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ERROR IN PERSONAM: CONFUSION IN INDONESIA'S ENVIRONMENTAL CORPORATE CRIMINAL LIABILITY

ABSTRACT. Since 1997, various provisions have been incorporated into Indonesia's environmental law which relate to corporate criminal liability. Other laws relating to natural resource management have also had provisions on corporate criminal liability inserted into them. These laws are problematic because they often fail to distinguish between corporate criminal liability and corporate officers' criminal liability, and as do the courts in their interpretation and application of them. Currently in Indonesia, an officer may be held liable for a crime committed by their corporation, even without being at fault or appearing as a defendant in the trial. Indonesia's environmental law can therefore be said to be applying a rather extreme version of individual vicarious liability in environmental cases, in which a corporate officer is punished merely because of their position as a high-ranking officer of a corporation. This practice seems to be the result of an erroneous interpretation of corporate criminal liability. We argue that the Indonesian interpretation of environmental corporate criminal liability is not only ineffective but also harmful and inconsistent with theories of corporate criminal liability. We also argue that corporate criminal liability should be distinguished from the liability of corporate officers. While corporate criminal liability places criminal liability on the corporation as a legal entity, officers' criminal liability places the criminal liability on the corporate officers as individuals. A corporate officer should only be criminally liable if they can be blamed for an environmental crime committed by the corporation.

I INTRODUCTION

Corporate criminal liability is recognized in Indonesian environmental law under the Environmental Protection and Management Act 2009 (''2009 EPMA''). Apart from this law, various other laws regarding natural resources also contain provisions related to cor-

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porate liability, such as the 1999 Forestry Law,[1] and the 2004 Fishery Law.[2].

In recent years, the number of court rulings in Indonesia regarding corporate criminal liability for environmental pollution has significantly increased. More corporations are being prosecuted as they are being held vicariously liable for environmental crimes committed by their employees; corporations are liable if the environmental crimes committed are within the employee's scope of work and on behalf of the corporation.

Although corporations are now being held vicariously criminally liable for the actions of their employees, Indonesian law currently allows for the officers of these corporations to be liable, even where they have no connection with the criminal acts to be punished. This is because there are no legal requirements to prove that the officers were personally at fault to charge them with criminal liability. In addition, the courts impose criminal liability on officers when the only defendant was a corporation, or they impose criminal liability on a corporation when the only defendant was a director. Laws and courts often confuse corporate criminal liability and directors' criminal liability.

This paper discusses whether the common understanding in Indonesia regarding corporate criminal liability can be defended. In particular, this contribution analyzes both the provisions on corporate criminal liability in various legislative instruments as well as the implementation of these provisions in various court rulings. The paper pays specific attention to the conditions for criminal liability of a corporation on the one hand, and that of corporate officers on the other hand. The paper stresses the importance of making a distinction between the two types of liability, and argues that Indonesia's interpretation of corporate criminal liability has allowed the shift of liability from a corporation to corporate officers even where they have no connection to a crime. The paper also offers several recommendations to improve the formulation and implementation of criminal liability of a corporation and that of corporate officers.

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[1] Law No. 41 of 1999 concerning Forestry, LN of 1999 No. 167, TLN No. 3888, as amended by Government Regulation in Lieu of Law No. 1 of 2004 concerning the Amendment of Law No. 41 of 1999, LN of 2004 No. 29, TLN No. 4374 [hereinafter referred to as the 1999 Forestry Law].

[2] Law No. 31 of 2004 concerning Fishery, LN of 2004 No. 118, TLN No. 4433 [hereinafter referred to as the 2004 Fishery Law].

To achieve these objectives, this paper is structured as follows. Following the introduction, Section II briefly explains the legal basis for environmental corporate criminal liability and describes whether the provisions distinguish between liability for a corporation and its corporate officers. In this section, the paper will also compare provisions on corporate liability according to the 2009 EPMA,[3] the 1999 Forestry Law, the 2004 Fishery Law, the 2013 Law against Forest Destruction,[4] and the 2014 Plantation Law.[5] Subsequently, Section III discusses how corporate criminal liability is implemented in various court rulings related to environmental pollution. After examining particular issues with the case law regarding the formulation and implementation of corporate criminal liability, Section IV provides a critical analysis of the case law, both on the grounds of theories of corporate liability as well as from a law and economics perspective. It is argued that the current problems in interpreting corporate criminal liability may also be counter-productive in the sense that they may be contrary to the objectives of imposing corporate criminal liability. Section V focuses on some of the latest developments in the implementation of corporate criminal liability, including the Attorney General's and Chief Justice's guidance on corporate liability, and provisions on corporate liability in the Draft Criminal Code, Book One.[6] Section VI provides some concluding remarks.

