the owner.[501]

Lastly, according to the definition of a corporation in Article 51 of the DCC, public institutions can also be a legal persons subject to the criminal law. The public institutions such as the State, the province, the municipality and many other public law organizations have the same position as private law corporations. However, certain public law legal persons that fall under Chapter 7 of the Dutch Constitution have legal immunity from criminal prosecution, although not absolute.[502] Several attempts to prosecute public corporations have occurred; however the Dutch Supreme Court's decisions and the immunity of the public body under Chapter 7 of the Dutch Constitution can only be accepted if the acts, were executed by civil servants acting within the scope of a duty assigned to that body.[503] In other words, public corporations can only be prosecuted if they act as a private entity in private activities and not as a public entity in the criminal offences. Immunity for public institutions also apply to its civil servant. The public institutions as well as the civil servants in control of the offence cannot be prosecuted if they acted based on the authority given by the law. But, the immunity of the civil servants does not mean the immunity for civil servant to act another crime such as taking bribery as a civil servant when making a policy. According to the Supreme Court decision, the immunity of public corporations is not absolute; nonetheless the only public corporation which still has the absolute immunity is the State.[504]

The immunity of public corporations from criminal prosecution, is an unfair treatment between public and private corporations in criminal cases. To mitigate this problem, on April 27th 2006, several Dutch parliament members filed an initiative bill to make public corporations

[501] De Doelder 1996., *Ibid*., p. 293.
[502] B.F. Keulen., *Op.Cit*., p. 8.
[503] HR 6 January 1998, NJ 1998.
[504] B.F. Keulen., *Op.Cit*., p. 9.

fully criminally liable by proposing to put an additional stipulation in Article 51 of the DCC.[505] The proposed stipulation was that the public law legal persons can be prosecuted on an equal foundation to private law legal persons. If the proposal was to be accepted, Article 51 of the DCC would have had an additional paragraph that would read as follows: *"Public legal entities are subject to prosecution on equal terms as other legal entities"*.[506] If the proposal was enacted as the law, there will be a similar treatment between public corporations and private corporations. Moreover, based on that bill, the state would have been able to prosecute all public corporations. In November 2015 that bill was rejected by the Dutch Senate *(Eerste Kamer der Staten Generaal).*[507] Even though the effort to pass the bill to make public corporations fully criminally liable failed, the possibility to sanction public corporations in the Netherlands for certain misconducts are interesting to be discussed later in Chapter 5 as the lesson learned for Indonesia.

Recently, there are several statutes and codes that are relevant to corporate criminal liability in the Netherlands, which are:[508]

a. Dutch Penal Code *(Wetboek van Strafrecht)* in Article 23 (7), Article 24 (1) and Article 51;
b. Dutch Code of Criminal Procedure (Wetboek van Strafvordering) in Part IV on Prosecution of Legal Persons;
c. Economic Offences Act (Wet Economische Delicten) which recognized the criminal liability of corporations through the former Article 15 and;
d. General Tax Act (Algemene Wet inzake Rijksbelastingen).

4.3. The Dutch Court Implementation of Corporate Criminal Liability in Criminal Cases

The method Dutch legislators employ to stipulate the law related to the recognition of corporate criminal liability in Article 51 of the DCC reflects the fact that the DCC has an importance position and strong influence in the courts in interpreting the law and establishing the corporate criminal law doctrine. This is especially the case with the Dutch Supreme Court. The process to develop several criteria and factors to establish corporate criminal liability

[505]Nico Keyser, *Criminal Liability of Corporations Under the Law of the Netherlands*, Unpublished Paper presented in front of the Indonesian President Delivery Unit (UKP4), Jakarta, 15 June 2013., p. 9.
[506] Ibid.
[507] See, https://www.eerstekamer.nl/stenogramdeel/20151110/initiatiefvoorstel_opheffing, accessed on 8 March 2016.
[508] Houthouf Buruma, Criminal Liability of Companies Survey "Netherlands", (Lex Mundi Ltd., 2008), p.1.

occurred over many years by the Dutch Supreme Court through several cases that varied in time, place and circumstance. For that reason, the criteria and factor in establishing corporate criminal liability made by the Dutch Supreme Court, according to *Keulen*, are diffuse and elusive.[509] In addition, *Mevis* stated that Dutch case law on corporate criminal liability has been very precarious.[510] This condition is understandable, because the criteria and the factors behind the cases varied depending on the case. It is important to highlight that amongst the different approaches in several different case laws in the Netherlands, the Supreme Court has established general criteria to determine the criminal liability of corporations. The method used by the Dutch's court to develop its system will be discussed as follows.

4.3.1. The Dutch Approach to Crime in the Sphere of Corporations before the Recognition of the Criminal Liability of Corporations

Before the acceptance of corporate criminal liability in the general rule of criminal law in and in the midst of the opinion that legal persons cannot be held criminally liable, the Dutch Supreme Court tried to create a solution to manage problems emerging from the existence and the activity of corporations in society. In some cases, the activity of corporations had disadvantaged society. But, because the complexity of corporations' structure and the position of natural persons behind the corporations who had not been directly involved on certain misconduct within the sphere of corporations caused the natural persons could not be brought before the court, since criminal law requires only the (physical) offender who is (directly) involved in the offence to be criminally liable.

The stipulation in old Article 51 to some extent opened a possibility of exculpation to the organs of a corporation who can prove that they already exercised their obligations. Consequently, if the misconduct can be proved to be committed outside their will, the organ of corporation cannot be criminally sanctioned. However, a question emerged about the criminal liability of natural persons when the Law directly pointed a condition that can only be possessed by the corporations itself. For example, in the *Wilde-bussen-arrrest*, only the corporation that can illegally transport because the transport permit was given to corporations not the organs.[511]

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[509] B.F.Keulen., *Op.Cit*., p. 4.
[510] Mevis, annotation to HR 21 October 2003, NJ 2006, 328 in M. Hornman & E. Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate Mens Rea', in: F. de Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M. Koenraadt, F.G.H. Kristen, D. Siegel-Rozenblit & E. Sikkema (eds.), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School,* (The Hague: Eleven International Publishers, 2015), p. 293.
[511] *HR 21 February 1938, NJ 1938, 820.* See the discussion of this arrest in: Schaffmeister, et al, *Hukum Pidana (Criminal Law),* (Bandung, Citra Aditya Bhakti, 2007), p.274.

In 1888, the Dutch Supreme Court considered that the obligation of an owner of a social home (*De armen van Cadier en Keer)* must be carried out by the organs of that social home.[512] The organs of social home were considered responsible for controlling and handling corporation's properties, in this case cleaning water transportation line. However, since 1902, in *N.V.Sommeling's Automobielbedrijf*, the Dutch Supreme Court left that opinion which at that time was called "small leap from corporations to organs of corporations" by deciding that the organs of corporations were not automatically the representatives nor the corporations itself.[513]

To deal with that problem, the Dutch Supreme Court developed the theory of functional offender in an organizational context.[514] This theory developed to extend the scope of criminal acts. Furthermore, this theory was originally implemented for economic crimes and this has not been codified in statutory law.[515] In the past, the act was defined only as a muscular movement of the offender, which showed the expression of their will.[516] Therefore in a criminal act, the offender must be directly involved in a criminal act to be held criminally liable.

By the functional offender in an organizational context theory, the condition that the offender must be involved personally in the criminal offence is widened by other persons who did not physically act in a criminal act, but was considered to commit the offence. Based on this theory, the offenders of certain crimes are divided into functional offender (indirect offender) and physical offender (direct offender). The physical offender is the person who directly participates in a criminal offence (physically act) while, the functional offender is a person who, in a social context, enables a certain activity to occur.[517] The owner of a construction company, despite not touching the bricks when his employees are building a house, based on that theory is also considered to have built the house. Dividing criminal offenders into two types creates the possibility of punishing the indirect offender based on the act of the direct offender.[518]

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[512] HR 26 November 1888, W 5643.
[513] *HR 10 November 1902, W 7835.* See. J Remmelink, *Inleideing Tot De Studie Van Het Nederlandse Strafrecht* translated by Tristam. p. Moeliono (Jogjakarta, Penerbit Maharsa, 2014), p.113.
[514] De Doelder, 2008, *Op. Cit*., p. 565.
[515]Harmen van der Wilt, On Functional Perpetration in Dutch Criminal Law. Some Reflection Sparked off by the case against the former Peruvian President Alberto Fujimori, Zeitschrift fur Internationale Strafrechtsdogmatic p. 616, available at www.zix-online.com, accessed on 10 February 2015.
[516] Ibid.
[517] De Doelder, 2008., *Loc.cit*.
[518] Ibid.

To define the scope of functional offender, The Dutch Supreme Court created the criteria, which are:[519]

1. The possibility of the functional offender having had the possibility of influencing the criminal action involved, and
2. The awareness and acceptance of the functional offender's actions.

Even though the functional offenders theory developed before the general recognition of corporations as criminal law subjects in the Netherlands, the theory was the basis theory of secondary liability in corporate criminal liability. As stated in Article 51 Paragraph 2 of the DCC, when a corporation commits a crime, criminal punishment for natural persons could be imposed on a person who had instructed the offence as well as on a person who had guided the criminal offence.

4.3.2. Corporate Criminal Liability in the Netherlands after the Recognition of the Criminal Liability of Corporations

Article 15 of the EOA 1951, which became the foundation for prosecuting corporations in economic offences, was abolished at the time of the enactment of the new stipulation of Article 51 of the DCC in 1976. Finally, after nearly a hundred years of the denial of criminal liability of corporations within criminal code and the recognition of it in special criminal Law outside the criminal code, the Netherlands finally accepted that a corporation could be a subject of all criminal offences. The enactment of Article 51 of the DCC was a general confirmation in the Dutch criminal legal system related to the criminal liability of corporations.

The stipulation outlined in Article 51 was similar to the stipulation in the old Article 15 of the EOA, which determined that the legal person is the subject of criminal punishment. Even though they are similar, the stipulation in Article 51 of the DCC does not regulate further on how a corporation can commit a criminal offence. Compared to the old Article 15 Paragraph 2 of the EOA, this article already determines that the act of corporations in the economic offences is based on the act of the natural person within the scope of the corporation. The regulation of Article 15 Paragraph 2 of the EOA reflected the concept of legal fiction that was denied during the past implementation of criminal liability. In civil law fiction doctrine, the recognition of legal persons is based on the fiction that the individual will of each of their representatives was the will of the legal persons. Therefore, based on the fiction doctrine, the act of the natural persons as the representative of the legal persons can lead to the liability of corporations. In

[519] *Ibid.*, pp. 565-566.

addition, even though Article 51 of the DCC does not have the same stipulation as Article 15 Paragraph 2 of the EOA, the stipulation mentioned in Article 15 paragraph 2 of the EOA is still used to answer the question whether a corporation can commit a crime in a criminal cases after the recognition of corporations as the subject of the criminal code.[520]

The fact that Article 51 of the DCC does not stipulate how to determine what falls within the scope of a corporate act, the earlier Dutch courts case laws established several circumstances to resolve this, which are:

1. *Based on the act of the official employee in the scope of corporations, whether by the act of the official organ of the corporation or by the act of low-ranking employees;*

A corporation is only a fiction, without natural persons who run it, if the corporations are only a name without any meaning. As an entity, the corporation can only act through its employees and other natural persons. The acts of those natural persons within the scope of the corporation means a corporation can achieve the purpose of its establishment. In the Netherlands, the liability of corporations can be easily concluded if the forbidden action has been arranged or approved by the official organ of a corporation.[521] In addition, the act of an ordinary employee of a corporation can also lead to the criminal liability of a corporation if the act of the ordinary employee within corporation in social context, is determined to be the corporation's act.[522] In the Groningen Case in 1988, the corporation (Groningen University) was held criminally liable because the low-ranking employee acted without the involvement of the official organ of the University.[523]

2. *Based on the act of a person(s) who is not the employee of the corporation but is considered as the act of the corporation.*

Making a corporation criminally liable in the Netherlands is based on the act of the person(s) who is not the employee of the corporation. It is not important whether the natural person who acts within the sphere of a corporation is an official employee of that corporation. Based on Papa Blanca or Nut Case in 1981,[524] the actual direct offenders at that case were not

[520] *Ibid.*, p. 569.
[521] *Ibid.*, p. 568.
[522] Ibid.
[523] HR 10 November 1987, NJ 1988, 303.
[524] In Papa Blanca Case, the official directors of the corporation actually were only drug addicted persons who had been hired only to sign paper and keep secret the activities as much as possible. According to the evidence presented by witnesses, the actual directors of the company were the people who were outside the organization of the corporation. The court then decided that even though the actual offenders were not the official employee of corporation, what they had done was considered as the act of the corporation. *see* De Doelder, 2008.

the employees of the corporation. In that case the judge decided that the corporation could be held criminal liable because the corporation, in a social context, had committed the unlawful act.

The two case laws above demonstrate that in the Netherlands the decision of the official organ or the director of the company is not the decisive condition to prove the criminal liability of a corporation. The act of a direct offender, both the low rank employee and non-employee of a corporation, also have an important element for the criminal liability of corporations as long as in the social context, the act of those offenders can be linked with the act of the corporation.[525] Social context becomes the important point to link an act of certain persons to the act of a corporation and the implementation of this doctrine is always based on the specific circumstances of the action and position of the natural person.

To establish the social context, there are two criteria which are closely related to the personal involvement of natural persons in an act of the corporation. According to *De Doelder,* those criteria are:[526]

1. The possibility of the corporation to deal with the forbidden situation, if we link this criterion to the personal involvement of a natural person in acts of a corporation, then the criterion can be set to the question: was there someone competent who could have acted to prevent such offence happening;
2. The awareness and the acceptance of the corporation in certain actions can also pose the question: was there someone competent that was aware of and/or accepting the acts of the corporation.

The Dutch Supreme Court took a clearer approach to corporate criminal liability in 2003. In the decision of the *Drijfmest* Case,[527] the Dutch Supreme Court formulated general foundations to determine whether a corporation was criminally liable or not. The basis to determine the criminal liability of corporations was to use the relevant behaviour around the case that can be reasonably imputed to the corporation (the reasonable attribution criterion).[528] The attribution of the relevant behaviour to the corporation will normally be reasonable, when the illegal conduct was committed within the scope of the corporation. The Dutch Supreme

[525] De Doelder, 2008, *Ibid.*
[526] *Ibid.*, p. 569.
[527] HR 21-10-2003, NJ 2006, 328.
[528] De Doelder, 2008., *Loc. Cit.*

Court then concluded four situations or group of circumstances in which conduct, in principle, may be performed within the scope of a corporation:

1. *"The case concerns an act or an omission of someone who works for the corporation (whether under a formal contract of employment or not);*
2. *The conduct concerned fits the everyday "normal business" of the corporation;*
3. *The corporation gained profit from the conduct concerned;*
4. *The course of action was at the "disposal" of the corporation, and the corporation has accepted the conduct; acceptance includes a failure to take reasonable care to prevent the conduct being performed."* [529]

The criteria mentioned above are complementary and not cumulative. Not all four criteria must be applied to the case, but is dependent on the circumstances of the case. Moreover, those four criteria are not exhaustive, as it is possible that in the future the Dutch Supreme Court will rule another circumstance to determine whether conduct was committed within the scope of a corporation.

It is important to note that the criteria within the *Drijfmest Case* were a compilation from the former case laws in the Netherlands related to corporate criminal liability. Before that decision, the criteria to establish the criminal liability of corporations spread throughout several cases.[530] Certainly, all criteria used by the Dutch Supreme Court in establishing corporate criminal liability may not answer all problems in establishing the criminal liability of corporations. However, those criteria demonstrate that the Dutch approach in establishing corporate criminal liability could be classified as a rather open one that allows the court to make the final decision, as long as the reasoning was adequate.[531]

The newest decision related to the criminal liability of corporations was issued by the Dutch Supreme Court on April 26th 2016.[532] That case involved a corporation *(Gemeenschappelijke Regeling Werkvoorzieningsschap Oost-Twente)* and its director in tax fraud. In general, the decision did not develop from an original approach on criminal liability

[529]B. F. Keulen, *Op. Cit.*, p. 5.
[530] For example in HR 23 February 1993, *NJ* 1993, 605, the criminal liability of corporation was established based on the fact that the corporation received a benefit from misconduct. The *Ijzerdraad* case (HR 23 February 1954, *NJ* 1954, 378) regulated that the conduct of natural person can be seen as the conduct of corporations when the conduct of natural persons was determined and accepted by corporations as daily business of corporation. *See* B. F. Keulen, *Op. Cit*, p. 6.
[531] Ibid.
[532] ECLI:NL:HR:2016:733.

of corporations. In fact, the newest decisions gather and clarifies the opinion from several previous Supreme Court decisions on corporate criminal liability into one single decision. Moreover, the Dutch Supreme Court's decision was not intended to provide a complete list or criteria to answer all questions related to the criminal liability of corporations, because the Supreme Court believed that the application of the criminal liability of corporations should depend on the relevant facts and circumstances. Even though there is no new opinion from the Dutch Supreme Court on corporate criminal liability, the decision provides a clearer method to establish the criminal liability of corporations.

It is important to further delve into the latest Supreme Court decision to understand corporate criminal liability. Firstly, that decision restates the reasonable attribution criteria in imputing criminal liability to corporations in the 2003 decision in *Drijfmest* case. It means that the Dutch Supreme Court opinion has not deviated from the *Drijfmest* case that corporate criminal liability is based on attribution of relevant behavior of the natural persons who committed the misconduct within the scope of corporation. Secondly, the most important point from that decision is the clarification of the Supreme Court on *"factual in charge person (feitelijk leidinggeven)"* based on the Article 51 subchapter 2 of the DCC. Article 51 subchapter 2 of the DCC stipulates that when a legal person commits a criminal, the prosecution and punishment can be imputed to three possible subjects, which are: the corporation itself (*rechtpersoon*), the natural persons who have ordered the commission of the criminal offence (*opdracht gegeven*) and/or the natural persons who control/are factually in charge of such unlawful behaviour *(feitelijke leiding gegeven*). "Factually in charge" theory broadens the scope of the natural persons that can be the subject of criminal liability by punishing both the natural persons who were directly or physically involved and the persons who was indirectly involved or was not physically involved in the misconduct.

The *factual in charge person* does not need to know about the exact details of the crime committed but they must have the possibility to influence the criminal action involved and have the awareness and acceptance of the misconduct. The prosecution of factual offenders does not have to be parallel with the prosecution of corporations and does not depend on whether the corporation still exists. But, when prosecuting a factual in charge person, it must first be established that the corporation has committed an offence and has its mental element. In contrast, to prosecute corporations for criminal offence does not depend on the criminal liability of natural persons who have ordered the commission of the criminal offence and/or natural persons who control/are factually in charge of such unlawful behaviour.

To conclude, even though the 2016 decision did not offer a new approach and has too broad of an approach toward establishing corporate criminal liability, the decision has created a basic guidance that makes it impossible for every party involved in misconduct to escape from criminal liability by hiding under the complex organizational structure of corporation.

4.3.3. The Method to Establish the Criminal Liability (*Mens Rea*) of Corporations in the Netherlands

In the Netherlands, to convict a criminal offender, the presence of the mental element, namely intention (*dolus*) or negligence (*culpa*), is the important for offenders to be criminal liable, especially in the case of crimes (*misdrijven*).[533] If a corporation is the criminal offender, the question is how to prove the intention or the negligence *(mens rea)* since the corporation is only a legal fiction which cannot act by itself but by the act of natural persons. The theory to establish corporate criminal liability the Dutch Supreme court introduced in 2003 only dealt with the criminal act *(actus reus)* of a corporation and did not have any relevance to *mens rea* (guilty mind of a corporation) because the case in question was a *misdemeanor* that did not require proof of intention or culpa.[534]

In April 2016 the Dutch Supreme Court clearly declared that *actus reus* and *mens rea* of corporations are different from the *actus reus* and the *mens rea* of the natural persons involved in a crime. [535] This means that to be criminally liable, a corporation should have its own mental element. Theoretically, there are two ways to derive mental elements of corporations, directly or indirectly. [536] The Netherlands employs those two approaches in establishing the *mens rea* of corporations, which are:

a. The mental element of a natural person is attributed to a corporation, so that a natural person's intention, under certain circumstances can be attributed directly to the corporation. The accumulation of conducts from several natural persons within corporations can also contribute to the *mens rea* of a corporation, even though those natural persons do not have *mens rea* in certain crimes. For example, the *mens rea* of

[533]P. J. P. Tak, *Op.Cit*., p. 69.
[534]B. F. Keulen., *Op.Cit*., p. 6.
[535] See http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:733, accessed on 11 November 2017.
[536] See Keulen, *Op.Cit*. p. 6.

directors and several employees of a corporation that committed a crime within the sphere of corporations can easily be the corporation's *mens rea*.[537]

b. The establishment of a corporate intention is concluded from other circumstances that closely related to the corporation itself; for example, the policy and decision of the corporation. For example, the lack of safety procedure within a corporation can establish *mens rea* of corporation in a working accident.[538]

4.3.4. Justification and Excuse of Corporations in the Netherlands

The Netherlands has two types of criminal defenses. Namely, statutory defenses and non-statutory defenses. Statutory defenses are the defenses which are outlined in the DCC, whereas non-statutory defenses originally emerged from case law. In general, those defenses based on criminal doctrine are divided into justification and excuse. To those concepts are defined below: [539]

1. The statutory defense	*2. Non-statutory defense*
a. the ground for justification - Necessity/force majeure (Article 40 DCC), self-defense (Article 41 DCC) and public duty (Article 42 DCC) b. the ground for excuse - insanity (Article 39 DCC), duress (Article 40 DCC), excessive self-defense (Article 41 Paragraph 2 DCC) and obeying an order issued without authority (Article 43 Paragraph 2 DCC)	- the absence of substantive unlawfulness as a justification - the absence of all blameworthiness due to ignorance (mistake of fact or law) or due to due diligence as an excuse

In the field of justification and excuse of a corporation, a legal person theoretically has the same position as a natural person to raise criminal defenses. However, corporations cannot raise the defense based on insanity. The most important defence that corporations can use as a justification is the non-statutory general defence of lacking sufficient culpability or the absence

[537] See HR. 10 November 1987, NJ 1988, 303. In this case the Hoge Raad determined that the low level employee's act sufficed to determine the criminal liability of corporation and it was not necessary that one of the higher organ of corporation has a control over the act.
[538] See HR 15 October 1996, NJ 1997, 109. In this case the management did not take an action when they know a misconduct within the corporation. Then, it can be proved that the corporation intended the misconduct.
[539] P. J. P. Tak., *Op. Cit*., pp. 72-75.

of the substantive unlawfulness. In this defence, the important basis for inculpation, such as the exercise of due diligence, can lead to the annulment of proof of *actus reus* because the violation of the law does not constitute a criminal offence. In the Aflatoxinepinda Case,[540] the fact that the corporation took maximal action to ensure the quality of their product (peanut paste) lead to the annulment of proof of *actus reus*. The decision in the 2003 *Drijfmest* Case is still consistent with the 1993 decision. In the *Drijfmest Case*, the court stated *"the course of action was at the 'disposal' of the corporation, and the corporation has accepted the conduct; acceptance includes a failure to take reasonable care to prevent the conduct being performed"*. [541] By exercising due diligence, a corporation can argue that they have already taken a reasonable step to prevent the commission of the offence.

However, in a 2017 case, [542] the Dutch Supreme Court ruled that exercising due diligence and taking reasonable action to prevent misconduct are not decisive defenses to avoid criminal sanctions when prevention was easy and simple, even when the crime was conducted by low-level employees and against the will of the corporation. In that case, Delta Airline was convicted for violating the Netherlands Aliens Law by carrying an Iranian passport passenger from the United States to the Netherlands without a valid visa document on his passport. In that case, the court determined that the airline company was guilty based on the conduct of the low-level employee (passenger service crew) who failed to check the passport of the passenger without the visa document and let him board the aircraft. The company defended the claim by stating that several reasonable measures were taken to prevent that misconduct by giving routine training and informing the employees to deal with the passengers' documents. Moreover, the company also showed the positive performances of the airline between 2013 and 2015 to prevent undocumented passengers travelling to the Netherlands. However, the appellate court rejected that defense based on the fact that the misconduct was actually easy and simple to prevent since there was no visa document in the passenger's passport. This decision then was upheld by the Dutch Supreme Court.

The different position of the *Hoge Raad* related to defenses used by corporations based on the *Aflatoxinepinda* case and Delta Airline case shows that exercising due diligence is not always a decisive factor to escape from inculpation for a corporation. The circumstances

[540] HR 2 februari 1993, ECLI:NL:HR:1993:AB7899.
[541] B. F. Keulen, *Op.Cit*., p. 6.
[542] ECLI:NL:HR:2017:40.

around the cases and the type of crimes is also an important consideration in establishing the criminal liability of corporations.

4.3.5. Criminal Sanctions for Corporations

In criminal sanctions, all sanctions that can be imposed on natural persons can theoretically also be imposed to corporations. In the DCC, there is no specific rule about the criminal sanctions that can be imposed to the corporations. Article 51 Paragraph 2 of the DCC only mentions that *"…penalties and measures as are prescribed by law, where applicable, may be imposed to…"* That stipulation concludes that all criminal sanctions in the DCC can be sanctioned to corporations insofar as the sanction is applied logically.

The Dutch criminal sanction system distinguishes between penalties and measures. Penalties involve punishment and general prevention, while measures involve the promotion of the security and safety of a person or property, or at restoring the state of affair.[543] Furthermore, penalties[544] and measures[545] in DCC are further distinguished into:

3. Principal penalties	*4. Additional penalties*	*5. Measures*
(1) Imprisonment; (2) Detention; (3) Community service; (4) Fine.	(1) Deprivation of certain rights; (2) Forfeiture of assets; (3) Publication of the verdict.	(1) Withdrawal from circulation; (2) Confiscation of illegally obtained profits; (3) Obligation to pay compensation; (4) Psychiatric hospital order; (5) Entrustment order; (6) Out-patient hospital order; (7) The persistent offender detention order.

Further explanation regarding the imposition of criminal sanctions to a corporation based on the DCC is as follows:

Discussions will first review the imposition of principle and accessory penalties to the legal persons. Not all criminal sanctions in the DCC can be imposed on a corporation, because a corporation is an entity. For that reason, in principal sanctions, a fine is the only sanction that

[543]P. J. P. Tak., *Op.Cit*. p. 71.
[544] See Article 9 of the DCC.
[545] See Article 36, 37 of the DCC

can be imposed on a corporation. Conversely imprisonment, detention and community service absolutely cannot be imposed since the nature of those sanctions is only for the natural person. The fine is the least severe among the principal penalties since the fine is in the last order in the Article 9 of the DCC.

The DCC regulates six categories of fines.[546] The maximum amount for the first category is currently 415 Euro and 830,000 Euro is the maximum amount for the sixth category.[547] Further stipulation in Article 23(7) DCC states that in case a legal person is punished and the applicable category does not allow for appropriate punishment, a fine of the next higher category may be imposed. If it is still inappropriate, the fine may be imposed up to a maximum ten percent from a corporation's annual revenue. The stipulation to impose a fine to corporations based on their annual revenue was just added in Article 23 (7) of the DCC in 2014.[548] By amending that article, the legislators wanted to ensure that the most suitable sanctions would be imposed on corporations when committing crime.

The difference between the fine to natural persons and legal persons is that the corporations will be fined one category higher than natural persons. However, the maximum fine that can be imposed both on natural persons and legal persons are the same in the sixth category. The only difference is that the corporation's fine is based on its annual revenue. The DCC does not regulate the subsidiary sanction if the corporation fails to pay the fine. The regulation on the subsidiary sanction, detention as a substitute penalty, is only applicable for the natural persons.[549]

Based on Article 28 of the DCC the deprivation of certain rights cannot be imposed on corporations because the rights that are mentioned only relate to the rights of natural persons.[550] Therefore, the accessory penalties in Article 9 (b) DCC that can only be imposed on the corporations are forfeiture of the assets and publication of the judgment.[551] The assets which can only be forfeited are those that are gained from the criminal offence, those that correlate to the criminal offence or those that are manufactured or used for committing the crime.[552] The

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[546]*See* Article 23 of the DCC.
[547] The amount of fines per 1st January 2018. The latest amount of the fine can be seen on Online Dutch Criminal Code which can be accessed on http://wetten.overheid.nl/BWBR0001854/2018-01-01#BoekEerste_TiteldeelII.
[548] Stb.2014, 445.
[549] See Article 24c of the DCC.
[550] The example of the rights based on the Article 28 DCC are: the right to hold public office or specific offices, the right to serve in the armed forces, the right to elect or to be elected in general representative bodies, the right to serve as an advisor before the court or an an official administrator and the right to practice specific profession.
[551]B. F. Keulen, *Op. Cit*., p. 7.
[552]P. J. P. Tak., *Op. Cit*., p. 118.

publication of the judgment can also be imposed on corporations as the secondary punishment. Bad publication of a corporation is always "a nightmare" for the corporations since the credibility of a corporation is the most important facet of business activities. By publishing the judgment, the public will get the official information related to the illegal activity of the corporation.

The imposition of measure on a legal person is analysed in this subchapter as the second point. In the Netherlands, a measure can be imposed on a criminal offender, even though the offender cannot be held criminally liable. Furthermore, the measures can also be imposed as the separate sanction or combined with other sanctions.[553] Three out of seven measures in the DCC can be imposed on legal persons. The measures are: the withdrawal from circulation, the obligation to pay compensation to the victim, and confiscation of illegally obtained profits (vide Article 36b, 36f and 36e of the DCC).[554] The other measures, such as psychiatric hospital order, out-patient hospital order, entrustment order and the persistent offender detention order, cannot be imposed on corporations since the subject of those measures is the mental health of the offender (natural persons).

The withdrawal from circulation can be instituted to a corporation because the subject of this measure is the corporations' properties that have a connection to the illegal activity, especially if those properties are dangerous objects such as contaminated products. In addition, the obligation to give compensation to the victim also can be imposed on corporations. This measure benefits the victim because the compensation can be directly enjoyed by the victim without further procedure such as filing a separate civil law suit to the corporation. After the judge decides to impose an obligation to pay compensation, the corporation should directly pay the victim through the State Treasury.[555]

The last measure is the confiscation of illegally obtained profits. This measure can also be instituted to a corporation because the subject of the measure is the illicit assets of the corporation obtained from the crime. The common motif of a corporation committing a crime is to gain profit. This measure is the appropriate punishment to fight against crimes with economic motif.

[553] *Ibid.*, p. 119.
[554]See Louise Layer et.al., Dutch Penal Code.
[555]P. J. P. Tak., *Op.Cit.*, p. 119.

Except all sanctions mentioned above, sanctions for corporations are found in the special economic crime regulation outside the DCC. Besides referring to the DCC on the types of sanction that can be imposed, such as fine,[556] publication of verdict and forfeiture.[557] The EOA also regulates other sanctions that can be imposed on a legal person when it has been convicted of an economic crime. A complete or partial stoppage of the activities of the corporation for a period of no longer than one year can be imposed on a corporation.[558] Withdrawal of the corporation's licence can also be imposed for no longer than two years.[559] An order to perform/desist from the activities which are illegally performed or failed to perform.[560] Lastly, the EOA also stipulates the sanction that the court can appoint a trustee for the corporation for no longer than three years.[561]

4.4. Special Criminal Procedure for the Corporations as the Criminal Offender

As a logical consequence of the recognition of a corporation as an offender in criminal offence in the DCC, criminal procedure law must also regulate the procedure to bring corporations before the criminal court, since a corporation as the subject of criminal law has different characteristic from a natural person. Therefore, the procedural law related to corporations was also introduced in 1976 within the Dutch Procedural Code when the Dutch recognized corporations as the subject of the Criminal Code.[562] In the Chapter VI of Book IV of the Dutch Code of Criminal Procedure Article 528 to 532 (further: the DCCP) regulates the prosecution and the trial of legal persons.[563] In general, the stipulations related to the prosecution and the trial of corporations rule two important things, which are the stipulation on the representative of corporations in criminal trials in Article 528 and the communication of court notice for different forms of legal person in Article 529 and Article 532 of the DCCP. These Articles stipulate:[564]

[556] See Article 6 Paragraph 1 of the EOA which refer to Article 23 paragraph 7 of the DCC.
[557] See Article 7 Paragraph d of the EOA which refer to Article 33a of the DCC
[558] See Article 7 Paragraph c of the EOA.
[559] See Article 7 Paragraph f of the EOA
[560] See Article 8 Paragraph c of the EOA
[561] See Article 8 Paragraph b of the EOA
[562] See Kamerstuk Eerste Kamer 1975-1976 kamerstuknummer 13655 ondernummer 140. p. 2.
[563] The original version of the Dutch Criminal Procedure Code can be accessed on http://wetten.overheid.nl/BWBR0001903/geldigheidsdatum_13-07-2014.
[564] English version of the Dutch Criminal Procedural Code can be accessed on http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf.

Article 528

1. *If criminal prosecution is instituted against a legal person, a special purpose fund or a shipping company, this legal person or this special purpose fund shall be represented during the prosecution by the director or, if there are more directors, by one of them and the shipping company by the accountant or one of the members of the shipping company. A person authorised by the representative may appear on his behalf.*
2. *If the criminal prosecution is instituted against a partnership or unincorporated company, said partnership or company shall be represented during the prosecution by the liable partner or, if there are more liable partners, by one of them. A person authorised by the representative may appear on his behalf.*
3. *The court may order that a specific director or partner appear in person; in that case it may order that he be brought forcibly to court.*

Article 529

1. *Judicial notices to a legal person shall be given at:*
    a. *the registered office of the legal person, or*
    b. *the place of business of the legal person, or*
    c. *the place of residence of one of the directors.*
2. *A judicial notice shall be served by its delivery to one of the directors, or to a person authorised by the legal person to accept receipt of the document on its behalf. The delivery shall be deemed in these cases to be service in person. Said notice may be delivered to these persons at a location other than the ones referred to in subsection (1).*
3. *The delivery of a judicial notice, as referred to in the preceding subsection, may also be made at one of the locations, described in subsection (1), to any person who is in the employment of the legal person and who declares that he is prepared to deliver the notice.*

Article 530

1. *Judicial notices to a partnership or unincorporated company shall be given at:*
    a. *the place of business of the partnership or company, or*
    b. *the place of residence of one of the liable partners.*
2. *A judicial notice shall be served by its delivery to one of the liable partners or to a person authorised by one or more of them to accept receipt of the document on their behalf. The delivery shall be deemed in these cases to be service in person. Said notice may be delivered to these persons at a location other than the ones referred to in subsection (1).*
3. *The delivery of a judicial notice, as referred to in the preceding subsection, may also be given at one of the locations, described in subsection (1), to any person who is in the employment of the partnership or company or of a liable partner and who declares that he is prepared to deliver the notice.*
4. *The preceding subsections shall apply mutatis mutandis in the case of prosecution of a special purpose fund or shipping company; in this case the directors or the accountant and the members of the shipping company shall take the place of the liable partners.*

> *Article 531*
>
> *If delivery could not be made in accordance with section 529(2) or (3), or section 530(2) or (3), then the letter shall be sent back to the authority which issued it and then presented to the clerk to the District Court where or in whose area of jurisdiction the case will be brought before the court or was last brought before the court. In that case the Public Prosecution Service shall promptly send a copy of the letter to the address stated in the letter, which shall be noted in the record of delivery.*
>
> *Article 532*
>
> *Sections 585-587, 588(2) and (4), 588a, 589(1), (3) and (4) and 590(1) and (3) shall apply mutatis mutandis to judicial notices given to a legal person, partnership or unincorporated company, a special purpose fund or shipping company.*[565]

Article 528 of the DCCP states that in criminal proceedings the representative of the corporation is based on the form of the corporation. A legal person, a special purpose fund or a shipping company, shall be represented during the prosecution by the director. On the other hand, a partnership or unincorporated company, shall be represented during the prosecution by the liable partner. The corporation itself may appoint the director(s) within the corporation that will represent the corporation (Article 528 (1)). On the other hand, the court also has the authority to order a specific director of the corporation before the court (Article 528(3)).

Related to the circulation of the court notices, Article 529 of the DCCP regulates that the letter of summons from the court can be submitted to several addresses: the address of the corporation, the office of the corporation and at the address of one of its directors. For partnership or unincorporated company based on Article 530, judicial notices can be submitted to the place of business of the partnership or company, or the place of residence of one of the liable partners. If the delivery could not be made, Article 531 rules that the letter shall be sent back to the authority which issued it to be presented to the District court which has the jurisdiction of the case. That article also states that the letter shall be promptly sent to the address and shall be noted in the delivery record. Related to the procedure and the form of the summons for corporations, Article 532 stipulates that judicial notices to legal person basically similar to natural persons.

In addition, the Dutch Supreme Court has also had a critical position in giving further meaning from the stipulation in the DCCP related to the prosecution and the trial of corporations because not all procedural matters are stipulated with comprehensive detail. For

[565] The stipulations on judicial notification regarding legal persons will be moved to articles 36j-36m DCCP when the law of February 22nd 2017 comes into effect, *Stb*. 2017, 82.

example, as a defendant, in one case the court stated that a corporation also has the right to remain silent as well as a natural person within the trial. That right is only enjoyed by the director(s) who represents the corporation before the court. Furthermore, the director who represents the corporation also cannot be a witness in that case.[566] In addition, in corporate criminal cases in the Netherlands, the prosecutor usually separates the indictment to prosecute a legal person and the indictment to prosecute a natural person when the corporation committed a criminal offence.[567]

4.5. Conclusion Remarks Regarding the Dutch Corporate Criminal Legal System

The fact that Indonesia still implements the criminal code that was inherited from the Dutch period is an essential factor for Indonesia to always learn from the development of the Dutch criminal legal system. There are two important conclusions that can be drawn by comparing Indonesia's and the Netherlands' criminal legal systems related to the criminal liability of corporations. Firstly, the Netherlands pragmatic and single approach policy in stipulating the corporate criminal liability within the criminal code and abolishing Article 15 of the EOA provides a solid regulation basis in the development of the criminal liability regime. Secondly, the massive corporate criminal cases that were brought before the courts lead to the sustainable development of the system to establish the corporate criminal liability regime through the case laws. Within case laws, the Dutch Supreme Court has developed several criteria in establishing corporate criminal liability that provide a guideline for law enforcers to handle corporate criminal cases. The stipulations within the Laws often cannot answer all the questions that emerge from the real cases. Therefore, the law finding process through the case laws is always the solution in a civil law country. The Netherlands have some stipulations of procedural aspects, but they leave certain questions to be answered trough case laws. For example, the court stated that a corporation also has the right to remain silent as well as a natural person within the trial. That right is only enjoyed by the director(s) who represents the corporation before the court.

[566] See HR 13 October 1981, *NJ* 1982, 17. HR 25 June 1991, *NJ* 1992, 7. HR 29 June 2004, *NJ* 2005, 273 in B. F. Keulen., *Op.Cit.*, p. 10.
[567]Nico Keyser, *Op. Cit.*, p. 6.

Chapter 5

Conclusion

5.1. Introduction

Around the world, the process of recognizing corporate criminal liability within criminal legal systems is often obstructed by theoretical and justification debates about establishing *actus reus* and *mens rea* for a corporation, as its entity is only a legal fiction. The aforementioned case studies indicate that the advantages and disadvantages of imputing criminal liability to corporations directly correlate with the process of embedding a corporate criminal liability regime within a criminal legal system. Despite clear advantages and disadvantages of imputing corporate criminal liability, and the wider theoretical debate, the main trend observed in the case studies shows that many countries in the world have already recognized corporations as a criminal law subject within their national criminal legal systems. For countries that do recognize the criminal liability of corporations, including Indonesia, there are consistent efforts to develop a clear and straightforward criminal liability system.