It will be argued that this detailed discussion of the Indonesian case is insightful, also for other (developing) countries dealing with the introduction of corporate criminal liability in environmental cases. It will be argued that this corporate criminal liability should be introduced while respecting fundamental principles related to the rule of law (such as the principle of guilt) in order to meet the basic objectives of corporate criminal liability.

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[3] Law No. 32 of 2009 concerning Environmental Protection and Management, LN of 2009 No. 140, TLN No. 5059 [hereinafter referred to as the 2009 EPMA].

[4] Law No. 18 of 2013 concerning the Prevention and Eradication of Forest Destruction, LN of 2013 No. 130, TLN No. 5432 [hereinafter referred to as the 2013 PEFD Law].

[5] Law No. 39 of 2014 concerning Plantation, LN of 2014 No. 308, TLN No. 5613 [hereinafter referred to as the 2014 Plantation Law].

[6] The Draft Criminal Code, the draft version of September 2019 [hereinafter referred to as the Draft Criminal Code].

II CORPORATE LIABILITY IN LAWS RELATED TO ENVIRONMENTAL MANAGEMENT

2.1 *Environmental Management Act*

Article 116 paragraph 1 of the 2009 EPMA states that when an environmental crime was committed by, for, or on behalf of a corporation, sanctions can be imposed on: a). the corporation, or b). the person giving an order to or acting as the leader of the committed crime.[7] Paragraph 2 of the Article further stipulates that when the crime was committed by a person acting within the scope of their employment, the penal sanction will be imposed on the person who gave the order or acted as the leader in the committed crime, regardless of whether the crime was conducted individually or collectively.[8]

Article 118 of the 2009 EPMA further provides that for crimes referred to in Art. 116 par. (1a), i.e. crimes committed by a corporation, the criminal sanction should be imposed on that corporation, and applies to the officers authorized to represent the corporation. The Elucidation[9] of the article defines the perpetrator of a crime in relation to corporate crime as "functional perpetrator", which is the corporation itself. The Elucidation prescribes that the prosecution should be directed against and a sanction should be imposed upon the leader (officer) of the corporation, who has the authority and accepted the crime committed by the actual perpetrator.[10]

It seems that the Elucidation of Art. 118 of the 2009 EPMA provides the possibility for prosecuting and imposing sanctions on corporate officers for a crime committed by the corporation. In this case, the officers are no longer viewed as the representatives of the corporation; they are the parties on which the sanction will be imposed. With this interpretation, one can conclude that Art. 118 of the 2009 EPMA and its Elucidation do not only deal with corporate criminal liability, but also seem to channel the criminal liability of a corporation to its corporate officer, which might eventually lead to an

[7] The 2009 EPMA, Art. 116, par. 1.

[8] The 2009 EPMA, Art. 116, par. 2.

[9] Pursuant to the Attachment of Law Number 12 of 2011 concerning the Formulation of Laws and Regulations, an elucidation serves as an official interpretation of the body of a law. An elucidation contains descriptions of words, phrases, sentences, or foreign terms and can be accompanied by examples.

[10] The 2009 EPMA, Elucidation of Art. 118.

individual vicarious liability. In that case the liability is shifted from the corporation to the corporate officers that can be held liable for the act of the corporation or its employees.

2.2 *Corporate Liability in Other Natural Resource-Related Laws*

Provisions related to corporate criminal liability can also be found in the 1999 Forestry Law. This law provides that for crimes committed by or on behalf of a corporation, prosecution and criminal sanctions should be imposed on corporate officers, whether individually or collectively.[11] A similar formulation of corporate liability can also be seen in the 2004 Fishery Law, which states that when a crime is committed on behalf of a corporation, any resulting prosecutions or sanctions must be directed towards the officers of that corporation.[12]Since these provisions are the only provisions related to corporations in these respective laws, one could conclude that both the 1999 Forestry Law and the 2004 Fishery Law only adopt individual vicarious liability. No corporate liability is possible, since corporate officers are the only party to be held liable for a crime conducted by or on behalf of the corporation.