The previous chapters in this book have outlined the theoretical foundation in establishing corporate criminal liability, the advantages and disadvantage of doing so, and case studies of implementation in several countries, especially from the Dutch criminal legal system. All discussions call for a recommendation for continued development in corporate criminal liability systems in Indonesia.

This trend of recognizing corporate criminal liability is also observable in Indonesia. In previous chapters, the exploration of corporate criminal liability regulations and the law enforcement of corporate misconduct has provided a picture of the history of the development of corporate criminal liability in Indonesia along with all the legal problems faced by Indonesia.

In Indonesia, there was nearly half a century between the recognition of corporate criminal liability and the start of progressive development. Even though there are still several issues that need to be resolved, improvements suggest that the Indonesian system of corporate criminal liability will eventually be able to successfully stop corporations from hiding behind the theoretical difficulties and be held criminally liable.

The approach taken to develop corporate criminal liability is unique for Indonesia. In some respects, the approaches used by Indonesia have had a positive impact on the development of

the Indonesian criminal legal system; however, the approaches also have weaknesses. Criticism of such weaknesses is necessary to comprehensively understand corporate criminal liability in the Indonesian criminal legal system.

This chapter firstly discusses the critiques of regulations and implementations of corporate criminal liability in Indonesia based on several problems which have been found in Chapter 2 and Chapter 3 discussions. Apart from all critiques, the advantages of Indonesian experiences both in regulations and implementations are also discussed. The end of this chapter tries to offer several recommendations to deal with all those arising problems faced by Indonesia. Positive lessons from general development of the criminal liability of corporations based on Chapter 1 and especially the Dutch criminal law system experience based on the discussion on Chapter 4 are used to enrich the recommendations.

5.2. Critiques on the Regulations of the Criminal Liability of Corporations in Indonesia

1. The Extended Period of Criminal Law Reform in Indonesia is the Basic Problem in the Development of Criminal Liability of Corporations

As Indonesia operates under a civil law system, the codification of the criminal provisions within the criminal code is an important part of the Indonesian criminal legal system. The present problem facing by the Indonesian criminal legal system stems from the fact that it still applies the 1886 criminal code from the period of Dutch colonialism. Due to the extended Law-making period of the new Indonesian criminal code Indonesia still applies the old perspective of corporations as the subject in criminal law within its criminal code. In contrast, the Netherlands, where the Indonesian criminal code originated from, shifted its position more than four decades ago. The combination between the long period of the criminal code reform and the preservation of the old soul of the *KUHP* which does not recognize the criminal liability of corporations become the root for other problems toward the development of the criminal liability of corporations in Indonesia. The problems that arise are the various systems in establishing criminal liability of corporations among special Laws, the lack of procedural law in prosecuting corporations, and the application of internal regulations to solve the statutory problem on corporate criminal liability. All those problems will become the focus of critiques later in the next subchapter.

Legislators enacted both Laws on special crimes and Laws with criminal provisions outside the criminal code to respond to emerging crimes in society. The enactment of the

various Laws outside the *KUHP* was a more practical approach for the Indonesian legislators, than partially revising, erasing or adding new stipulations to the *KUHP*. In the early enactment of the *KUHP*, legislators conducted the amendments by erasing, adding and replacing the stipulations in the *KUHP*.[568] Yet, further into development, the legislators preferred to create Laws outside the *KUHP* and preserve the old soul of the *KUHP* which does not recognize the criminal liability of corporations.

The decision to develop criminal Laws outside the *KUHP* has profoundly influenced the recognition of corporations as the subject of criminal law. Almost all Laws outside the *KUHP* recognize corporations as the subject of criminal law. This also means the Laws outside the *KUHP* are the special Laws *(lex specialis)* in the law enforcement. Prosecutors employ special Laws in cases of crimes such as corruption, banking crimes, money laundering, environmental crimes, trafficking and terrorism. The Indonesian Criminal Code is only applied in cases of ordinary and traditional crimes such as murder, theft and kidnapping. The special Laws outside the *KUHP* still refer to the basic stipulation on Book One of the *KUHP* on general provisions on criminal law, unless the special Laws govern themselves.

Problems emerge when special Laws that recognize corporations as the subject of criminal offences do not further regulate how to treat corporations before the law as the criminal offenders. In theory, Book One on general provisions of the *KUHP* is the general regulation on criminal law *(lex generalis)*, which is also applicable to acts that are punishable under the special Laws, when the special criminal Laws outside the *KUHP* do not determine otherwise. Since the *KUHP* is in the same position as it was two centuries ago, in such that it does not recognize corporations as the subject of criminal law, the condition of the law *(legal vacuum)* in the corporate criminal liability is unclear when special Laws recognize the corporations as the subject, but there is no further provisions on how to establish the corporate criminal liability. Several Laws have already stipulated how to establish the criminal liability of corporations, but these stipulations are only applicable to those specific Laws and do not apply generally to other Laws.[569]

Historically, the process to accept the criminal liability of corporations within the Indonesian criminal legal system did not stem from the long theoretical debate on the urgency

[568] The example was in 1946 when isolation was added as one type of primary punishments in the *KUHP* by the Law Number 2 Year 1946.
[569]The Corruption Law, the Money Laundering Law are the example of the Laws stipulating the recognition of the criminal liability of corporations in appropriate way. *See.* The elaboration on subchapter 2.2.

and possibility of accepting corporate criminal liability in society. Legal drafters, legal enforcers and legal scholars in Indonesia understand that corporations significantly influence society and accept that a criminal law regime is necessary to treat to the misconduct of corporations. It can be seen in 1951, 6 years after Independence, Indonesia recognized the criminal liability of corporations in economic crime through the Stockpiling Law. Since then many other Laws outside the *KUHP* also recognized the criminal liability of corporations.[570]

The complexity of establishing corporate criminal liability is exacerbated by the fact that regulations concerning the criminal liability of corporations vary. Hence, it is important to have a single stipulation on corporate criminal liability within the criminal code. The criminal code is not like the unamendable. It is about the political will and the decision of the Indonesian government and the parliament to revise the *KUHP*. Instead of revising Article 59 of the *KUHP*, Indonesia was delaying the recognition of corporate criminal liability within the criminal code until the full enactment of the new *KUHP*, even though this process is taking a long time. Instead of making partial amendments to the *KUHP*, Indonesian legislators were continuing to regulate the criminal liability of corporations outside the *KUHP*.

In addition to the delayed period of drafting the new *KUHP*, another problem exists. The procedural law, which is the general regulation on procedural matters related to the criminal law enforcement found in the *KUHAP*, compliments the substantive criminal law found in the *KUHP*. When the *KUHAP* replaced the *HIR* in 1981 the Indonesian criminal legal system had already recognized the criminal liability of corporations; however, legislators still did not accommodate procedural law for corporations in general criminal procedural code. As the general law on criminal procedure, The *KUHAP* bases its stipulation on the *KUHP*. Therefore, the *KUHAP* also stays away from the recognition of corporations as its subject. Later it will further explore the critiques on procedural law.

2. Specific Laws That Recognize the Criminal Liability of Corporations Differently Lead to Complex Law Enforcement Problems

There is no uniform characteristic of the stipulations among the special Laws outside the *KUHP* that recognizes the criminal liability of corporations. Legislators formulate stipulations related to corporations differently among Laws. Subchapter 2.2 elaborates on Laws outside the *KUHP* that recognize the criminal liability of corporations to provide a picture of various

[570] See the history behind the enactment of Stockpiling Law on Chapter 2.

corporate criminal liability regulations that have been implemented since 1951.[571] This subchapter concludes that Indonesian legal drafters did not consider the benefits of having an uniform characteristic of the regulations on corporate criminal liability among the Laws when the *KUHP* did not recognize corporations as the subject of criminal law. It seems that conditions will be preserved when Indonesia enacts the new KUHP in the near future, because there is no transitional provision in the *KUHP draft* that directly regulates the abolishment of stipulations related to the criminal liability of corporations within all the Laws outside the *KUHP*.

The position would be different if Indonesian had an uniform or similar stipulations on corporate criminal liability within the various Laws outside the general criminal law. Different formulations will lead to various corporate criminal liability regimes in Indonesia. Legal enforcers will face complex problems during implementation if they do not understand the different regimes among the Laws when they are handling criminal cases involving corporations. Laws that have detailed stipulations on corporate criminal liability will give law enforcers sufficient guidance on prosecuting corporation. When certain Law limitedly stipulate on the criminal liability of corporations law enforcers will find it difficult to apply provisions that can serve as the legal basis to prosecute corporations because general criminal law cannot be a legal foundation to establish the criminal liability of corporations.

The limited corporate criminal liability cases in Indonesia before the 2000s is another consequence of having various approaches stipulated in Laws. The existence of various approaches confuse legal enforcers that are handling corporate cases; therefore, legal enforcers often take practical ways by prosecuting only the natural persons within the corporations when examining crimes committed within the sphere of corporations. Law enforcers consider it easier to establish the criminal liability of natural persons, rather than establishing the criminal liability of the legal persons. Law enforcers must have a good understanding of the multiple stipulations in various laws to do their job effectively. However, the varied capabilities of law enforcers is a major obstacle in ensuring corporate cases are handled equally.

The elaboration of several Indonesian Laws in Chapter 2 demonstrate the complicated problem faced by law enforcers when implementing Laws to corporations. The problem is as follow. Firstly, after determining which Law has been violated, law enforcers must determine whether that Law recognizes the criminal liability of corporations. After that, they must review

[571] See also table 2.3 in Chapter 2.

the definition of a corporation within that law, because in Indonesian Law corporations are categorized into four types. The four types of corporations are: corporations that have a legal entity[572]; corporations with a legal entity or non-legal entity;[573] corporations that are mentioned directly by the Law;[574] and finally, corporations that are broadly defined as organized association of persons and/or wealth both in the form of a legal entity or non-legal entity.[575] Multiple definitions means a corporation can be criminally liable in one crime, but not in other crimes. In practice, it gives corporations the opportunity to avoid criminal liability by establishing a corporation that has a different form of the requirement from that certain Law.

Thirdly, when handling cases against corporations, law enforcers should consider the way to establish the criminal liability of corporations in the Indonesian criminal legal system. In many Laws, the way to determine the criminal liability of corporations already determined by the provisions within the Laws. The stipulations definitely vary from one Law to another. In general, the system to establish the criminal liability of corporations based on the Indonesian Laws are divided into three types. Firstly, the criminal liability of corporations is based on the act of person(s) on behalf of corporations or within the scope of corporations, however they are defined.[576] Secondly, the criminal liability of corporations is established using several criteria, which are stipulated within the Law.[577] Thirdly, some Laws which recognize corporations as the subject of criminal sanctions do not stipulate the way to establish the criminal liability of corporations.[578]

Establishing a system to determine corporate criminal liability in a country which already recognize the criminal liability of corporation in its general criminal law is very complex. The complexity is exacerbated by the fact that Indonesia regulations have three types systems to address the criminal liability of corporations. It is therefore difficult for the courts to develop

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[572] See the elaboration on the Indonesian Banking Law in subchapter 2.2.7.
[573] The Laws which define the corporations based on this type are the former Stockpiling Law, Environment Protection Law. See the elaboration in subchapter 2.2.
[574] The example of this type is the Traffic Law which stipulates that the corporations which can be criminally liable based on that Law are only public transportation company and road organizer. See subchapter 2.2.9.
[575] The Laws which define the corporations based on this type are the Corruption Law, the Money Laundering Law, and the Narcotic Law. *See* subchapter 2.2.
[576] The Laws which determine the way to establish the criminal liability of corporation based on this type are the Economic Crime Law, the Corruption Law, the Environment Protection Law, the Pornography Law. See table 2.2.
[577] The Money Laundering Law is the only Law that has the criteria to determine the criminal liability of corporations. See table 2.2.
[578] The Laws which do not stipulate the way to establish the criminal liability of corporations are: the Narcotic Law, the Traffic Law, the Banking Law, and the Capital Market Law. *See.* Table 2.2.

the system because there will be different starting points depending on the Law. For Laws that do not specifically regulate corporate criminal liability, the courts should develop the system from the beginning. For Laws which already have stipulations on how to establish the criminal liability of corporations, such as in the first and second types mentioned above, the court does not need to start from the basics, but from the stipulations within the Laws, making the process easier. The court can develop the corporate criminal liability system by combining or trying to find similarities among the stipulations in Laws.

When Indonesia first became an independent nation, the system had potential to further develop into a regime of corporate criminal liability. The 1955 Emergency Law Number 7 on Economic Crime was the first Law that sufficiently regulated the criminal liability of corporations. However, the government did not consider it to be the standard model for other Laws when drafting the Laws recognizing the corporations as the subject of criminal offences. Following that, the process of law-making during the formulation of the corporate criminal liability system varied among the laws.

3. The Absence of Procedural Law related to the Prosecution of Corporations in the General Procedural Law and the Limited Stipulations within the Special Laws

Another consequence of the *KUHP* not recognizing corporations as the subject of criminal law emerges in the field of procedural law. The general law on criminal procedure, the Indonesian Criminal Procedure Code (*KUHAP*) holds the same position as the *KUHP*. The 1981 version of the *KUHAP* aimed to regulate the enforcement of substantive criminal law, especially within the *KUHP*, and was to become the general criminal procedure law for the Laws outside the *KUHP* which do not set their own procedural law provisions. Different from the *KUHP*, which Indonesia inherited from the Dutch colonial period when criminal liability was not yet recognized, the criminal liability of corporations had been recognized in the Indonesian criminal legal system by the enactment of the 1981 *KUHAP*.[579] However, the *KUHAP* legal drafters did not consider including the procedural regulation on corporate criminal liability within the *KUHAP*. As the general procedural law, the *KUHAP* takes the same position as the *KUHP*, which recognizes that the natural persons are the only subjects in criminal law. This position then leads to more difficulties in the development of the criminal liability of corporations, since the problems of the development are not only in the substantive

[579] See the elaboration on the general criminal procedural law in the Indonesian criminal legal system in Chapter 3.

criminal law, but also in criminal procedure law. Similar to the *KUHP*, the revision process of the *KUHAP* must wait for the new *KUHP* law-making process to finish, even though the draft of the new *KUHAP* is already in the parliament.

Following the position of the *KUHP*, all stipulations in the *KUHAP* originally concern only the natural persons. However, even though the *KUHAP* has not yet recognized corporations as its subject, the stipulations within the *KUHAP* can also apply to corporations if these are matching with the characteristics of corporations. The important thing is to provide specific procedural law on the prosecution of corporations within the various Laws recognizing the corporations as its subject. Those Laws should at least stipulate natural persons within corporations that can be the representatives of corporations before the court and also the correspondence process during the trial.

The procedural law relates to the authority of the law enforcers and the court when examining cases. The authority in procedural law is given by or based on the Law. All law enforcement treatments relate to the rights of the defendants and therefore should have the same legal basis. Indonesia's experiences, as discussed in Chapter 3 and Chapter 4, have outlined that one of the difficulties in prosecuting corporations is due to the lack of the specific legal basis in procedural law related to corporations. This has resulted in the absence of cases involving corporations brought before the court by the law enforcers. The procedural law stipulations within the special Laws that recognize the criminal liability of corporations cannot cover the entire process of law enforcement. In fact, not all Laws in Indonesia which recognize the criminal liability of corporations have their own procedural law stipulations to prosecute corporations. The absence of the stipulations of procedure within both the *KUHAP* and the special Laws that recognize corporations as the subject of criminal sanctions results in a law vacuum. The vacuum of law happens within the Laws as well as the regulation under the Laws. An example can be found in the absence of the technical regulations within law enforcers' offices during the extended period.[580] In 2010, the Prosecutor Office finally enacted the internal regulation but only for corruption cases. In 2014, all crimes involving corporations were finally internally regulated. On the other hand, the Supreme Court released the internal regulation in 2016.

[580] The examples of the internal regulation are the PERJA guidelines and the Regulation of The Chief of The Indonesian National Police.

4. The Application of Internal Regulations to Solve the Statutory Problem on Corporate Criminal Liability

Internal regulations are technical regulations that is only applied in internal organization of the Law enforcers. It is the guidance used to examine cases, especially in procedural matter. To some extent, internal regulations are an important part of the law enforcement process because they often offer detailed stipulations. Furthermore, the internal regulations solves problems faced by the legal enforcers when handling real cases. Internal regulations provide a practical guidance for legal enforcers when exercising the authority given by the Laws. Moreover, internal regulations ensure a uniform approach to handling cases.[581]

For a long time, Indonesia did not consider the issues with procedural law that created obstacles to prosecuting corporations to be a serious problem. This is demonstrated by the fact that the prosecutor's office did not issue supporting internal regulations through the Attorney General Circular until 2010, which served as guidance for prosecutors to handle corporations in corruption cases. Even though the regulation was only intended for corruption cases, this Circular represents the change of the prosecutors' service view on the criminal liability of corporations. At the end of 2014, the prosecutor service finally enacted new internal regulation as the guidance principle for prosecutors dealing with corporations in all criminal cases. Two years later, at the end of 2016, the Supreme Court released the internal regulation for the same.

There will be two important questions related to the enactment of internal regulations on corporate criminal liability. Firstly, what is the position and the binding power of internal regulation on the hierarchy of legislation in Indonesia? Secondly, what is the impact of two different internal regulations from two different authorities in law enforcement? To answer the first question, the types and the hierarchy of written law in Indonesia must be explored. Law Number 12 Year 2011 on Enactment of Laws, provides the types and the hierarchy of written laws in Indonesia does not mention internal regulations:[582] As there is no internal regulation mentioned, the position of the regulation such as Supreme Court and General Attorney (Prosecutor) Internal Regulations (PERMA and PERJA) within the hierarchy of written laws in Indonesia are acknowledged and have a binding power because those regulations are enacted based on a mandate from higher regulations or based on an authority.[583] In addition, the Law on Supreme Court gives the Supreme Court an authority to give guidance for all lower

[581] See Chapter 3 for further elaboration on the internal regulations related to corporations in criminal cases.
[582] See further on sub chapter 3.4.2.
[583] See Article 8 of the Law Number 12 Year 2011 on Enactment of Laws.

courts.[584] By that authority, the Supreme Court can easily control the lower courts by issuing the regulations related to certain issues, such as the way to handle corporations in criminal cases. The internal regulations are valid and applicable within the hierarchy of written laws in Indonesia. However those regulations are to act as a guidance for their officers and only applicable within their own organizations. The most important issue related to internal regulations actually related to its external impact as they regulate the procedural and substantive law to handle the cases. Even though internal regulation is considered as a "low-level regulation", the internal regulations related to corporations play an important role in solving problems that actually should be solved by regulation within the Laws.

The second question, concerning the different stipulations between two regulations, to some extent, can affect the law enforcement process in several ways. Firstly, law enforcers such as police officers, prosecutors and judges, should adapt to those two internal regulations because all those stakeholders are integrated into one criminal justice system. The judges have the ability to take control in that situation since their central position is to take decisions in criminal cases. Therefore, even though the regulation is used internally, it is important for both law enforcers and the public to understand the whole system. They are several different stipulations within those two regulations which need to be harmonized and they are as follows:

a. For corporations without legal personality, the PERJA guidelines determines that the criminal liability shall be imposed only to the organ of corporations. The corporation itself can only be imposed upon by the additional and/or measurement sanction. In contrast, the PERMA guidelines only generally stipulates how to determine the criminal liability of corporations, without making distinction between corporations with or without a legal personality.[585]
b. The PERMA guidelines differentiates between the criteria to establish the criminal act (*actus reus*) and the criteria to establish corporate criminal liability (*mens rea*). On the other hand, the PERJA guidelines only stipulates the criteria to establish the criminal liability of corporations in general.[586] Despite the different wording of both regulations, the criteria to establish the criminal liability between those two regulations are relatively

[584] See Article 38 and Article 79 of the Law No. 14 Year 1985 as amended by Law No. 5 Year 2004 and Law No. 3 Year 2009 on the Powers and Organization of the Supreme Court. See the discussion on the Supreme Court PERMA on Subchapter 3.4.2
[585] See the Annex of the PERJA guidelines Point E Number 3 and the discussion of both regulations in Chapter 3.
[586] See the Annex of the PERJA guidelines Chapter II Point A and the PERMA guidelines Article 3 and 4.

similar.[587] However, the PERJA guidelines adds some additional criteria to establish the criminal liability of corporations, which includes misconduct involving the corporation's human resources, capital resources, and/or other corporations' facilities or support and the corporations possess the proceeds of crimes.

c. There is a minor difference in the bill of indictment in which the PERJA guidelines requires an additional corporation's tax registration number register as the part of the identity of a corporation.

Secondly, the enactment of the PERJA guidelines on 1st October 2014 changed the way prosecutors indict corporations.[588] The Attorney General office already provides detailed guidance that answer the prosecutor's questions when prosecuting corporations. [589] All stipulations in the internal regulations, which already covers all questions related to establishing the criminal liability of corporations, only bind to the prosecutors and not to other legal enforcers and judges. The Attorney General Service has its own interpretation of how to establish corporate criminal liability. Stipulations on the PERJA guidelines, which cover procedural matters and the criteria to establish corporate criminal liability, reflect this interpretation. Even though the regulation is only internally binding, it will significantly influences future cases, as this regulation will unify approaches to prosecuting corporations. Having a uniform approach for prosecutors, this will help other legal enforcers, such as police officers and investigators, to follow the prosecutor's system, since investigators deliver their results prosecutors.

On the other hand, the Supreme Court gives more criteria for establishing corporate criminal than the criteria determined by the prosecutor office.[590] Both judges and prosecutors will have to adapt to those broad criteria to establish the criminal liability of corporations. The prosecutors will be more burdened because they need to understand their own internal regulations as well as the Supreme Court's internal regulation, then they decide which criteria they will use to develop the case before the court. However, since both internal regulations

[587] See the discussion on the substances of both regulations in Chapter 3.3 and Chapter 3.4.2.
[588] The discussion on the PERJA guidelines can be seen on Chapter 3.3.2
[589] Based on the data provided by Deputy Attorney General for Special Crimes until mid-2017 there are 5 criminal cases which involved corporations have been handling by prosecutor office. It shows positive trend in the development of corporate criminal liability in Indonesia. See Arminsyah, *Op. Cit*, 408.
[590] See the differences between the PERMA and the PERJA on sub chapter 3.3 and 3.4. See also Article 3 and 4 PERMA guidelines and Chapter II.A PERJA guidelines.

have also stipulated the procedural law for handling corporations in criminal cases, prosecutors must also pay attention to differences between the two internal regulations.

The decision of those two authorities to provide a guidance for their officers is appreciated as an effort to swiftly resolve the problems emerging from the law enforcement process. It is as fast solution because both regulations give detailed guidance that prosecutors and judges can implement directly. However, since prosecutors and judges now have their own guidance, they will be bound to their internal regulations. The judges will only obey the PERMA while the prosecutors will obey PERJA and the PERMA during the trial.

In the future when the *KUHP* Draft comes into force, both PERMA guidelines and PERJA guidelines will remain valid as long as the two institutions who issue the regulations do not revoke it. However, since the KUHP has higher position than those two regulations, the regulations must adjust the stipulation within the KUHP, especially related to the criteria in establishing the criminal act and criminal liability of corporations. The KUHP draft has already stipulated all those criteria,[591] yet, both guidelines can still be applied when the KUHP draft does not regulate certain detail issues.

5. The Draft of KUHP can potentially be an Obstacle to Fight against Crimes in the Sphere of Corporations

Since Indonesia recognizes the criminal liability of corporations within various Laws outside the *KUHP*, the regime to establish the criminal liability of corporations is also varied in nature. While some Laws have a broad approach to determine corporate criminal liability, other Laws have a narrower approach.[592] There is no general rule in the Indonesian regime to establish the criminal liability of corporations.[593] At the same time, the courts also take different approaches when examining different case laws.[594] The future enactment of the new *KUHP* will unify the various regimes for establishing the criminal liability of corporations. Chapter 2 thoroughly outlines the stipulations related to corporations within the draft of *KUHP*. This discussion demonstrates that the stipulations within the *KUHP* Draft answer several important questions related to the criminal liability of corporations. However, the draft produces several potential problems.

[591] See Articles 53, 54, 56 KUHP draft and discussion in subchapter 2.4.
[592] See Table 2.3 in Chapter 2.
[593] See three models of the criminal liability of corporation in Indonesia in Mardjono, *Op.Cit*., p. 9.
[594] See the discussion on several cases in chapter 3.

Firstly, in the transitional provisions of the *KUHP* Draft there are no stipulations that directly regulate the abolishment of stipulations related to the criminal liability of corporations within all the Laws outside the *KUHP*.[595] Without the transitional provisions annulling all regulations related to corporations outside the *KUHP*, the problem of various system among the Laws will still exists. The unification of all stipulations related to corporations into the criminal code is important to ensure the effectiveness of future law enforcement. The Dutch decision to annul Article 15 of the EOA when enacting Article 51 of the DCC is a good benchmark to avoid various systems on the criminal liability of corporations. Several specific Laws that will be integrated into the new *KUHP*, such as the Law on Eradication of Corruption and the Anti Money Laundering Law, will have systems that automatically follow the system of the new *KUHP*.[596] The transitional provisions are still required for the Laws that are not integrated into the *KUHP* to ensure that the stipulation on corporate criminal liability will always refer to the *KUHP*.

Secondly, as the future general system in establishing the criminal liability of corporations, the *KUHP* draft will determine two ways to establish the criminal act of corporations which are based on the acts of persons within the corporation's organizational structure who hold a functional position or persons outside the corporate structure who orders the misconduct or the act of the corporate controller.[597]

In general, the legal drafters want to create broad criteria by defining the act of corporations based on the act of persons within the corporation and the act of persons outside the corporation. However, those criteria are not broad enough to ensure that the fight against crimes within the sphere of corporation is effective.

For the person within the corporate organizational structure, the legal drafters limit the acts of corporation based only to the act of persons who hold the functional position of the authority to represent the corporation, to take decisions on behalf of the corporation and/or the authority to supervise the corporation.[598] However, it still unclear who are the definite subjects intended by that Article. It is unclear whether the persons must have all three required authorities or one authority to sufficiently determine whether a corporation has committed a criminal act.

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[595] See Chapter XXXVIII on Transitional Provision of the *KUHP* version 2017.
[596] The *KUHP* Draft stipulates several Articles related to corruption, money laundering and narcotics however it is still unclear whether the special Laws related to those crime will be abolished or not. If the special Laws still remain applicable, the various systems will keep exist.
[597] See Article 53 and 54 of the *KUHP* Draft 2018 and sub chapter 2.4.
[598] The definition of "functional position" is based on elucidation chapter of the *KUHP* draft version 2015.

However, the acts of low level employees cannot lead to the criminal liability of corporations. That stipulation implies that the functional position is related only to the part of the corporation that officially has all three authorities. The decision to determine the act of corporations based on the act of a person who holds a functional position will raise a legal barrier to fight against corporate crimes that involve well educated people and complex organizational structures.

Moreover, it will be impossible to establish the criminal liability of corporations based on the act of the corporation itself, such as through its policy or through the act of low level employees acting on behalf of and in the interest of the corporation. Consequently, corporation can easily absolve itself from criminal liability through complex organizational structures.

On the other side, the *KUHP* Draft also opens the possibility of determining the act of corporations based on the act of two types of persons outside the organizational structure: the person who gives the order of the misconduct or the person that becomes the corporate controller even though that person is outside the corporate structure. Those two distinctions reflect the Dutch system, which recognizes the subject of criminal punishment as either the natural person who has ordered the commission of the criminal offence *(opdracht gegeven)* or the natural person who controls or is factually in charge of the misconduct *(feitelijke leiding gegeven)*. However, the Netherlands has a broader definition for those two subjects. The concepts of *opdracht geven* and *feitelijke leiding geven* in the Netherlands are not limited to natural persons as they also include the legal person. Furthermore, in the Netherlands those two subjects do not only relate to the subject outside the structure of the corporation but also to the subject inside the structure of the corporation.[599] In contrast, the *KUHP* Draft limits those two subjects to only the natural person outside the corporate structure.

In conclusion, the *KUHP* Draft has more detailed stipulations compared to the Netherlands related to the criminal liability of corporations by providing criteria in establishing criminal act and criminal liability of corporations. On one side, those detail stipulations will give benefit for law enforcement by giving sufficient basis in establishing the criminal liability of corporations and avoiding different law interpretations. More detail stipulations will also have a potency to limit the law-making power of the judge.

[599] See the discussion on this matter in subchapter 4.3.2.

Following the critique on how Indonesia regulates the criminal liability of corporations along with its implications, a critique of the implementation of corporate criminal liability in several case laws will follow.

5.3. Critiques on the Implementation of Corporate Criminal Liability in Indonesia

Based on several countries' experiences, the development of corporate criminal liability system through case laws plays an important role in influencing a countries' criminal legal system. Courts must interpret and implement the stipulations within various Laws related to the criminal liability of corporations in real cases. The limited number of existing cases related to the criminal liability of corporations in the Indonesian criminal legal system makes the development of the system of the criminal liability of corporations more difficult. The courts' case laws could aid in solving the problem of the lack of Laws on the criminal liability of corporations. Unfortunately, Indonesia has problems with both criminal law regulations and implementation. This sub chapter will criticize the way prosecutors and the courts implemented the law.

1. Critiques for the Prosecutors

The elaboration on the third chapter related to the implementation of corporate criminal liability in Indonesia, stipulates that implementation problems are caused by both the lack of regulations and the position of law enforcers, especially prosecutors, when handling corporate crime cases. The prosecutors are often held responsible for the lack of cases related to the criminal liability of corporations, because the decision to prosecute a corporation before the courts is at their sole discretion.

For prosecutors, it is more practical and easier to prosecute the natural persons within corporations rather than prosecuting the corporations. The criminal liability of natural person's regime is already well established and therefore prosecutors are more experienced in that matter. This is why prosecutors do not prosecute corporations. That position changed when prosecutors indicted a corporation despite the lack of regulations, especially in procedural law.[600] Prosecutors faced several obstacles but tried to address those situations. One of the obstacles is the form of bill of indictment, which is based on the *KUHAP* can only be applied to the natural persons. Prosecutors then improvised to find the correct form of the bill of indictment. Based on the agreement of the court's decisions, the improvisation was

[600] Several attempts had been conducted by the prosecutors, but the first successful case on the criminal liability of corporations was the *Dongwoo case*. See sub chapter 3.2.1.

successful.[601] However, in the *Dongwoo Case*, the prosecutor was unable to write the correct identity on the bill of indictment by mentioning the identity of the natural person when prosecuting the corporation.[602] As this was an early case related to corporations, the confusion is understandable; however the prosecutor still tried to find the best procedure to prosecute a corporation. Conversely, in *the Cakrawala Nusadimensi* case, the prosecutor's decision to fill the religious identification of the corporation as "*a non syariah compay*" was questionable.

To find the best method to prosecute corporations, prosecutors use a strategy whereby prosecuting the natural persons within the corporations occurs first, which, in this case, was the directors of the corporations. After the conviction of the natural persons, the prosecutors then filed the second prosecution against the corporation. In the second prosecution, it is easy for the prosecutors to establish the criminal liability of corporations, because there is a direct imputation of the corporation through the criminal liability of the director. This approach used by Indonesian prosecutors is impractical and time consuming, because to prosecute a corporation, the case against the natural persons should be finished first. Moreover, reaching a final and binding decision in the criminal court also takes a long time. Consequently, when the first case has reached final and binding decision, the second case against the corporations could lose momentum. For example, if dissolution of the corporation occurs or the corporation tries to illegally secure their assets it will be difficult for the prosecutors to prosecute the corporation. Prosecutors have not tried yet to prosecute corporations directly without waiting for the conviction of the natural persons.[603] Moreover, when we look at *Dongwoo Case* and *GJW Case*, the prosecutors copied the bill of indictments from previous cases and replaced the name of the defendants from the natural persons to the corporations. Since the director of the corporation was convicted in previous cases, the prosecutors were confident enough to prosecute the corporation using the same facts from previous cases. Finally, in the 2015 *Kalista Alam* case and the 2016 *Cakrawala Nusadimensi* case, the prosecutors implemented a different strategy by prosecuting corporation without waiting for the results of the prosecution of natural person.

Similar to the aforementioned strategies of prosecutors, the PERJA guidelines does not regulate which party should be prosecuted at the very beginning, whether it is the corporation or the natural person. The PERJA guidelines only mandates a separation between the

[601] Based on the Article 143 Paragraph 2 of the *KUHAP*, the form of the bill of indictment is only suitable for the natural persons. See the *GWJ case* in subchapter 3.2.3.
[602] See the way the legal enforcers examining the Dongwoo Case in Subchapter 3.2.2.
[603] It can be seen from all the cases related to corporation were started by the prosecution of the director of corporation.

investigation process for corporations and the natural persons.[604] However, for the prosecution process, the PERJA guidelines opens the possibility of prosecuting the corporation as well as the natural person in one bill of indictment or in a separate bill of indictment. Therefore, the prosecutors can choose their preferred strategy to maximize the results of the prosecution.

The enactment of the *KUHP* in the future will give significant influence toward the way the prosecutors prosecute corporations. Clearer stipulations on specific sanction to corporations along with the way to execute the sanctions will make it easier for prosecutors to prosecute corporations.[605] The imposition of imprisonment in lieu of fine on corporation case such as in *Dongwoo Case* will not happen again. Moreover, the *KUHP* draft also provides several factors that must be considered before sanctioning corporations. Those factors can be used as an important guideline for prosecutors in exercising their authority.[606]

2. Critiques for the Courts

This section criticizes previous decisions by the Indonesian courts related to the criminal liability of corporations. Society needs a solution to the implementation problem of the criminal liability of corporations through court decisions, but instead the courts through often pose additional questions to society. The way the court imposed criminal sanctions in the *Dongwoo case* and the way the court imposed fines on the corporations in the *Suwir Laut* case and the *Indar Atmanto* case reflects this issue.[607] The possibility to impose criminal sanctions to a corporation even though the corporation is not the defendant is a violation of the corporation's right to a fair trial. In *Suwir Laut* case and *Indar Atmanto* Case, both *Asian Agri* and *Indosat* cannot do anything except pay the fine. The enactment of the PERMA guidelines should be the catalyst that stops that controversy.

It will be interesting to discuss the decision of the Indonesian Courts after the enactment of the PERMA guidelines. However, since the PERMA was not released until the end of 2016, more time is needed to comprehend the implementation of the cases. Apart from the implementation of the PERMA, reviewing the position of the Indonesian Supreme Court related to the criminal liability of corporations based on previous decisions is important. The Indonesian Supreme Court has various criteria to establish the criminal liability of corporations, which spread in its various decisions. Those criteria are: the Supreme Court identifies the

[604] The Annex of the PERJA guidelines Chapter III Paragraph 6.
[605] See subchapter 2.4.
[606] Article 62 KUHP draft
[607] See subchapter 3.2.3 and 3.2.4.

directors of corporations as the directing mind of the corporations and therefore the criminal liability of the directors can lead to the criminal liability of the corporations;[608] the conduct of the natural persons act on behalf of the corporations and give profits to the corporations;[609] and finally, the corporation did not implement prudential principle which then leads to the misconduct.[610]

The Supreme Court decision to impose a criminal sanction on a corporation without a legal process will create a legal uncertainty for corporations. Suddenly, courts can sanction corporations without giving them the opportunity to defend or challenge the decision by filing an appeal or cassation, since the corporation would not be the defendant within the case. In *Suwir Laut* case, *Asian Agri* as a corporation did not have another option except to pay the fine for the misconduct of *Suwir Laut*, who was the employee of the corporation. The controversial decisions on several cases with limited complexities brought before the courts raise questions about the future development of the system of the criminal liability of corporations and how more complex cases that will be handled. The courts have the challenge and the opportunity to answer those questions in their future decisions. Logically, it will be easy for the judges to examine cases after the enactment of the PERMA guidelines, which has a detailed and broad definition on the criminal liability of corporations.

5.4. Lessons for Indonesia from the Development of Corporate Criminal Liability in the Netherlands

The elaboration on the development of corporate criminal liability in the Netherlands demonstrates that the Netherlands employed systematic steps to develop their approach to the criminal liability of corporations. Systematic steps mean that the development has happened in regulations and has been followed by various case law, which gives precious contributions to developing the criminal liability system in the Netherlands. Even before the recognition of corporations as criminal law subject in the general criminal code, the Netherlands tried to enhance the effectiveness of prosecution of crimes committed within the sphere of corporations by enacting former Article 50a of the DCC to reach natural persons behind the misconduct.

The discussion of corporate criminal liability in the Netherlands is dominated by the important role of the Dutch Supreme Court in interpreting the law and creating several criteria

[608] See Dongwoo Case.
[609] *See* Suwir Laut Case, in that case suwir laut was only a finance manager.
[610] See Kalista Alam Case.

to establish the criminal liability of corporations through case laws after the introduction of former Article 15 EOA and the enactment of Article 51 of the DCC. Several court decisions were landmark decisions that the legal enforcers used as a foundation to prosecute corporations in criminal cases. On the other hand, the Dutch Prosecutor also had significant role in the development of corporate criminal liability as case laws are always started by the decision of the prosecutor to prosecute corporations. The elaboration regarding the development of corporate criminal liability in the Netherlands shows the important position of the Dutch Supreme Court in the development of corporate criminal liability, especially through the interpretation of the implementation law of Article 51 of the DCC. Even though the Dutch criminal legal system does not formally regulate the precedence principle, the Dutch Supreme Court has an important and strong position in the development of the criminal liability of corporation. Therefore, other judges often follow the former decisions of the Dutch Supreme Court.

After understanding how the Netherlands established their system of corporate criminal liability, the next question will be; what can be learned from the Netherlands, as it is the root of the Indonesian criminal legal system? That question will be answered by discussing seven important lessons.

1. Lessons from How the Netherlands Regulates Corporate Criminal Liability within the Laws

The first important lesson that can be learned from the Netherlands is the recognition of the criminal liability of corporations within their criminal legal system. Even though in the beginning the recognition was implemented outside the criminal code, and then within economic offences, the next step taken by the Netherlands in 1976 was the most important step within their criminal legal system. In 1976, the Netherlands enacted the new Article 51 in their criminal code, which later became the single general basis stipulation in the regime of the criminal liability of corporations. Article 51 of the DCC applies to all criminal offences within the criminal code and also to the special criminal Laws outside the criminal code.

The enactment of the new Article 51 in the DCC in 1976 annulled the same stipulation in the Economic Offence Act related to the recognition of corporate criminal liability in economic offences. As the general stipulation in the criminal law, the consequences of recognizing corporate criminal liability in Book One of the DCC are that all criminal offences based on Book Two and Book Three of the DCC and the criminal offences outside the DCC (as long as

the Laws outside the DCC do not stipulate otherwise) can be committed by the natural person and/or the corporation. Therefore, the decision to annul Article 15 of the EOA in 1976 was a logical decision of Dutch legislators to create a single stipulation on corporate criminal liability.

The single stipulation of corporate criminal liability within the criminal legal system through the stipulation in the criminal code offers several advantages. Firstly, through the stipulation within the criminal code, all criminal Laws outside the criminal code do not need to have a special stipulation on corporate criminal liability. Those Laws just need to refer to the stipulation in the criminal code as the general stipulation (*lex generalis)*. Secondly, the single stipulation will also prevent the possibility of the emergence of various provisions related to corporate criminal liability among the Laws. Various stipulations on corporate criminal liability can lead to various approaches by the court to deal with criminal cases which involve corporations as the offenders. Moreover, this can also make corporate crime law enforcement more difficult and complex.