Some provisions on corporate criminal liability can be found in the 2013 Prevention and Eradication of Forest Destruction (PEFD) Law. Art. 82 of this law, for example, provides that a corporation that has, in contravention of its forest utilization permit, without any permit, or illegally, chopped down trees in a forest "shall be sentenced to imprisonment for a minimum of five years and a maximum of fifteen years and a fine of a minimum of five billion rupiah and a maximum of fifteen billion rupiah."[13]

Based on the way in which corporate criminal liability is formulated in the 2013 PEFD Law, one can conclude that the Law has explicitly provided for both imprisonment and fines as viable sanctions for a corporation. This is clearly absurd, as it is impossible to put a corporation in jail. Ironically, the Law seems to realize the absurdity, as it later states in Art. 109 (par. 5) that the penalty for a crime conducted on behalf of a corporation as referred to in Arts. 82 to 103 is a fine.[14] The 2013 PEDF Law also states that if a criminal

[11] The 1999 Forestry Law, Art. 78, par. 14.

[12] The 2004 Fishery Law, Art. 101.

[13] The 2013 PEFD Law, Art. 83, par. 3. Similar provisions on criminal liability can also be found in Arts. 83-103 of the 2013 PEFD Law.

[14] The 2013 PEFD Law, Art. 109, par. 5.

offence related to illegal logging was conducted on behalf of a corporation, "the indictment and sentence can be directed toward the corporation and/or the officers of the corporation".[15] Furthermore, the Law states that an offence is considered to have been carried out by a corporation "if the criminal offence was committed by an individual based on either work relations or other relations, who acted within the corporation, either individually or jointly".[16]

Meanwhile, the 2014 Plantation Law states that if crimes related to the Law were conducted on behalf of a corporation, in addition to the officers, the corporation itself could be held liable for the crimes. The Law states that the maximum fine for a corporation is 1/3 higher than that for individuals.[17] In contrast to previous laws, the 2014 Plantation Law has made it clear that the liability of a corporation is separate from that of its officers. Also, the 2014 Plantation Law makes clear that the sanction applicable to a corporation is a fine. Such penalty is different from that for individuals, which includes both a fine and imprisonment.[18]

III CORPORATE LIABILITY OR OFFICER LIABILITY? SELECTED COURT RULINGS ON CORPORATE CRIMES

The number of court rulings regarding environmental crimes has increased significantly in the last decade. We will analyse a selection of court rulings ordered since 2010 to illustrate particular problems in the way in which courts have interpreted the concept of corporate criminal liability.

3.1 *Republic of Indonesia v. Kim Young Woo* (2010)

The first interesting case is the case of *Kim Young Woo* (2010), which involved Mr. Kim Young Woo, the President Director of PT Dongwoo Environmental Indonesia (PT DEI), a company engaging in waste management operation.[19] Mr. Kim Young Woo, the

[15] The 2013 PEFD Law, Art. 109, par. 1.

[16] The 2013 PEFD Law, Art. 109, par. 2.

[17] The 2014 Plantation Law, Art. 113, par. 1.

[18] Regarding provisions on sentences for individuals, see: The 2014 Plantation Law, Arts. 103-112.

[19] *Republic of Indonesia v. Kim Young Woo* (Supreme Court Cassation) [2010], Decision No. 882 K/Pid/Sus/2010, pp. 1–2. The term "PT" stands for "*Perseroan Terbatas*", which refers to a limited liability company.

defendant, was charged under Art. 41, par. 1 of the 1997 EMA for polluting the environment.[20] In its indictment, the prosecutor alleged that the corporation, i.e. PT DEI and its directors, as well as other employees, were involved in illegal waste disposal.[21] The prosecutor claimed that Mr. Kim Young Woo's role in the crime involved approving several actions to carry out criminal activities, such as paying and signing necessary documents.[22] The prosecutor asked the court to pronounce Mr. Kim Young Woo guilty of illegal disposal of wastes and sentence him to 6 months imprisonment. [23] Despite the fact that the only defendant against whom charges were brought by the prosecutor was Mr. Kim Young Woo, the Supreme Court declared that PT DEI, as a corporation, was also guilty of the crime.[24] The court also held the corporation liable despite the fact that it was not named as a defendant. Accordingly, it could be inferred that the court not only failed to distinguish corporate criminal liability and officer's criminal liability, but also treated corporate liability and officer's personal liability as one and the same thing.