If we look at the Dutch experiences, even though the Netherlands already had a single stipulation on the recognition of corporate criminal liability, the methods to implementing that stipulation in real cases are not easy. Since 1976, when the new Article 51 of the DCC was introduced, the Dutch Supreme Court was still in the process of finding the best criteria to establishing the criminal liability of corporations. The approach taken during the Dutch Supreme Court Decision in 2003 is an example. Even though it took 27 years, that decision has succeeded improving the guiding principles to establish the criminal liability of corporations from the criteria in the former case laws; but that guiding principle still cannot be applied in each criminal case and still needs further interpretation based on the specific circumstances. The newest decision of the Dutch Supreme Court in 2016 that compiled and clarified several opinions from previous Supreme Court decisions also has room for interpretation. Based on that experience, the way to recognize corporate criminal liability in the various Laws, consequently generates more complex problems because the court has to concentrate on actual circumstances of the case in addition to the certain Law stipulations on the criminal liability of corporations.

The recent position of Indonesia, which still recognizes the criminal liability of corporations outside the criminal code, has consequentially resulted in special Laws outside the *KUHP* that have their own stipulations about the criminal liability of corporations. The number of Laws which recognize the criminal liability of corporations will increase as

Indonesia enacts the new Laws. This "fragmentary approach" is more complicated because of the differences of the stipulations on the criminal liability of corporations among the Laws.

Before 1976, Indonesia had a similar position to the Netherlands related to the recognition of corporate criminal liability outside the criminal code. [611] This happened when Indonesia enacted the Economic Crime Law in 1955 which was drafted based on the Netherlands Economic Offence Act 1951. At that time, the Laws which recognized corporate criminal liability in Indonesia were still limited to the Laws in economic offences.[612] The difference emerged in 1976, when the Netherlands enacted the new Article 51 in their criminal code, while Indonesia continued to recognize corporate criminal liability outside its criminal code.

The reason that the Indonesian criminal legal system has not recognized the criminal liability of corporations in the *KUHP* until now is not based on the position of the Indonesian legislators who still agree with the *Savigny* opinion of *societas delingure non potest.* The reason is procedural and is a long drafting process of the new Indonesian *KUHP*. In the bill of the new Indonesian *KUHP*, the criminal liability of corporations has already been recognized and even stipulated completely.[613] The enactment of the new *KUHP* will change the position of the Indonesian general criminal law in the recognition of corporate criminal liability, even though it will not automatically annul the provisions of corporate criminal liability outside the *KUHP*.

Important here is the decision of the Netherlands to annul Article 15 of the EOA when enacting the new Article 51 of the DCC in 1976. The Netherlands wanted to apply a single stipulation related to the recognition of corporate criminal liability. Furthermore, if we compare the stipulation in Article 15 of the EOA and Article 51 of the DCC, the stipulation on corporate criminal liability in the DCC has a broader meaning than in the EOA. The Indonesian condition of many Laws stipulating corporate criminal liability should be a serious consideration for the Indonesian legislators when they enact the new *KUHP*. Otherwise, the diversity of the regulations on corporate criminal liability will remain. If Indonesia decides to enact a new *KUHP*, legislators should consider following the decision of the Netherlands legislators to make a single stipulation on corporate criminal liability. The recognition of corporate criminal liability in the criminal code as the general rule in criminal law is meaningless if the special

[611] The discussion related to the regulation of corporate criminal liability within the Indonesian criminal legal system is discussed in Chapter 2.
[612] In 1955 Indonesia had two Laws related to economic offences which already recognized the criminal liability of corporation namely, the Stockpiling Law and Economic Crime Law. Only Economic Crime Law that is still valid until now.
[613] *See* Chapter 2 subchapter 2.4.

Laws outside the criminal code still have their own stipulations. In addition, the Indonesian legislators should also consider the way the Dutch Criminal Code stipulates Article 51 generally. By doing so, it will give the court freedom to interpret the law based on specific facts and circumstances of the case. However, Indonesian legislators should also consider that the general stipulation also needs an active and strong position from Supreme Court in judge making laws process.

2. The Lessons from the Netherlands' Approach in Developing Corporate Criminal Liability through the Case Laws

Another important lesson that can be learned from how the Netherlands developed their system of corporate criminal liability is the active role of legal enforcers such as prosecutors and judges in handling criminal offences committed by corporations. The Dutch prosecutors actively prosecute the corporations in criminal offences, if they believe there is sufficient proof to bring the corporations before the court. Moreover, in Dutch Law there are many directives for different type of crimes which contain specific stipulations to handle corporations when they involve in the misconducts.[614] For example in the Directive for Criminal Proceedings Telecommunications Act *(Richtlijn voor strafvordering Telecommunicatiewet (2018R005)),*[615] When a natural person or a company uses radio equipment without a license, this is considered as a crime. For natural persons, the prosecution will demand a different sort of sentences than for the company. The directive regulates different sentences both for natural person and legal persons. As follows:

	first offender	**1x repeated offence**	**multiple repeated offences**
Natural person	community service 120 hours	community service 180 hours Idem or custodial sentence 3 months	Demand community service 240 hours or custodial sentence 4 months
Corporation	fine € 2000	fine € 3000	fine € 4000

The directives' stipulation on the way to handle corporations is an important factor to ensure the effectiveness to prosecute corporations because the prosecutors have a clear guidance to handle corporations. It can be seen from the numbers given by *Nico Keyser* that show that in 2010 around 4500 corporations were prosecuted in the Netherlands.[616] Compared

[614] See the list of Directives on https://www.om.nl/organisatie/beleidsregels/overzicht-0/index
[615] The Directive can be accessed on https://www.om.nl/organisatie/beleidsregels/overzicht-0/index/@94065/richtlijn-9/
[616] Nico Keyser, *Op. Cit*., p. 6.

to Indonesia, that number of cases is tremendously different. The discussion in Chapter 3 has portrayed this situation, the number of cases brought before the court in Indonesia are nothing compared to the Dutch cases.

Article 51 of the DCC is stipulated in a simple and general way. Through the active role of the Dutch Supreme Court in case laws, several criteria have been constructed to establish the system of corporate criminal liability. In many cases brought before the court, the court had the opportunity to implement and build the argument to establish the criminal liability of corporations in criminal cases. The case laws become an important part in the development of the corporate criminal liability doctrine and can be used as one of the legal resources to solve legal problems. For example, the social context theory and the reasonable charge criteria made by the Dutch Supreme Court, became the important handhold for the law enforcement in corporate crime in the Netherlands. Even though several legal scholars in the Netherlands argue that the criteria made by the Dutch Supreme Court have not answered all problems in corporate criminal liability and have an open approach in establishing criminal liability of corporations, the process of legal finding to develop the better system of corporate criminal liability in the Netherlands is sustainable.

However, the method used by the Netherlands to develop corporate criminal liability through the active role of the prosecutors to prosecute corporations before the court and the role of the court in establishing case laws on corporate criminal liability, have not happened yet in Indonesia. Even though the Indonesian criminal legal system has recognized that corporations can be held criminally liable since 1951 and there have been many Laws recognizing the criminal liability of corporations, there are not many cases involving corporations that were brought before the court compared to the Netherlands. In other words, the progressive development of the corporate criminal liability of corporations in the Indonesian criminal legal system has only occurred within the criminal regulations and weakness exists in the implementation of the laws in the real cases.[617]

The lack of the case laws related to corporate criminal liability creates an obscurity in the system to establishing the criminal liability of corporations. The lesson from the Netherlands has shown that the approach taken by the Netherlands Supreme Court to establish corporate criminal liability has produced important guidance for the legal enforcement. In the context of

[617] See the elaboration in Chapter 4 related to the implementation of the criminal liability of corporations in Indonesian criminal court along with problems surrounding it.

the lack of case laws related to corporate criminal liability, the Indonesian approach to regulating corporate criminal liability amongst several Indonesian Laws is a start to the development of the system of the criminal liability of corporations in the Indonesian criminal legal system. If we take a look at the several Laws in Indonesia that have a stipulation on corporate criminal liability, which already discussed in Chapter two, several Indonesian Laws already have detailed stipulations on how to establish corporate criminal liability. Those stipulations can be used as the basic handhold for the legal enforcers to start prosecuting corporations. However, the legal enforcers should understand that the various regulations among the Laws on corporate criminal liability can lead to the difficulties to have a single system to establishing the corporate criminal liability in Indonesia.

3. How the Netherlands Defines the Legal Person and What Can be learned by Indonesia

The DCC defines the word *"rechtspersoon"* broader than similar terminology used in civil law regime by including all legal entities both with legal civil status and not as the subject of criminal punishments. Despite that broad definition, it is not difficult to determine which entities that become the subject of the DCC because all form of legal entities are already stipulated within the CCN. Moreover, Article 51 paragraph 3 of the DCC also stipulates which legal entities are given equal status as corporations. In this case, corporations without civil legal status, partnership, firm of ship owners, and properties gathered for special purpose.

Comprehensive discussion related to the types of legal entities that can be subject of criminal punishment in Indonesia has been elaborated in chapter two but it is important to give brief overview about the way Indonesia defines corporations. The definition of corporations as the criminal offender in Indonesia is various in nature. Several Laws are similar to the Netherlands, which broadly define corporations as all entities, whether they have a civil legal status or not. That similarity is strengthened by the fact that Indonesia has inherited both the criminal code and the civil code from the Netherlands. Therefore, the types of entities, both with legal status or not, are quite similar. In several Indonesian Laws (such as Corruption Law, Money Laundering Law and Narcotic Law) a corporation is defined as the organized group of people and/or wealth both in form of legal entity or non-legal entity. The meaning of organized group of people and/or wealth refers to the type of the entity based on civil law.

For the Indonesian Laws that have similar definition of corporations as the Netherlands, the Dutch experience related to public corporations as the subject of criminal liability is important to be discussed. The Dutch case laws about the change of the absolute immunity of

public corporations in criminal cases is an important lesson for Indonesia. Even though the plan to put an additional article in Article 51 of the DCC related to public corporations has been rejected by the Dutch Parliament, Indonesia should start thinking to what extent the immunity of public corporations will be given. The Dutch experience that only prosecutes public corporations if they act as a private entity in private activities and not as a public entity in the criminal offences can be a valuable lesson to start the discussion. Recently, Indonesian Traffic Law is an example of the Law which explicitly opens the possibility to sanction public corporations because the Law directly points road organizer (government) which fails to maintain the road and causes an accident as the subject to be criminally sanctioned.[618] However, until now, there is no single case related to public corporations in Indonesia.

On the other hand, several Indonesian Laws have also defined the legal person in diverse ways. The Banking Law for example, only considers a corporation as a legal entity in the form of a limited liability company, association, foundation or cooperative. That definition makes it impossible to establish the criminal liability of public corporations. Then, the Traffic Law does not have a general definition of corporations, but directly addresses only the public transportation company and the road organizers as the criminal offenders in certain offences. It is best to employ the broad definition of corporations as the subject of criminal law within the criminal legal system to cover all types of the entity in society. The narrow definition of corporations, like in the Indonesian Banking Law and the Traffic Law, make other entities that are not mentioned by the Law immune from prosecution.[619]

4. Lessons Learned from How the Netherlands Determines the Act of the Corporations

Article 51 of the DCC is stipulated in general way, and consequently, the Dutch Supreme Court has an influential role in interpreting the article into real cases. The discussion concerning how the Dutch Court implemented the corporate criminal liability in criminal cases in subchapter 2.3 has shown the critical position of the Supreme Court in interpreting the law. The combination of how Dutch law-makers stipulate Article 51 of the DCC in general way and the strong role of the Courts in interpreting the Law is an important lesson for Indonesia to understand how to manage problems in regulations and in implementation. The most major decision was the landmark decision of the *Drijfmest* Case in 2003. In that case, the Supreme Court established "the reasonable attribution criterion" to determine which acts corporations

[618] See the discussion on Traffic Law in subchapter 2.3.
[619] See Chapter 2 for detail discussion about the Indonesian Laws stipulating the criminal liability of corporations.

can commit. That criterion was later restated in newest decision in 2016.[620] The attribution of the relevant behaviour to the corporation will be reasonable, when the illegal conduct was committed within the scope of the corporation. The court then created four situations or group of circumstances in which conduct, in principle, may be said to be performed within the scope of a corporation.

Chapter 2 and 3 have discussed how Indonesia regulates and implements the system of corporate criminal liability, both in regulation and in implementation within the criminal cases. As an introduction, Indonesia variously established the criteria both within various Laws and case laws. There are several similarities in the criteria to determine the act of corporations between the two countries. For example, the Corruption Law and the Pornography Law stipulate that to determine whether an act is the act of the corporation is based on the act of people who, based on work and other relations, act in the sphere of corporations, both personally and collectively.[621] That stipulation is similar to the doctrine from the Netherlands case laws, such as the Nut Case and the Groningen University Case, which recognizes the act of the official employee, low-ranking employee and people outside the corporation as the act of corporation, as long as in the social context the corporation can be said to have committed an act.[622] The similarity is also show in Article 48 of the bill of the *KUHP*. That bill states that a criminal act is committed by corporations in the event that the act is committed by person, personally or collectively, who holds a functional position in the corporation, based on employment or other relations in the scope of the corporation.

The criteria from the landmark decision of the Dutch Supreme Court in 2003 regarding the circumstances that can be performed within the scope of a corporation to establish criminal liability can be partially seen in the stipulation of the Money Laundering Law.[623] Article 6 Paragraph 2 of the Money Laundering Law has four criteria which are used to determine the criminal liability of corporations in money laundering crime.

The second and the fourth criteria is directly similar to two criteria of the Dutch Supreme Court Decision in 2003, which are the conduct which fits the everyday "normal business" of the corporations and the corporation gained profit from the conduct concerned. In contrast, the first and the third criteria from the Money Laundering Law are not similar to the criterion of

[620] ECLI:NL:HR:2016:733.
[621] See Article 20 of the Corruption Law and the Article 40 of the Pornography Law.
[622] See subchapter 4.3.2.
[623] Further discussion related to corporate criminal liability within the Money Laundering Law is discussed in Chapter 2.

"the act of someone who works for the corporation, whether or not under a formal contract of employment" from the Dutch Supreme Court decision in 2003.[624] The corporation control personnel in the Money Laundering Act is defined as anyone who has the authority to determine or implement the corporation policy without requiring authorization from their superior. Conversely, the Money Laundering Law does not further stipulate whether the corporation control personnel should be under formal contract of employment or not. That question can only be answered by the Indonesian court through the case laws in money laundering, which unfortunately have not existed until now.

5. Lessons from the Netherlands related to the Secondary Liability in Criminal Offences by Corporations

In the Netherlands, if an offence is committed by a corporation, the prosecution and the punishment can be imposed on the legal persons, the natural persons who ordered the commission of an offence, as well as the natural persons who actually controlled the commission of the offence.[625] Indonesian Laws also recognize the secondary liability in corporate criminal liability as stipulated in the Netherlands in Article 51 Paragraph 2 of the DCC, though in various forms. The stipulation in Indonesian Laws that is similar to the Netherlands can be seen in the Indonesian Environmental Protection and Management Law.[626] In contrast, the Indonesian Corruption Law only recognizes that if an offence is committed by a corporation, the secondary liability only covers the corporation and/or the board of directors. The same stipulation is found in the Indonesian Money Laundering Law, which simply regulates that the corporation and/or the corporation control personnel can be held criminally liable if a corporation has committed a criminal offence. In contrast, Indonesian Banking Law does not recognize the secondary liability, if a corporation commits an offence. Only the natural persons who ordered such activities and/or the natural persons who are responsible for the management of such activities shall are criminally liable, not the corporation.[627]

The future Indonesian general criminal Law, the bill of the *KUHP*, also stipulates which subject shall be criminally liable if a corporation commits an offence which has been discussed chapter two. The way several Indonesian Laws limit the secondary liability to only the

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[624] See sub chapter 4.3.1.
[625] See the discussion related to natural persons who have ordered the commission of the criminal offence (*opdracht gegeven*) and/or natural persons who control/factually in charge of such unlawful behaviour *(feitelijke leiding gegeven*) in subchapter 4.3.2.
[626] See the discussion of the article 116 of the EPM Law in Chapter 2.
[627] See the discussion on Banking Law in Subchapter 2.3.

corporation and the director of corporation creates an obstacle for punishing other persons who do not have the required official status within of the corporation but are the intellectual actor behind the offence.

6. The Lessons from How the Netherlands Regulates Criminal Sanctions for Corporations

The first important lesson from the Netherlands related to criminal sanctions for corporations is that this country does not have a special stipulation that mentions specific sanctions that can be imposed to corporations. The applicable criminal sanctions in the DCC are stipulated generally, which can be imposed on both the natural persons and legal persons.[628] The type of sanctions for corporations then based on the characteristic of corporation itself.

The Netherlands only stipulate the way to determine the amount of fine to be imposed on corporations. Article 23 Paragraph 7 of the DCC stipulates DCC states that in case a legal person is punished and the applicable category does not allow for appropriate punishment, a fine of the next higher category may be imposed. If it is still inappropriate, the fine may be imposed up to a maximum ten percent from corporation's annual revenue. In addition, if the natural persons fail to pay the fine, the DCC stipulates the detention as the substitute penalty, but in the case of the corporations, the DCC has not stipulated further.

A general lesson from the Netherlands related to criminal sanctions for corporations is the fact that even though the DCC has recognized the legal persons as the new subject in criminal law, the criminal sanctions in the DCC have not adequately changed to adjust to the nature of corporations as the new type of criminal offender. However, the way The DCC adjust the amount of fine that can be imposed on corporations higher than the fine for natural persons and determine the amount of fine based on corporations annual revenue are two most valuable lessons for Indonesia in regulating the fine for corporations.

Before deep discussion on the criminal sanctions for corporations in Indonesia in chapter three. The short overview of criminal sanctions for corporations in Indonesia is important to be discussed. Since the *KUHP* has not recognized the criminal liability of corporations, this code does not regulate specific sanction to corporations. The criminal sanctions that can be imposed on the corporations are only based on the Laws that already recognize the criminal liability of corporations.

[628] See the discussion on the Netherlands's criminal sanctions in subchapter 4.3.5.

The Indonesian Law that has comprehensive stipulation on criminal sanctions for corporations and can serve as the role model in criminal sanctions for the corporations is the Indonesian Money Laundering Law. The criminal sanctions for the corporations in this Law directly affect corporations as the subject of the criminal sanctions. This Law prescribes that the fine is the principal sanction to corporations along with the stipulation that determine the maximum fine that can be imposed on corporations.[629] If corporations fail to pay the fine, this Law regulates the confiscation of the assets of the corporations or the assets of the corporate control personnel. Then, if the fine still cannot be paid after the confiscation, the detention as a substitute penalty can be imposed on the corporate control personnel.

The nature of corporations as the criminal offender is different from the natural persons, and for that reason, the criminal sanction for corporations should be based on the nature of corporations. The fine that can be imposed on corporations should be different from the fine to the natural persons. Then, the substitute penalty, if the fine fails to be paid by the corporations, should be stipulated specifically and should directly be imposed on the corporations as the criminal offender. The *KUHP* bill has also comprehensively stipulated how to sanction corporations. In general, the stipulation on the criminal sanctions for corporations is similar to the stipulation in the Money Laundering Law, except for the substitute penalty if the corporation fails to pay the fine.

7. The Lessons from How the Netherlands Regulates the Criminal Procedure Law for Corporations

The Netherlands does not only stipulate the recognition of corporate criminal liability in their criminal code, but also recognizes corporations in the stipulations within the criminal procedural code. The stipulation on the procedural law is important because the nature of corporations as the criminal offender is different from that of the natural persons. In addition, the stipulation of the prosecution and the trial of corporations within the general code of the criminal procedure creates a single approach toward the prosecution and the trial process of corporations. The stipulation in criminal procedural law of corporations in the Netherlands emphasizes two important points: the party that can represent the corporations in criminal processes and the communication of the court notices. The Netherlands case laws has also given a meaningful interpretation of the Dutch Supreme Court toward the stipulation in the criminal procedure code.

[629] See discussion related to Money Laundering Law in Chapter 2.

Having a single approach to the corporate criminal liability, both in the substantive criminal law and in the procedural law, can simplify the process of the legal enforcement because the legal enforcers will not find it difficult to establish a legal basis to exercise their authorities. The stipulation within the general law can also create a single system for the development of corporate criminal liability within a country.

Since the Indonesian Procedural Code has not recognized how to prosecute corporations, the various prosecution approaches in procedural law is unavoidable. In several Indonesian Laws that stipulate the procedural law toward corporations directly within the Laws, the legal enforcers can refer to that stipulation. The problems then emerges when the Laws that recognize the corporations as the subject of criminal offences, do not stipulate the procedural law on corporations. The question that arise then is which procedural law legal enforcers should refer to. That question can only be answered by the Indonesian court through case laws.

In the future, the Indonesian legislators should consider the lessons from the Netherlands, which is using a single approach to regulate the corporate criminal liability system through not only the criminal code but also in the criminal procedure code.

5.5. A Proposal to Develop Corporate Criminal Liability in Indonesia

The Indonesian criminal code is still far behind the modernization project, since the Criminal Code dating back to the colonialism era is still applicable and the process of creating a new Criminal Code is long. The old criminal code is still applied with several parts that have been partially amended, erased, added or replaced by new Laws outside the criminal code in order to modernize the criminal legal system. The law-making process of the new Indonesian criminal code, which began more than 50 years ago, seems to involve the difficult task of creating a criminal code as a general regulation on criminal law that reflects the moral value of a multicultural and religiously diverse country. Consequently, criminal law regulations in the Indonesian criminal legal system spread outside the criminal code, whereby each Law has different systems and stipulations, including the stipulations on the regime of corporate criminal liability. That condition then leads to the difficulties in implementing the system of criminal liability of corporations, especially for the legal enforcers, because they must deal with different systems of liability based on a specific crime and its applicable law. From the lessons learned from general development of the criminal liability of corporations especially the Dutch experiences, there are several solutions and recommendations to deal with this legislation problem and the problem of enforcement, which are:

1. Unifying and Harmonizing the Law on the Criminal Liability of Corporations by Reforming the Indonesian Criminal Code (KUHP) and the Indonesian Code of Criminal Procedure (KUHAP)

The recognition of the criminal liability of corporations within both the Indonesian Criminal Code and the Indonesian Code of Criminal Procedure is an effective way to solve problems which emerge because of the various stipulations on corporate criminal liability. Through recognition within the *KUHP* and *KUHAP*, the Indonesian criminal legal system will generally recognize that both natural persons and legal persons can commit crimes. There will be no question regarding which subject and conduct corporations can commit. Currently, the answer of that question is dependent upon certain Law that correlate with the misconduct. Furthermore, the recognition will also create a single legislative approach towards the criminal liability of corporations. The development of the regime of corporate criminal liability will depart from the same starting point even though in its journey the system of corporate criminal liability will always develops to adapt with the development of society.

The enactment of Article 51 of the Netherlands Criminal Code in 1976 demonstrates the importance of having a single stipulation on corporate criminal liability within general criminal law. The new Article 51 of the Dutch Criminal Code did not include the stipulation related to the criminal liability of corporation within the Act of Economic Offence, as the general stipulation within the Criminal Code replaced it.[630] It will be more beneficial for Indonesia to replicate the Netherlands' approach when enacting the new *KUHP*. The *KUHP* Draft should repeal all stipulations related to the criminal liability of corporations outside the *KUHP* and stipulate that all the Laws will follow the system within the *KUHP*. Without that, stipulations related to corporate criminal liability in Laws outside the *KUHP* will still exist because, as stated by the *lex specialis derogate legi generalis* theory, the stipulation in specific Laws override the stipulation in general Law. Without that transitional stipulation, the existing problems caused by the various Laws on corporate criminal liability will still occur. Furthermore, the annulment of various stipulations on corporate criminal liability in Laws outside the *KUHP* will ensure the effectiveness of the legal enforcement of corporate criminal liability. However, in the latest *KUHP* draft, there is no single transitional provision which states that all regulations related to criminal liability of corporations outside criminal code

[630] *See* chapter 4 related to the development of the criminal liability of corporations in the Netherlands.

should be annulled when the new *KUHP* is enacted. The legal drafters should take a single approach toward corporations seriously by accommodating it in the new *KUHP*.

The stipulation on the criminal liability of corporations in the draft of the *KUHP* is a detailed and comprehensive stipulation. The *KUHP* draft stipulates the recognition of the corporation as the subject of criminal law, how to establish the criminal liability of corporations and the type of criminal sanctions that corporations can receive.[631] That detailed stipulations is important because it will give a sufficient basis for prosecuting corporation. Furthermore, as discussed in chapter 4, the Indonesian law enforcers have higher confidence when using clear and detailed stipulations. In addition, in reference to punishing corporations, the draft of the *KUHP* regulates an obligation for law enforcers to consider several factors before punishing corporations such as obligation to consider the impact of prosecuting corporation.[632] To avoid the abuse of authority for the benefit of corporations, it should further regulate the criteria or the system to apply those factors in handling corporations case, for example the criteria to measure the impact of prosecuting corporations.

If we look at the stipulation in the draft of the *KUHP* that recognizes the criminal liability of corporations, the repeal of the stipulation on corporate criminal liability within the Laws outside *KUHP* will not mean that the Indonesian criminal legal system will have a new system of corporate criminal liability. Even though this is a narrow approach, the stipulations within the draft of the *KUHP* in general are still in line with the current system that among the Laws which recognize the criminal liability of corporations. The process of creating the new *KUHP* should also consider the Supreme Court's view on corporate criminal liability. The point of view of the Supreme Court is demonstrated in their decisions and in the PERMA guidelines. Broad and detailed criteria to establish the criminal liability of corporations, which are made by the Supreme Court, deserve to be accommodated in the future stipulations of the new *KUHP*.

Various stipulations among the Laws on the criminal liability of corporations are found in both substantive criminal law and in procedural law. Many Laws outside the *KUHP* that recognize corporations as the criminal law subject have limited stipulations on procedural law if any at all. This is why it is important to have general stipulations on procedural law related to corporations in the Code of Criminal Procedure. The fact that the *KUHAP* as the general law

[631] See the elaboration on the way the Draft of *KUHP* regulates the criminal liability of corporation in chapter 2.
[632] See Article 62 the draft of *KUHP*.

(lex generalis) in criminal procedure has not stipulated how to handle corporations in cases often leads to difficulties, since the applicable law only deals with the natural person as the criminal subject. Thus, the reformation of the *KUHAP* is also important for the development of the corporate criminal liability regime in the Indonesian criminal legal system. As the corporation is the subject of criminal law, which has different characteristics compared to the natural person. The *KUHAP* as the general law in procedural law must also provide the stipulation related to corporations.

To conclude, the recognition of the corporation as the subject both in *KUHP* and *KUHAP* does not lead to theoretical debates in Indonesia, such as whether a corporation can be criminally liable or not. In fact, the Indonesian criminal legal system has already recognized this since the 1950s. The draft of the *KUHP* has recognized the liability of corporations and therefore it is important for the government and Indonesian legislators finally to enact the new Indonesian *KUHP*. Looking at the progress of the law making process of the draft of *KUHP*, there is a possibility that the new KUHP is enacted when this thesis will be defended.

2. The Harmonization of the Guidance Regulations on the Criminal Liability of Corporations as a Solution to the Problem of Corporate Criminal Liability in Indonesia

Criminal law reform in Indonesia, especially in the law-making process of the new *KUHP* and the *KUHAP*, has taken many years and still needs a long time to finish. Conversely, societal development is growing rapidly, which influences the development of crimes that involve corporations. The Indonesian criminal legal system has developed Laws related to corporate criminal liability outside general criminal law as an answer to the development of crimes which involve corporations. This led to the existence of various systems to establish the criminal liability of corporations, as stated before. Since the stipulation on corporate criminal liability is absent in general criminal law and in criminal procedure, the special Laws should regulate both substantive and procedural law related to corporations. A problem emerges when the stipulations in special Laws are not comprehensive or do not have further regulations on corporate criminal liability. Those special Laws cannot refer to the general regulation in criminal law both in the *KUHP* and in the *KUHAP*.

The absence of stipulations on corporate criminal liability in general substantive law (*KUHP*) and general criminal procedural law (*KUHAP*) has led to the problem of implementation. The legal enforcers have difficulty finding a legal basis for prosecuting and punishing corporations because the applicable Laws do not stipulate on certain issues and they

also cannot find any legal basis in general criminal law. The guidance regulations by legal enforcers and the courts can answer the present problems related to the criminal liability of corporations. When the amendment of Laws involves the government and parliament agreement it is too complex and therefore requires more legislation time; in contrast, the guidance regulation is simpler, timesaving and can be directly applied.

On 1st October 2014, the Indonesian Attorney General Office issued PERJA Guidelines. This regulation aims to give internal guideline for prosecutors to handle corporations as the subject in criminal law. The Attorney General Office realized that in practice, prosecutors often find it difficult to establish the criminal liability of corporations both in substantive criminal law and in criminal procedure. That guideline is important for enhancing the capability and confidence of prosecutors in prosecuting corporations. Moreover, there will be no excuse for prosecutors to not prosecute corporations due to a lack of legal basis.

After several years of discussions, at the end of 2016, the Indonesian Supreme Court issued PERMA Guidelines. This regulation is important because judges will use the guidelines to examine corporations in criminal cases. The Supreme Court guideline will create a foundation for judges to establish the criminal liability of corporations. The enactment of the PERMA Guidelines should end the controversy about the possibility to sanction corporations when the corporation is not the defendant of the case. The PERMA Guidelines state that sanctioning corporations without making corporations the defendant violates the right of fair trial for corporations as the legal subject in criminal law. Since the implementation of the PERMA guidelines cannot be retroactive, two corporations in Indonesia, *the Asian Agri* and the *IM2*, must still comply with the final and binding decision of the Indonesian Supreme Court to pay a fine as the result of the prosecution of their directors.[633]

To deal with those two different internal regulations, both the General Prosecutor Office and the Supreme Court should harmonize not only between those two internal regulations but also between internal regulations and the Laws which recognize corporation as its subject. Harmonization will help expedite the law enforcement process because both prosecutors and judges will have the same perspective. In harmonizing the process, prosecutors will be more active by absorbing or adjusting their internal regulations with the PERMA Guidelines because all cases will be brought before the court and the court will apply their own internal regulation. Therefore, to ensure the maximum result of the prosecution, the prosecutors should refer to the

[633] See the elaboration of *IndarAtmanto case* and *Suwir Laut case* in sub chapter 3.2.

PERMA Guidelines. Previous subchapter discussed several differences between the guidelines.[634] In general, both guidelines have quite similar systems for establishing the criminal liability of corporations. The differences only happens in the detail of the guidelines; therefore, harmonizing them will become easier. For example, both regulations generally have similar criteria to establish the criminal liability of corporations. The PERMA guidelines, however, distinguishes between the criteria to establish the criminal act and the criminal liability of corporations. The harmonization can occur, for example, by separating the criteria within the PERJA guidelines based on the separation within the PERMA guidelines.

The PERMA guidelines and the PERJA guidelines are important for dealing with the present condition of corporate criminal liability in Indonesia and can also be the basis for further development in the criminal liability of corporations. The implementation guidelines can serve as the basis of legal reform on corporate criminal liability besides case law *(jurisprudentie)* because the implementation guidelines fill the gap between Laws and practice. However, those two internal regulations are a temporary solution, while the process of the Indonesian criminal legal reform continues.

3. The Corporation as the Subject of Criminal Law Should be more Broadly Defined

Currently, the system to establish the criminal liability of corporations in the Indonesian criminal legal system varies from one Law to another. There are even different provisions to determine the corporation as a subject. Some laws narrowly defines corporations. For example, Traffic Law limits the corporation o only at public transportation company or a road organizer. Conversely, other Laws define corporations more broadly, as an organized collection of people and/or wealth both in the form of a legal entity or a non-legal entity.[635] With that stipulation, legal enforcers should be careful when determining the subject of their case to avoid *error in persona* in prosecution. Even though the PERMA guidelines has broadly defined the corporation, it does not mean that there will be a universally applied. Law enforcement will still bind the stipulations within the Laws since the Laws have higher position than just an internal regulation.

In the future, the definition of corporation should have single and broader stipulations. As the definition of a corporation should be an organized collection of people and/or wealth either in the form of a legal entity or non-legal entity. This definition will offer several advantages.

[634] See discussion about the differences between two regulations in subchapter 3.3 and 3.4.
[635] See table 3.2 in chapter 3 about the Corporate Criminal Liability in the Indonesian Legal System.

Firstly, despite the fact that this definition already exists in several Laws in Indonesia, a single definition of a corporation will simplify the method to determine whether a certain form of corporation is the subject of a certain Law. Secondly, a broad definition of a corporation will broaden the subject of criminal law. Nowadays, there are so many entity types in business activities with distinctive characteristics, ranging from simple to complex corporate structures. The single and broad definition can ensure that the long arm of the law can always reach the misconduct committed in the sphere of business activities. Thirdly, in a modern world, with fast growing knowledge and development in business activities, it is possible that a new form of business entity will emerge. Thus, the Law can always adapt to new developments since the definition of the subject that is the corporation is broad.

4. Criteria to Establish the Criminal Liability of Corporation

The question that emerges in discussions of corporate criminal liability is how to establish the criminal liability of corporations since this entity is a legal fiction. The criteria to establish the criminal liability of corporations have been acknowledged by Indonesia but the criteria are varied and spread throughout three separate places: in the stipulations within various Special Laws; in several case laws; and within the PERJA guidelines and the PERMA guidelines.[636] Consequently, the criteria are various in nature. Therefore, it is important for Indonesia to have a comprehensive criteria on corporate criminal liability in the general law. The criteria should be regulated directly within the Laws because it will give a strong legal foundation for establishing corporate criminal liability. The Dutch law only stipulates the recognition of corporate criminal liability in a general way because the Dutch courts, especially the Dutch Supreme Court, have a key role in the law finding process. In the next sub chapter this will be discussed further by introducing the ideal system in establishing the criminal liability of corporations in Indonesia.

5. Recommendations on the System of Sanctioning Corporation

A characteristic of Criminal law is the imposition of criminal sanctions as the response of misconduct of the perpetrator. The sanctions have special characteristics that differs from civil law since it involves harsher punishment, such as capital punishment and imprisonment. Since corporations have different characteristics than a natural person, the fine is the primary sanction. The present primary criminal sanction that corporations can receive in Indonesia is a

[636] The criteria within the Specific Laws can be seen in chapter 3, the criteria in several case laws and the criteria based on PERJA guidelines and PERMA guidelines can be seen in chapter 4.

fine, but the various stipulations related to the criminal liability of corporations among the special Laws have also influenced stipulations on the criminal sanctions too. The general problem that exists among the Laws is how to implement criminal sanctions on corporations, especially when the corporation has failed to pay the fine as the primary sanction. The controversial example about implementing criminal sanctions to corporation is in *Dongwoo Case*, where the court imposed imprisonment in lieu of fine if the corporation failed to pay the fine.

Law reform, especially in the case of the future *KUHP*, should consider the absence of stipulations within the Laws about the imposition of criminal sanctions on corporations. The fine as a primary sanction to corporations must differentiate from the fine for a natural person. Corporations should receive a higher fine than natural persons, because wealth is the most valuable asset for corporations. Therefore, primary and secondary criminal sanctions should focus on the wealth of corporations. The fine for corporations should be significantly more than the fine for a natural person. If corporations fail to pay the fine, there should be clear stipulations of the criminal sanction in lieu of the fine, and the sanction should always focus on corporations as the subject of punishment. The corporation's asset should be the main object to confiscate to fulfil the obligation to pay the fine. Furthermore, imposing additional criminal sanctions to the corporation, such as revoking the rights of corporation or the whole or partial closing of the corporation, should be maximised because it is more severe than just a fine. The *KUHP* draft is correct in stipulating the special sanctions to corporations along with how to execute those sanctions.[637] In addition, the decision of the Indonesian Attorney General Office to accept the request of convicted corporations in *Suwir Laut case* and *Indar Atmanto case* to pay their fines by instalment, should be appreciated and formalized within the Law. It also means that in the execution of criminal sanctions, the law should facilitate corporation when they have good faith to serve their punishment. If the convicted corporation fails to pay fine and its assets are not sufficient, the director of the corporation cannot be responsible for paying the rest of the unpaid fine.

The *KUHP* Draft provides ten factors which the judges must consider before punishing a corporation. The legal drafters want to ensure that law enforcers are cautious and professional when prosecuting and sanctioning corporations. However, in cases of corporate criminal liability, examination of all factors within the *KUHP* Draft will prolong and make the trial

[637] See subchapter 3.4.

process more complicated. Based on the expediency principle, prosecutors will assume decisive power about whether to prosecute corporations. Moreover, judges should be respected for their independence and the impartiality.

5.6. The Ideal Corporate Criminal Liability System for Indonesia

This study proposes the ideal system of corporate criminal liability in Indonesia, as follows.

Firstly, as already recommended in the previous subchapter, Indonesia should regulate in detail the system of corporate criminal liability in the *KUHP*. The stipulation should cover three important aspects. The first aspect is the type of corporation that can be the subject of criminal punishment. The second aspect is the criteria to determine the criminal act and criminal liability of corporations. The third aspect is the types of sanction and how to implement them to corporations. All those three aspects will be elaborated as follows.

a. The definition of corporation

Most of Indonesian Laws define corporation as an "organized collection of people and/or wealth both in form of legal entity or non-legal entity". This broad definition is good because all possible entities are considered criminally liable, regardless of their form, as long as they committed a crime as an "organized group". However, that definition is still open for a multi-interpretation since it does not directly point certain types of corporation.

The Draft of the new *KUHP* has correctly defined a corporation using a broad definition on corporation, but with a different approach by mentioning all existing legal entities as the example of the forms of corporations. The Draft defines corporation as organized collection of people and/or wealth, whether as legal person in the form of Limited Liability Company *(Perseroan Terbatas)*, Foundation *(Yayasan)*, Association *(Perkumpulan)*, Cooperation *(Koperasi)*, Public/State Owned Enterprise *(Badan Usaha Milik Publik)*, Province/City Owned Enterprises *(Badan Usaha Milik Daerah)*, Village Owned Enterprises *(Badan Usaha Milik Desa)*, or similar entities, or business entities in form of Firm (Firma), Limited Partnership (persekutuan komanditer (CV)), or similar entities.

b. The criteria to establish criminal act and criminal liability of corporations

Until the Indonesian Supreme Court decisions have stronger influences in developing the system of corporate criminal liability, the Law should regulate criteria to impute the criminal

liability of corporations. Detailed stipulations within the Law will give a sufficient foundation in law enforcement toward corporations.

The separation between the criteria to establish the criminal act and the criteria to establish the criminal liability of corporations along with a further definition of those criteria within the *KUHP* can help law enforcers to better understand how to implement the law. The ideal criteria to determine whether a criminal act is committed by a corporation are: *"When the act is committed by people who are based on employment relation or other relations both personally and collectively, act within the scope of corporation or outside the scope of corporation"*

Then, to determine the criminal liability of a corporation can derive from the fact that:

1. The corporation gained profit or benefit from misconduct or the misconduct committed on behalf of corporation,
2. The corporation accepted the misconduct
3. The corporation did not take necessary measures for the prevention, preventing greater impact and to ensure compliance with applicable Laws and regulations to avoid the misconduct.