3.2 *Republic of Indonesia v. PT Adei Plantation & Industry* (2013)

Another case worthy of mention is that of *PT Adei Plantation & Industry (2013)*. In this case, the defendant named was the corporation PT Adei Plantation & Industry (PT API), which was represented by Mr. Tan Kei Yoong, a Malaysian citizen acting as the managing director of the company.[25] The prosecutor relied on Art. 116, par. 1a of the 2009 EPMA, which, as mentioned earlier, allows for corporations to be held criminally liable.[26] The prosecutor alleged that the corporation, PT API had committed illegal burning. The prosecutor did not, however, prove that the corporate director, i.e. Mr. Tan Kei Yoong, was involved in the criminal act. In its ruling,

[20] *Id.*, p. 19. Art. 41(1) reads: "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 IDR 500 million.

[21] *Id.*, pp. 19–80.

[22] *Id.*, p. 15.

[23] *Id.*, p. 71.

[24] *Id.*, p. 95.

[25] *Republic of Indonesia v. PT. Adei Plantation & Industry* (District Court of Palawan) [2013] Decision No. 228/Pid.Sus/2013/PN.PLW, pp. 1–2.

[26] *Id.,* p. 6.

the Palawan District Court argued that since the only defendant was the corporation, it was impossible to impose a punishment such as an imprisonment. However, the Court further stated that the director, Mr. Tan Kei Yoong, was the right party to receive the substitute sentence.[27] The Court held PT API was guilty and liable for the fires, and was therefore sentenced to pay a fine.[28] In the event that PT API was not able to pay the required fine, the Court ruled that this could be substituted with a 5-month term of imprisonment for Mr. Tan Kei Yoong.[29] It follows from this ruling that a director, regardless of the fact that he was not the defendant, can be imprisoned if a corporation is unable to pay a fine. The ruling also shows how the Court adopted a form of individual vicarious liability, in which the liability of a corporation is shifted to individuals acting as the corporate officers.

3.3 *Republic of Indonesia v. Kosman Siboro (2015)*

The third decision to be addressed is that of the Pekanbaru High Court in the case of *Kosman Siboro (2015)*. The defendant in this case was Kosman Siboro, who was the estate manager of PT Jatim Jaya Perkasa (PT JJP), a company engaging in palm oil plantation, in the Sei Rokan concession area.[30] The prosecutor asked the court to sentence the defendant to five years imprisonment for polluting by way of land burning.[31] The Prosecutor relied on Art. 116, par. 1 b of the 2009 EPMA, which imposes criminal liability on those who gave an order or led the criminal act.[32]

Although the defendant in this case was Kosman Siboro, who was the officer of PT JJP, the prosecution focused solely on the actions of the corporation, and not on the defendant's role in the crimes.[33] Although the article which was relied upon in the indictment was Art. 116, par. 1b, which focuses on the person who gave the order or led the criminal act, the prosecutor did not provide any evidence that Mr. Kosman was the person who gave the order or led the crime. The

[27] *Id., p.* 213. In Indonesian criminal law, the substitution sentence is the imprisonment imposed on a person who failed to pay the determined fine.

[28] *Id.*, p. 226.

[29] *Id.*

[30] *Republic Indonesia v. Kosman Siboro* (High Court of Pekanbaru) [2015], Decision No.186/Pid.Sus/2015/PTPBR., p. 1.

[31] *Id.*, p. 19.

[32] *Id.*, p. 5.

[33] *Id.,* 2–5.

prosecutor only mentioned that the defendant was in charge as the estate manager of the burned land.[34]. It seems, thus, that the only contribution of the defendant was his position as the estate manager. However, the ambiguity concerning the role of the defendant in the crime did not prevent the Court from declaring Mr. Kosman guilty and imposing a sentence of imprisonment as well as fines on him.[35] Interestingly, the Court claimed that it was applying vicarious liability when finding the defendant liable. The court argued that by following vicarious liability, corporate officers are liable for the crimes conducted by their subordinates.[36]

The Supreme Court upheld the lower court decision. Interestingly, the court found that the defendant was not a "direct cause" of the crime and was not present when the crime was committed.[37] Hence, the court seems to be unsure about the defendant's power to control the criminal act. Yet, the court still held the defendant liable because in the court's view, everyone with a position in a corporation should be responsible. Hence, the defendant was held liable due to his position in the corporation.[38]

3.4 *Republic of Indonesia v. PT Karawang Prima Sejahtera Steel* (2013)

In the case of *PT Karawang Prima Sejahtera Steel (PT KPSS)*, the Supreme Court punished the director of a corporation for a crime allegedly conducted by the corporation. In this case, the defendant was the corporation PT Karawang Prima Sejahtera Steel (PT KPSS), which during the trial was represented by Mr. Wang Dong Bing as the director of the corporation.[39]

In this case, the Prosecutor applied Art. 116, par. 1a of the 2009 EPMA that imposes criminal liability on the corporation.[40] The prosecutor argued that PT KPSS produced hazardous waste that was

[34] *Id.,* p. 3.