All criteria given by the PERMA guidelines mentioned above is clearer than criteria given by the *KUHP* Draft for several reasons. Firstly, the *KUHP* Draft has the possibility of multiple interpretations of the terminologies "functional position" and "corporate controller personnel". Secondly, The PERMA guidelines gives broader criteria to determine the act of corporation than the *KUHP* Draft. That broader criteria will improve the effectiveness of law enforcement when dealing with corporate crime in the future.

c. Types of sanctions against corporations and how to execute them

Specific criminal sanctions and implementation methods are important for regulation because corporations have distinctive characteristics compared to the natural person. Fine is the only primary sanction corporations can receive. The ideal amount of fine for corporations should be higher than the maximum fine imposed to natural persons for the same offence. In addition, learning from the Netherlands, it can also be considered to fine the corporations based on their annual revenue.

If the corporation fails to pay the fine, the judge may replace the fine with the revocation of the corporation's licenses or liquidation. In addition, the differences between primary sanction and additional sanctions to corporations are not substantial. The additional sanctions

are harsher than a fine. Therefore, combining those two types of sanctions will ensure the effectiveness of the punishment.

Secondly, sufficient procedural law related to corporations should also be regulated in the *KUHAP*. In the past, the lack of criminal procedural law concerning corporations has been the primary reason that there have been a limited number of cases on corporate criminal liability. Consequentially, both the General Prosecutor Office and the Supreme Court enacted the necessary internal regulations to provide guidance for their officers. In the future, requisite procedural law should be accommodated by the criminal procedural code. The stipulations should cover procedural law from the point of investigation to the execution of criminal sanctions. The *KUHAP* should clearly stipulate who can be the representatives of corporations along with the rights of the representatives, the communication of the court notice, and the special stipulation on the form of legal documents.

Summary

Indonesian criminal legal system inherited the general criminal code from the Dutch colonialization period, *Wetboek van Straftrecht voor Nederlandsch Indie (WvSNI)* which then became *Kitab Undang-Undang Hukum Pidana (KUHP)* that does not recognize corporations as the subject of criminal punishment. The recognition of corporations as the subject of criminal punishment always creates pros and cons since the origin of criminal law only recognized persons in term of flesh and blood as the subject of criminal punishment. A particular characteristic of criminal law system is the focus on the characteristic of natural persons as the primary subject of punishment. All crimes in criminal law originally could only be perpetrated actively or passively by natural persons, since only the natural persons who have both capability to act physically *(actus reus)* and freedom to decide so that they have the culpable mental state *(mens rea)*. Therefore, a solid foundation is needed to develop the system to make corporations criminally liable.

Indonesian criminal law system develops its unique approach to address corporate criminal liability by recognizing corporations as the subject of criminal punishment in various special Laws since 1951. Since then, the recognition takes place outside the KUHP. As a consequence, several problems have emerged during the development of corporate criminal liability system. In contrast, the contemporary Dutch criminal legal system has recognized the criminal liability of corporations within its criminal code since 1976 and has succeeded to develop the system in establishing the *actus reus* and *mens rea* of corporations.

For those reasons, the purpose of this study is to map out problems faced by Indonesia in developing the system of criminal liability of corporations and offering solutions to improve the way to establish the criminal liability of corporations. This study is conducted by comparing established systems and theories among countries, especially the Dutch criminal legal system as the root of Indonesian criminal legal system.

Looking at the development of the criminal liability of corporations along with its pros and cons among the countries notably the Netherlands and the development problems faced by Indonesia, the central questions of this study emerge: What is the development of corporate criminal liability in Indonesia especially compared to the Netherlands? Then, several sub-questions that follow from that central question are: (a) What are the general developments and the theories of corporate criminal liability? (b) What are the corporate criminal liability regulation problems in Indonesia? (c) What are the problems in the implementation of

corporate criminal liability in Indonesia (d) What is the corporate criminal liability development in the Dutch criminal legal system and (e) What can be proposed to develop the system of criminal liability of corporations in Indonesia?

To get comprehensive understanding in criminal liability of corporations regime, Chapter One begins with the elaboration of the general development in corporate criminal liability by firstly discussing essential theoretical and practical arguments in imputing criminal liability to the corporations both from pros and cons perspective. Both perspectives questioning similar issues whether corporations are morally responsible parties and the legitimation in imputing the criminal liability to the corporations. The cons side bases their arguments from the theoretical obstacle in imputing criminal liability to corporations by stating that corporations cannot be considered morally wrong and punishing corporations is against the fundamental principle of criminal law since corporations are only legal fiction. In their view, other legal sanctions are better and more severe to be imposed on corporations. On the contrary, the pros perspective argues that corporations are morally responsible for their acts because corporations are real entities which means that the act of corporations can be separated from the act of natural persons within corporations. The attribution of conduct and mental state of natural persons to the corporations is the key element for the development of corporate criminal liability through several theories, such as vicarious liability, identification theory, and corporate culture theory.

Chapter One also discusses several different legal systems, namely common law and civil law system on their way to develop the system to sanction corporations. The active role of the courts in interpreting and finding the law is an essential key for those countries to establish the system of criminal liability of corporations. Even though the approaches used among the countries are commonly different, each country develops its system using three categories by determining: (1) the types of the legal entity that can be held criminally liable; (2) the types of the criminal offenses which can be committed by the corporations; and (3) the way to attribute the criminal liability of corporations.

In this study, the discussion on the problems that arose during the development of corporate criminal liability in Indonesia is divided into two categories which are the problems in regulation and the problems in implementation. Chapter Two discusses regulatory issues stemming from the existence of different systems among the Laws recognizing the criminal liability of corporations and the absence of stipulations on corporate criminal liability within the KUHP and the Code of Criminal Procedure *(Kitab Undang-Undang Hukum Acara Pidana/ KUHAP).* Various regulations in Indonesia are divided into three categories, namely: (1) the

Laws that do not recognize corporations as a legal subject. Therefore corporations cannot be held criminally liable and become the subject of punishment. (2) The Laws which recognize criminal acts by corporations, but it is only the natural person within the corporation who can be held criminally liable on behalf of the corporation. (3) The Laws which recognize that a corporation can be criminally liable and the subject of criminal punishment. The absence of stipulations on corporate criminal liability within the general criminal law both in the KUHP and the KUHAP creates difficulties for the legal enforcers to prosecute corporations. Legal enforcers should have a comprehensive understanding of all systems of the criminal liability of corporations among the Laws recognizing corporations as criminal punishment subject. Moreover, the absence of the stipulations within general criminal law also creates a missing link between the special Laws (*lex specialis*) and the general Law (*lex generalis*). Indonesia has spent more than 50 years to create a new criminal code, but the draft of the KUHP is still in the discussion in parliament. The draft of the KUHP will have detail stipulations on establishing the criminal liability of corporations, but it is still unclear whether the legal drafters will annul all various stipulations in all Laws outside the criminal code to have a single stipulation or will preserve that condition.

After discussing problems in regulations, Chapter Three elaborates problems in the implementation of criminal liability of corporations within criminal cases in Indonesia. After the first recognition of corporations as criminal punishment subject in 1951, there have been limited cases brought before the criminal courts. The lack of the general substantive and procedural law and knowledge of law enforcers are the primary reasons for the lack of case laws on corporations. Just after 2010, there have been a number of criminal cases involving corporations examined by the courts. The prosecutors tried to deal with those problems by adjusting the characteristics of corporations to the formal requirements in procedural law and prosecuting natural persons within the corporations before prosecuting the corporations. For the prosecutors, it will be easy to prove the criminal act and the criminal liability of corporations by identifying the directors of corporations as the directing mind of the corporations. Another reason behind the rare court decisions related to corporations in Indonesia is the fact that the criminal court cannot impose criminal sanctions on the party who is not the subject of the bill of indictment. However, in two case laws, the Indonesian Supreme Court opened the possibility to sanction corporations without requiring the corporations to be the defendant based on the fact that the acts of employees were actually on behalf of the corporations. Both General Prosecutor Office and the Supreme Court then released the internal

guidelines in 2014 and 2016 as practical solutions for their officers to deal with all problems related to the criminal liability of corporations.

As the root of the Indonesian criminal legal system, it is essential for Indonesia to learn from the Dutch experience; therefore, Chapter Four comprehensively discusses the way the Dutch criminal legal system develops its system. The single approach policy in stipulating the criminal liability of corporations by recognizing corporations within the Dutch Criminal Code and abolishing Article 15 of the Dutch Economic Offence Act provides a substantial basic regulation to develop the criminal liability system. On the other side, the process to develop criteria and factors to establish the criminal liability of corporations through many cases in the Netherlands varied in time, places and circumstances. However, the Dutch Supreme Court has succeeded in creating "the reasonable attribution" criteria in imputing the criminal liability to corporations and also the way to sanction factual in charge person *(feitelijk leidinggeven)* in the crime within the sphere of corporations. These are valuable lessons learned for Indonesia.

After mapping out all problems both in regulations and implementation of the criminal liability of corporations, this study comes out with an analytical critique on the way Indonesia developed the system in establishing the criminal liability of corporations. This study also gives recommendations on how Indonesia should improve the criminal liability of corporations system using lessons learned from the discussions in the first and fourth chapter.

The decision to recognize the criminal liability of corporations in various Laws outside the general criminal law and the extended period of criminal law reform has a strong correlation with the limited number of cases and slow development of the criminal liability of corporations. Therefore, speeding to unify and harmonize the law on the criminal liability of corporations by reforming the KUHP and the KUHAP is essential. This study recommends Indonesia to only have a single system in establishing the criminal liability of corporations stipulated within the KUHP and the KUHAP by annulling all stipulations on corporate criminal liability in various special Laws. Moreover, learning from the difficulty to prosecute corporations caused by the lack of regulations on the criminal liability of corporations, the Indonesian general criminal law should have comprehensive stipulations. The general criminal law should define corporations in a broad meaning, give clear criteria in establishing the *actus reus* and *mens rea* of corporations, and have a comprehensive system of sanctioning corporations including the way to enforce the sanction to corporations, and also the detail procedure to bring corporations in a criminal legal process. In addition, what has been developed by the court through their

case laws and in their internal regulations should be an important consideration accommodated in the law reform process.

Samenvatting

Met het *Wetboek van Strafrecht voor Nederlandsch Indië (WvSNI)* erfde Indonesië zijn strafrecht van de Nederlandse koloniale periode. Dit werd vervolgens omgezet in de *Kitab Undang-Undang Hukum Pidana (KUHP)* waarin ondernemingen niet erkend worden als onderwerp voor strafrechtelijke vervolging. De erkenning van ondernemingen als onderwerp van strafrechtelijke vervolging heeft altijd voor- en tegenstanders, aangezien het strafrecht oorspronkelijk alleen mensen van vlees en bloed erkende als onderwerp van strafrechtelijke vervolging. Een specifiek kenmerk van het strafrechtstelsel is de focus op het kenmerk van de natuurlijke persoon als primair voorwerp van bestraffing. Alle strafbare feiten in het strafrecht konden oorspronkelijk alleen actief of passief gepleegd worden door natuurlijke personen, aangezien alleen natuurlijke personen zowel in staat zijn tot fysiek handelen *(actus reus)* als ook de vrijheid hebben om te beslissen, zodat er sprake is van opzet, een schuldige geest (*mens rea).* Derhalve is een stevige basis vereist voor een rechtsstelsel waarin ondernemingen strafrechtelijk aansprakelijk kunnen worden gesteld.

Het Indonesische strafrecht heeft een unieke benadering met betrekking tot de strafrechtelijk aansprakelijkheid van ondernemingen, omdat sinds 1951 ondernemingen in verschillende speciale wetten, buiten de KUHP, als onderwerp van strafrechtelijke vervolging erkend worden. Als gevolg daarvan zijn tijdens de ontwikkeling van het systeem van strafrechtelijke aansprakelijkheid van ondernemingen verschillende problemen aan het licht gekomen. Het Nederlandse strafrechtsysteem, daarentegen, erkent sinds 1976 in algemene zin de strafrechtelijke ondernemingsaansprakelijkheid binnen het Wetboek van Strafrecht door de *actus reus* en *mens rea* van ondernemingen vast te stellen.

Dit onderzoek beoogt de problemen te inventariseren waarmee Indonesië geconfronteerd wordt bij het strafrechtelijk aansprakelijk stellen van ondernemingen, en oplossingen voor te stellen ter verbetering van de manier waarop strafrechtelijke aansprakelijkheid van ondernemingen vastgesteld wordt. In dit onderzoek worden gevestigde systemen en theorieën van verschillende landen vergeleken, met name het Nederlandse strafrecht dat ten grondslag ligt aan het Indonesische strafrecht.

Wanneer we kijken naar de ontwikkeling van de strafrechtelijke aansprakelijkheid van ondernemingen, inclusief de voor- en tegenstanders in de verschillende landen en met name Nederland, en de problemen waar Indonesië zich voor gesteld ziet, dienen zich de volgende onderzoeksvragen aan: Hoe heeft de strafrechtelijke aansprakelijkheid van ondernemingen

zich ontwikkeld in Indonesië, met name in vergelijking met Nederland? Uit deze hoofdvraag volgen verschillende deelvragen: (a) Welke algemene ontwikkelingen en theorieën bestaan er over de strafrechtelijke aansprakelijkheid van ondernemingen? (b) Welke problemen doen zich in Indonesië voor met de regulering van de strafrechtelijke aansprakelijkheid van ondernemingen? (c) Welke problemen bestaan er rondom de invoering van de strafrechtelijke aansprakelijkheid van ondernemingen in Indonesië? (d) Hoe heeft de strafrechtelijke ondernemingsaansprakelijkheid zich ontwikkeld binnen het Nederlandse strafrecht? En (e) welke aanbevelingen kunnen gedaan worden voor de ontwikkeling van de strafrechtelijke ondernemingsaansprakelijkheid in Indonesië?

Voor een diepgaand inzicht in het systeem van de strafrechtelijke aansprakelijkheid van ondernemingen, begint Hoofdstuk 1 met een beschrijving van de algemene ontwikkeling in de strafrechtelijke aansprakelijkheid van ondernemingen. Er worden essentiële theoretische en praktische argumenten gepresenteerd voor het toerekenen van strafrechtelijke aansprakelijkheid aan ondernemingen vanuit de perspectieven van zowel voor- als tegenstanders. Beide perspectieven stellen ter discussie of ondernemingen moreel verantwoordelijke partijen zijn en hebben vragen over de legitimatie van het toerekenen van strafrechtelijke aansprakelijkheid aan ondernemingen. De argumenten van de tegenstemmers tegen het toekennen van strafrechtelijke aansprakelijkheid aan ondernemingen berusten op de theoretische hindernis dat ondernemingen niet beschouwd kunnen worden als moreel fout en dat, aangezien ondernemingen niet meer zijn dan juridische fictie, het bestraffen van ondernemingen tegen de fundamentele uitgangspunten van het strafrecht ingaat. In deze optiek zijn er andere en strengere sancties, die geschikter zijn. Anderzijds luidt het argument van de voorstanders dat ondernemingen wel moreel verantwoordelijk zijn voor hun handelingen, omdat ondernemingen echte entiteiten zijn, hetgeen betekent dat er een onderscheid gemaakt kan worden tussen het handelen van ondernemingen en de handelingen van natuurlijke personen binnen ondernemingen. Het toeschrijven van gedrag en geestestoestand van natuurlijke personen aan ondernemingen is het centrale element in de ontwikkeling van de strafrechtelijke aansprakelijkheid van ondernemingen. Dit toeschrijven gebeurt via verschillende theorieën, zoals plaatsvervangende aansprakelijkheid voor de handelingen van anderen, de identificatiemethode en theorie met betrekking tot bedrijfscultuur.

In Hoofdstuk 1 wordt ook besproken hoe verschillende rechtsstelsels, namelijk het Angelsaksische recht *(common law)* en het continentale rechtsstelsel *(civil law)*, zich aanpassen om ondernemingen te kunnen bestraffen. De actieve rol van de rechter bij het interpreteren en

vaststellen van de wet is een essentieel element voor die landen om de strafrechtelijke aansprakelijkheid van ondernemingen vast te stellen. Hoewel de benaderingen van de landen verschillen, ontwikkelt elk land zijn eigen stelsel op basis van drie categorieën: (1) de types juridische entiteiten die strafrechtelijk aansprakelijk gesteld kunnen worden; (2) het type strafbare feiten dat door de ondernemingen gepleegd kan worden; en (3) de manieren om ondernemingen strafrechtelijk aansprakelijk te stellen.

In dit onderzoek worden de problemen die zich aandienden tijdens de ontwikkeling van de strafrechtelijke aansprakelijkheid van ondernemingen in Indonesië in twee categorieën onderverdeeld, namelijk reguleringsproblemen en invoeringsproblemen.

In Hoofdstuk 2 worden reguleringsproblemen als gevolg van de verschillende stelsels die de strafrechtelijke aansprakelijkheid van ondernemingen erkennen besproken, alsmede het ontbreken van bepalingen betreffende de strafrechtelijke ondernemingsaansprakelijkheid binnen de KUHP en het Wetboek van Strafprocesrecht *(Kitab Undang-Undang Hukum Acara Pidana/ KUHAP)*. Er zijn in Indonesië drie categorieën reguleringen, te weten: (1) wetten die ondernemingen niet erkennen als rechtspersoon. Derhalve kunnen ondernemingen niet strafrechtelijk aansprakelijk gesteld en bestraft worden. (2) Wetten die erkennen dat ondernemingen strafbare handelingen kunnen plegen, maar alleen de natuurlijke persoon binnen de onderneming kan namens de onderneming strafrechtelijk aansprakelijk gesteld worden. (3) Wetten die erkennen dat een onderneming strafrechtelijk aansprakelijk kan zijn en bestraft kan worden. Het ontbreken van bepalingen, zowel in de KUHP als de KUHAP, met betrekking tot de strafrechtelijke aansprakelijkheid van ondernemingen binnen het algemene strafrecht maakt het voor de rechtshandhavers problematisch om ondernemingen te vervolgen. Rechtshandhavers zouden een grondig inzicht moeten hebben in de strafrechtelijke aansprakelijkheid van ondernemingen binnen de wetten die ondernemingen erkennen als onderwerp voor strafrechtelijke vervolging. Bovendien is het ontbreken van bepalingen binnen het algemene strafrecht ook een missing link tussen de speciale Wetten (*lex specialis*) en de algemene Wet (*lex generalis*). Indonesië is meer dan 50 jaar bezig geweest om een nieuw wetboek van strafrecht op te stellen, maar het parlement is nog steeds in discussie over de concepttekst van de KUHP. De concept-KUHP zal gedetailleerde bepalingen bevatten met betrekking tot de strafrechtelijke aansprakelijkheid van ondernemingen, maar het is nog onduidelijk of the opstellers alle bepalingen in alle wetten buiten het strafrecht zullen afschaffen om zo te komen tot een enkele bepaling, of dat ze de situatie zo zullen laten als die is.

Na de bespreking van de reguleringsproblemen, worden in Hoofdstuk 3 problemen bij de invoering van strafrechtelijke aansprakelijkheid van ondernemingen binnen strafzaken in Indonesië aangekaart. Nadat in 1951 ondernemingen voor het eerst strafrechtelijk aansprakelijk werden gesteld, is een beperkt aantal zaken voor de strafrechter gebracht. Het ontbreken van algemene materiële en procedurele wetgeving en kennis bij rechtshandhavers zijn de primaire redenen voor het gebrek aan jurisprudentie met betrekking tot ondernemingen. Net na 2010 is een aantal strafzaken over ondernemingen onderzocht door de rechtbank. De aanklagers probeerden de problemen op te lossen door de kenmerken van ondernemingen aan de formele vereisten in het procesrecht aan te passen en natuurlijke personen binnen de ondernemingen te vervolgen voordat zij de ondernemingen aanklaagden. Voor de aanklagers zal het gemakkelijk zijn om het strafbaar handelen en de strafrechtelijke aansprakelijkheid van ondernemingen te bewijzen door de directeuren van ondernemingen te identificeren als de '*directing mind',* degene met beslissingsmacht t.a.v. het ondernemingsbeleid. Een andere reden achter de zeldzame gerechtelijke beslissingen met betrekking tot ondernemingen in Indonesië is het feit dat de strafrechter geen strafrechtelijke sancties kan opleggen aan de partij die niet in de akte van beschuldiging wordt genoemd. Echter, in twee zaken liet de Hoge Raad van Indonesië, op basis van het feit dat werknemers in feite handelden namens de ondernemingen, de mogelijkheid open om ondernemingen te bestraffen zonder dat voldaan hoefde te worden aan de eis dat de onderneming de gedaagde partij moest zijn. Zowel de Openbare Aanklager als de Hoge Raad gaven vervolgens voor hun functionarissen in 2014 en 2016 interne richtlijnen uit, met praktische oplossingen voor alle problemen met betrekking tot de strafrechtelijke ondernemingsaansprakelijkheid.

Aangezien het Nederlandse systeem ten grondslag ligt aan het Indonesische strafrecht, is het van essentieel belang voor Indonesië om te leren van de Nederlandse ervaring. Daarom bespreken wij in Hoofdstuk 4 de manier waarop het Nederlandse strafrecht zich heeft ontwikkeld. De uniforme benadering bij het bepalen van de strafrechtelijke aansprakelijkheid door ondernemingen binnen het Nederlandse Wetboek van Strafrecht als subject te erkennen en het afschaffen van artikel 15 Wet op de Economische Delicten, biedt een substantiële basisrichtlijn voor de ontwikkeling van strafrechtelijke aansprakelijkheid. Anderzijds varieerden de vele zaken op basis waarvan criteria en factoren ontwikkeld werden om de strafrechtelijke ondernemingsaansprakelijkheid in Nederland vast te stellen, in termen van tijd, plaats en omstandigheden. Toch is de Hoge Raad der Nederlanden erin geslaagd om aangaande "de redelijke toerekening" criteria te realiseren voor de vaststelling van strafrechtelijke

aansprakelijkheid aan ondernemingen, evenals de manier om feitelijk leidinggevende personen binnen de onderneming te bestraffen voor het strafbare feit. Dit zijn waardevolle lessen voor Indonesië.

Na de inventarisatie van alle problemen zowel wat betreft regulering als invoering van de strafrechtelijke aansprakelijkheid van ondernemingen, presenteert dit onderzoek een kritische analyse van de manier waarop Indonesië het systeem voor het vaststellen van de strafrechtelijke aansprakelijkheid van ondernemingen ontwikkeld heeft. Vervolgens worden aanbevelingen gedaan voor hoe Indonesië het systeem van de strafrechtelijke ondernemingsaansprakelijkheid zou kunnen verbeteren op basis van de lessen die geleerd zijn uit de discussies in Hoofdstuk 1 en 4.

De beslissing om de strafrechtelijke aansprakelijkheid van ondernemingen te erkennen in verschillende wetten buiten het algemene strafrecht en de langdurige periode van hervorming van het strafrecht zijn mede veroorzaakt door het beperkte aantal zaken en de trage ontwikkeling van de strafrechtelijke aansprakelijkheid van ondernemingen. Derhalve is het van essentieel belang om haast te maken met de hervorming van de KUHP en KUHAP door het bundelen en harmoniseren van de wet op de strafrechtelijke aansprakelijkheid van ondernemingen. Dit onderzoek adviseert Indonesië om over te gaan tot een uniform systeem voor het vaststellen van de strafrechtelijke aansprakelijkheid van ondernemingen zoals vastgelegd binnen de KUHP en de KUHAP, door alle bepalingen over de strafrechtelijke aansprakelijkheid van ondernemingen in de verschillende speciale wetten af te schaffen. Daarnaast, lerend van de problemen met de vervolging van ondernemingen vanwege het gebrek aan wetgeving betreffende de strafrechtelijke aansprakelijkheid van ondernemingen, heeft het Indonesische strafrecht uitgebreide bepalingen nodig. Het algemene strafrecht zou een brede definitie van ondernemingen moeten hanteren, duidelijke criteria moeten aanreiken voor het vaststellen van de *actus reus* en *mens rea* van ondernemingen, evenals een uitgebreid systeem voor het sanctioneren van ondernemingen, inclusief de manier van ten uitvoer brengen van de sanctie, en ook de gedetailleerde procedure om ondernemingen voor de strafrechter te brengen. Bovendien, dat wat door de rechtbank via jurisprudentie en in interne voorschriften ontwikkeld is zou als belangrijk punt in het proces van wetshervorming meegenomen moeten worden.

Ringkasan

Keberadaan Kitab Undang-Undang Hukum Pidana (KUHP) tidak bisa dipisahkan dari periode kolonialisasi Belanda di masa lalu. Melalui Undang-Undang Nomor 1 Tahun 1946, berdasarkan asas konkordansi, Indonesia mewarisi *Wetboek van Straftrecht voor Nederlandsch Indie (WvSNI)* yang menjadi Kitab Undang-Undang Hukum Pidana (KUHP) yang berpendirian tidak mengakui korporasi sebagai subyek pemidanaan.

Pengakuan korporasi sebagai subyek pemidanaan seringkali menciptakan pro dan kontra di masyarakat mengingat hukum pidana pada mulanya hanya mengenal manusia alamiah (individu sejati yang memiliki daging dan darah) sebagai subyek pemidanaan. Hukum pidana memiliki karakteristik unik yang berfokus hanya pada pemidanaan manusia alamiah. Semua kejahatan dalam hukum pidana pada awalnya hanya bisa dilakukan baik secara aktif maupun pasif oleh manusia alamiah, dengan alasan hanya manusia alamiah yang memiliki kapasitas secara fisik untuk berbuat *(actus reus)* dan juga memiliki kehendak sehingga terdapat sikap batin yang dapat dicela (kesalahan/*mens rea*). Atas dasar alasan tersebut, pemidanaan korporasi harus memiliki landasan yang kuat.

Dalam pemidanaan korporasi, sistem hukum pidana Indonesia memiliki pendekatan yang unik yaitu melalui berbagai Undang-Undang di luar KUHP. Pendekatan ini terjadi semenjak tahun 1951 melalui Undang-Undang Darurat Nomor 17 Tahun 1951 Tentang Penimbunan Barang. Sejak saat itu, korporasi menjadi subyek pemidanaan di berbagai Undang-Undang di luar KUHP. Pengakuan korporasi di luar KUHP ini pada praktiknya menciptakan beberapa permasalahan. Sebaliknya, sistem hukum pidana Belanda yang menjadi pondasi sistem hukum pidana Indonesia telah mengakui korporasi sebagai subyek pemidanaan dalam *Wetboek van Strafrecht* sejak tahun 1976 dan berhasil mengembangkan sebuah sistem pertanggungjawaban pidana korporasi.

Berdasar uraian di atas, penelitian ini dilakukan untuk; pertama, menganalisa permasalahan-permasalahan yang dihadapi oleh Indonesia dalam mengembangkan sistem pemidanaan korporasi. Kedua, studi ini juga dimaksudkan untuk menawarkan solusi terhadap permasalahan yang dihadapi Indonesia. Untuk memperkaya solusi yang ditawarkan, penelitian ini menggunakan studi perbandingan hukum dengan mendiskusikan perkembangan umum sistem pemidanaan korporasi di beberapa negara terutama Belanda. Belanda dipilih selain karena negara ini merupakan akar dari sistem hukum pidana Indonesia, keberhasilan Belanda dalam membangun sistem pemidanaan korporasi juga menjadi alasan yang tidak kalah penting.

Melihat perkembangan pertanggungjawaban pidana korporasi di beberapa negara terutama Belanda berikut pro kontranya, serta permasalahan yang dihadapi Indonesia dalam membangun sistem pemidanaan korporasi. Pertanyaan utama studi ini adalah: Apa perkembangan sistem pertanggungjawaban pidana korporasi di Indonesia dibandingkan dengan Belanda? Dari permasalahan utama tersebut, beberapa sub pertanyaan muncul: (a) Apa perkembangan dan teori umum pertanggungjawaban pidana korporasi?; (b) Apa permasalahan regulasi tentang pemidanaan korporasi di Indonesia?; (c) Apa permasalahan implementasi pertanggungjawaban pidana korporasi di Indonesia?; (d) Apa perkembangan pemidanaan korporasi di Belanda?; dan (e) apa yang dapat ditawarkan untuk pengembangan sistem pertanggungjawaban pidana korporasi di Indonesia?

Untuk mendapatkan gambaran menyeluruh terhadap sistem pertanggungjawaban pidana korporasi, Bab Satu dimulai dengan diskusi tentang perkembangan umum sistem pertanggungjawaban pidana korporasi. Diskusi tersebut meliputi argumentasi-argumentasi yang bersifat theoritis dan praktis sebagai alasan pengenaan sanksi pidana terhadap korporasi baik dari perspektif pihak yang pro maupun kontra terhadap pertanggungjawaban pidana korporasi. Baik pihak pro maupun kontra pada dasarnya berangkat dari pertanyaan yang sama terkait pemidanaan korporasi, yaitu apakah korporasi dapat bertanggungjawab secara moral atas perbuatannya dan apa legitimasi dalam pengenaan sanksi pidana terhadap korporasi. Pihak yang kontra terhadap pertanggungjawaban pidana korporasi berpendapat, secara teori, korporasi tidak dapat dikatakan secara moral bertanggungjawab atas perbuatannya dan penjatuhan sanksi pidana terhadap korporasi bertentangan dengan prinsip dasar dari hukum pidana mengingat korporasi hanyalah sebuah entitas buatan *(legal fiction).* Menurut pendapat pihak yang kontra, sanksi di luar sanksi pidana lebih baik dan efektif terhadap korporasi.

Sebaliknya, dalam perspektif pihak yang pro terhadap pemidanaan korporasi berpendapat bahwa korporasi dapat secara moral bertanggungjawab atas perbuatannya karena di dunia modern sekarang korporasi adalah sebuah entitas nyata yang dapat dirasakan keberadaannya. Ini terbukti dari dapat dibedakannya perbuatan korporasi dengan perbuatan manusia di dalam korporasi. Atribusi perbuatan dan kesalahan dari manusia alamiah kepada korporasi adalah elemen kunci dalam perkembangan sistem pertanggungjawaban pidana korporasi. Proses atribusi tersebut dilakukan melalui beberapa teori seperti teori pertanggungjawaban pengganti *(vicarious liability)*, teori identifikasi *(identification theory)*, dan teori budaya korporasi *(corporate culture theory).*

Bab Satu juga mendiskusikan perkembangan umum sistem pertanggungjawaban pidana korporasi di dua sistem hukum yang berbeda yakni sistem common law dan civil law. Peran aktif pengadilan dalam mengintepretasikan dan menemukan hukum menjadi kunci utama perkembangan sistem pertanggungjawaban pidana korporasi di beberapa negara. Meskipun secara umum pendekatan yang digunakan beberapa negara berbeda, masing-masing negara memiliki persamaan kategori dalam mengembangkan sistem pemidanaan korporasinya yakni dalam hal: (1) penentuan jenis-jenis korporasi yang dapat dipidana; (2) jenis-jenis kejahatan yang dapat dilakukan oleh korporasi; dan (3) cara menentukan pertanggungjawaban pidana korporasi.

Dalam penelitian ini, pembahasan masalah yang dihadapi Indonesia dalam mengembangkan sistem pertanggungjawaban pidana korporasi dibagi menjadi dua kategori yaitu masalah dalam hal regulasi dan masalah implementasi. Bab Dua membahas permasalahan–permasalahan regulasi yang muncul sebagai akibat dari keberadaan sistem yang berbeda di antara Undang-Undang yang mengakui korporasi sebagai subyek pemidanaan dan posisi KUHP dan KUHAP yang tidak mengakui korporasi sebagai subyek pemidanaan. Sistem pertanggungjawaban pidana korporasi dalam berbagai macam Undang-Undang secara umum dapat dibagi menjadi tiga kategori yakni: (1) Undang-Undang yang tidak mengakui korporasi sebagai subyek pemidanaan, sehingga korporasi tidak dapat dikenai pertanggungjawaban pidana, (2) Undang-Undang yang mengakui korporasi dapat melakukan perbuatan pidana, tapi hanya manusia alamiah yang dapat bertanggungjawab secara pidana. (3) Undang-Undang yang mengakui korporasi dapat berbuat dan bertanggungjawab secara pidana.

Posisi KUHP dan KUHAP yang tidak mengatur sistem pertanggungjawaban pidana korporasi menciptakan kesulitan tersendiri bagi para penegak hukum. Para penegak hukum harus memiliki pemahaman yang menyeluruh dan mendalam terhadap semua sistem yang dianut masing-masing Undang-Undang. Hal ini diperparah dengan absennya pengaturan di KUHP dan KUHAP sehingga terdapat hubungan yang hilang antara hukum pidana umum *(lex generalis)* dan hukum pidana khusus *(lex specialis)*. Indonesia telah menghabiskan lebih dari 50 tahun dalam proses pembuatan KUHP baru, akan tetapi sampai saat ini draf KUHP masih dalam proses pembahasan antara pemerintah dan DPR. Jika dilihat, KUHP baru nanti akan memiliki pengaturan yang cukup detail mengenai pertanggungjawaban pidana korporasi. Akan tetapi, sampai saat ini belum jelas apakah dengan diberlakukannya KUHP baru nanti, semua pengaturan tentang pertanggungjawaban pidana korporasi di Undang-Undang di luar KUHP

akan dicabut, sehingga Indonesia hanya akan memiliki satu sistem pertanggungjawaban pidana korporasi berdasarkan KUHP baru.

Setelah mendiskusikan permasalahan yang muncul dalam regulasi korporasi di Indonesia, Bab Tiga penelitian ini akan membahas implementasi pertanggungjawaban pidana korporasi dalam praktek peradilan. Semenjak pengakuan pertama kali korporasi sebagai subyek pemidanaan pada tahun 1951, kasus-kasus pidana yang berkaitan dengan korporasi bisa dibilang sangat jarang. Permasalahan aturan baik materiil maupun formil serta pemahaman para penegak hukum terhadap sistem pemidanaan korporasi, menjadi alasan utama terbatasnya kasus-kasus korporasi yang dibawa ke pengadilan. Sejak tahun 2010, terjadi trend peningkatan kasus pidana korporasi yang dibawa ke pengadilan. Penuntut umum berusaha mengatasi permasalahan penuntutan dengan menyesuaikan Undang-Undang dengan karakteristik korporasi terutama menyangkut hukum acara dan menuntut pengurus korporasi sebelum menuntut korporasi. Bagi penuntut umum, akan lebih mudah membuktikan perbuatan pidana dan pertanggungjawaban pidana korporasi dengan terlebih dulu menuntut pengurus dari korporasi. Alasan lain dari terbatasnya jumlah kasus pidana korporasi adalah jarangnya penuntut umum menuntut korporasi sehingga pengadilan tidak dapat menjatuhkan pidana terhadap korporasi, karena korporasi tidak masuk dalam surat dakwaan. Akan tetapi, di dalam dua kasus, Mahkamah Agung membuka kemungkinan menjatuhkan sanksi pidana kepada korporasi, walaupun korporasi yang bersangkutan tidak menjadi subyek penuntutan dengan alasan bahwa perbuatan manusia di dalam korporasi tersebut dilakukan atas nama dan untuk kepentingan korporasi. Di sisi lain, untuk mengatasi permasalahan implementasi, Kejaksaan Agung pada tahun 2014 mengeluarkan Peraturan Jaksa Agung tentang pedoman penanganan perkara pidana dengan subyek hukum korporasi sebagai petunjuk bagi para penuntut umum ketika menuntut korporasi. Di sisi lain Mahkamah Agung pada tahun 2016 juga melakukan hal yang sama dengan mengeluarkan Peraturan Mahkamah Agung (PERMA) tentang tata cara penanganan perkara tindak pidana oleh korporasi sebagai petunjuk bagi pengadilan di bawahnya dalam menangani kasus yang melibatkan korporasi.

Sebagai akar dari sistem hukum pidana Indonesia, sangatlah penting mempelajari perkembangan terkini dari sistem pemidanaan korporasi di Belanda. Oleh sebab itu, Bab Empat mendiskusikan tentang cara Belanda mengembangkan sistem pertanggungjawaban pidana korporasinya. Kebijakan peraturan tunggal dalam pemidanaan korporasi melalui pengakuan pertanggungjawaban pidana korporasi dalam *WvS* dan pencabutan Pasal 15 Undang_Undang Tindak Pidana Ekonomi Belanda *(Wet op de economische delicten)* menciptakan landasan

yang kuat dalam pengembangan sistem pemidanaan korporasi di Belanda. Di sisi lain, proses pengembangan kriteria dan faktor-faktor yang berpengaruh dalam penegakan pertanggungjawaban pidana korporasi di berbagai putusan di Belanda sangat bervariasi berdasarkan waktu, tempat dan keadaan tertentu. Akan tetapi, Mahkamah Agung Belanda telah berhasil menciptakan kriteria "atribusi yang masuk akal" dalam pengenaan pertanggungjawaban pidana terhadap korporasi. Di samping itu, Mahkamah Agung Belanda juga mengembangkan cara untuk menghukum orang yang secara nyata bertanggungjawab dalam perbuatan pidana *(feitelijk leidinggeven)* dalam lingkup korporasi sebagai perluasan subyek pemidanaan. Pengalaman Belanda dalam mengembangkan sistem pertanggungjawaban pidana korporasi tersebut, dapat menjadi pelajaran berharga bagi Indonesia.

Setelah memetakan seluruh masalah baik dalam hal regulasi dan implementasi pertanggungjawaban pidana korporasi di Indonesia, penelitian ini akan mendiskusikan beberapa kritik terhadap cara Indonesia mengembangkan sistem pertanggungjawaban pidana korporasinya. Berdasarkan kritik tersebut, penelitian ini juga memberikan rekomendasi tentang bagaimana seharusnya Indonesia mengembangkan sistem pertanggungjawaban pidana korporasi. Rekomendasi yang diberikan didasarkan pada pelajaran yang didapat dari beberapa negara terutama Belanda sebagaimana didiskusikan dalam Bab Satu dan Bab Empat.

Dalam konteks Indonesia, keputusan untuk mengakui korporasi sebagai subyek pemidanaan di dalam berbagai Undang-Undang di luar KUHP dan KUHAP serta berlarut-larutnya proses penyusunan KUHP, berkaitan erat dengan sedikitnya jumlah kasus pidana korporasi yang dibawa ke pengadilan dan lambatnya perkembangan sistem pertanggungjawaban pidana korporasi. Oleh sebab itu, percepatan reformasi KUHP dan KUHAP sangatlah penting dilakukan. Reformasi tersebut haruslah dilakukan dengan semangat unifikasi dan harmonisasi hukum yang berkaitan dengan pertanggungjawaban pidana korporasi.

Penelitian ini merekomendasikan kepada Indonesia untuk hanya memiliki peraturan tunggal mengenai pertanggungjawaban pidana korporasi yang diatur di dalam ketentuan hukum pidana umum baik di dalam KUHP maupun KUHAP dan mencabut ketentuan mengenai pertanggungjawaban pidana korporasi di luar dua kitab tersebut. Kemudian, belajar dari pengalaman para penegak hukum dalam penuntutan dan proses peradilan terhadap korporasi, pengaturan tentang pertanggungjawaban pidana korporasi baik di dalam KUHP maupun KUHAP harus diatur secara detail dan menyeluruh. Cara pengaturan tersebut misalnya: Korporasi seyogyanya didefinisikan sebagai korporasi secara luas, memberikan

kriteria yang jelas dalam penentuan perbuatan pidana dan pertanggungjawaban pidana oleh korporasi dan juga pengaturan yang sistematis tentang jenis sanksi pidana yang dapat dikenakan kepada korporasi beserta cara mengimplementasikan sanksi tersebut, demikian juga dengan hukum acara yang berkaitan dengan korporasi. Terakhir, dalam proses reformasi hukum pidana, pembuat Undang-Undang seyogyanya mengakomodasi kriteria yang telah dikembangan oleh pengadilan melalui putusan-putusannya termasuk ketentuan-ketentuan dalam PERMA maupun PERJA.

Curriculum vitae

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