[35] *Id.,* p. 48.

[36] *Id.*, pp. 45–46.

[37] *Republic Indonesia v. Kosman Siboro* (Supreme Court Cassation) [2017], Decision No. 1275 K/PID.SUS/2016, p. 86.

[38] *Id.*

[39] *Republic Indonesia v. PT Karawang Prima Sejahtera Steel* (Supreme Court Cassation) [2013], Decision No.1450K/Pid.Sus/2013, p. 1.

[40] *Id.,* p. 3.

not managed in accordance with the law.[41] Mr. Wang Dong Bing's involvement in the accused crime was never addressed. The only explanation about Mr. Wang Dong Bing's role was that the person represented the board of directors to lead and manage the corporation, including the authority to sign any document and enter into agreements with third parties on behalf of the corporation.[42]

Despite never charging Mr. Wang Dong Bing as a co-defendant, and never explaining his role in the alleged crime, the prosecutor not only asked the court to hold the defendant, i.e. PT KPSS, liable and to sentence it with a fine, but also demanded that Wang Dong Bing be sentenced to 5 months in prison.[43] The Supreme Court granted the prosecutor's claim and held both the defendant, i.e., PT KPSS, and Mr. Wang Dong Bing liable for the crime. The Court sentenced Mr. Wang Dong Bing to a 10-month term of imprisonment.[44] This ruling was given without considering Mr. Wang Dong Bing's connection to the crime and without ever formally charging him as a defendant.

3.5 *Summary*

Indonesian Laws have attempted to adopt corporate liability for environmental crimes or other crimes related to natural resource management. Some courts have also tried to apply the provisions of corporate criminal liability to some environmental cases. However, both laws and court rulings seem to have misinterpreted corporate liability as personal liability of corporate officers. It appears also that the courts in Indonesia have not been consistent in interpreting the provisions concerning corporate criminal liability and the liability of corporate officers. It has been demonstrated how in cases, such as *the Republic of Indonesia v. Kim Young Woo (2010)* and *the Republic of Indonesia v. Kosman Siboro (2015)*, the courts focused on the corporation's fault, even though in those cases the defendants were the officers of the corporation. It seems that in these cases, the prosecutors blamed the corporate officers for the fact that the crimes had been conducted by the corporation. In *the Republic of Indonesia v. Kim Young Woo (2010)*, the Supreme Court even ruled that the corporation, PT DEI, was guilty even though it was not the defendant in the case.

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[41] *Id.,* pp. 3–4.

[42] *Id.,* p. 10.

[43] *Id.,* p. 5.

[44] *Id.,* pp. 15–16.

In contrast, in the *Republic of Indonesia v. PT Adei Plantation & Industry (2013)* and *Republic Indonesia v. PT KPSS (2013)*, the courts not only held the defendants, i.e. the corporations, liable for conducting the accused crimes and sentenced them with fines. The courts also opened the possibility of imprisoning the directors of the corporations, although they had never been charged as defendants. In *Republic of Indonesia v. PT KPSS (2013)*, the director was sentenced to five months imprisonment regardless of the fact that he was not the defendant in the case.

It seems that the confusion here results from misconceptions concerning corporate liability, in which the liability of a corporation directly leads to the liability of the officers of the corporation, and *vice versa*. In this regard, when the courts hold a corporation liable for a crime, sanctions can be imposed both on the corporation itself and the officers of the corporation. In Indonesia, sanctions are being imposed on corporate officers simply because of their high-ranking positions. This is similar to individual vicarious liability under tort law, whereby a principal is liable for the conduct of other persons, i.e. the employees. As explained later, this interpretation cannot be considered a form of corporate liability.

IV MISCONCEPTIONS ABOUT CORPORATE CRIMINAL LIABILITY IN INDONESIA

4.1 *Major Problems*

Indonesia's interpretation of corporate criminal liability as represented in the court rulings discussed in the previous section is problematic for a variety of reasons.

Firstly, shifting liability from the corporation to individual officers, as practised in several rulings of Indonesian courts, runs the risk of violating human rights. Indonesia's interpretation of corporate liability is not genuine corporate liability; it constitutes a shift of liability from the corporation to its corporate officers. In this regard, an officer is held liable simply because of their position as an officer, regardless of their contribution to the crime. This practice is dangerous, as it allows a corporate officer to be imprisoned although they were never tried as a defendant. From the discussions above, one can see that a corporate officer was sentenced to imprisonment without any prior trial against them, simply because the person held the position as an officer of a corporation. Sending someone to jail

without a fair trial is a serious violation of human rights. This is supported by Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which recognizes that ''in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law''.

Secondly, the Indonesian interpretation of corporate liability also contravenes the purpose of imposing corporate liability from an economic perspective. This section aims at discussing theoretical flaws in the shifting of liability from a corporation to corporate officers and proceeds as follows: first, it provides a theoretical framework related to the allocation of liability to and within corporate entities; next, corporate criminal liability is presented from a law and economics perspective; then, we present the allocation of corporate criminal liability in a few common law jurisdictions as they correctly reflect both the theoretical framework and the economic considerations; finally, these various theoretical models will be used as a framework to test the Indonesian case law in a critical manner.

4.2 *A Theoretical Framework*

4.2.1 *Different Theories*

To understand Indonesia's approach to corporate liability and to analyze it in a critical manner, we will first present a theoretical framework concerning corporate criminal liability.[45] De Maglie put forward three approaches to determining corporate criminal liability.[46] In relation to the first approach, liability is attributed to corporations for the *actus reus* and *mens rea* of those who work for and on behalf of the corporation; one might find the theory of vicarious corporate criminal liability as part of this model. With regard to the second approach, corporations are liable if the accused's crimes were conducted by the director or officer of the corporation. This is a typical form of corporate liability based on the ''directing mind'' doctrine, which is also known as the ''identification'' doctrine. With the third approach, corporations are liable for their own errors, for

[45] See generally for an excellent overview of the theories of corporate criminal liability, David Roef, ''Corporate Criminal Liability'', in Johannes Keiler and David Roef (eds.), *Comparative Concepts of Criminal Law*, 3rd ed. (Cambridge, 2019), pp. 333–339.

[46] Cristina de Maglie, ''Models of Corporate Criminal Liability in Comparative Law'', *Washington University Global Studies Law Review,* Vol. 4:3 (2005), pp. 553–560.

example because they failed to supervise the behaviour of their employees or because of a culture within the corporation that allowed the crimes to take place.[47] In the third approach, liability arises because of the actions of the corporation itself, and hence corporations are liable for their own actions regardless of whether the actions correspond to the criminal conduct and liability of the people within the corporation.

One can also find a similar classification in Pieth and Ivory's study, who divide the approaches of different legal systems into three distinct groups. According to these authors, first, corporate criminal liability can be based on a so-called strict vicarious liability; in this case, the corporations are liable regardless of whether they have prevented or taken steps to respond to the crime or not. In a second model, corporations are liable based on the so-called ''qualified'' vicarious liability. In this case, liability is established only if the corporations fail to take appropriate steps to prevent criminal acts. Under the first and second approaches, corporations are also liable for the actions of humans, be it the actions of employees for the former approach or the actions of corporate officers/leaders for the latter approach. Accordingly, under the first and second approaches, liability is derived from the criminal conduct of natural persons. In a third model, corporations are liable for the collective actions of the people or organization working within the corporation. Here, corporations are liable either through the aggregation theory, or through the organizational model theory, such as corporate fault or cultures, within the corporations that encourage criminal acts. In contrast to the first two approaches, under the third approach, corporations are liable for their own wrongdoing, fault, or culpability.[48] As a comparison, a classification of corporate criminal liability into three approaches can also be observed in a study by Gobert. He argues that corporations are liable when: a) they order, aid, abet, counsel, or facilitate criminal offences by persons for whom the corporation would bear liability, such as directors, officers, employees, or agents; b) they fail to prevent a crime by a person for whom the corporation should bear liability, namely if they owe the duty to prevent harm, if they should have been aware of the risks and have exercised due

[47] *Id.*

[48] See Mark Pieth and Radha Ivory, ''Emergence and Convergence: Corporate Criminal Liability Principles in Overview'', in Mark Pieth and Radha Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Dordrecht, 2011), pp. 21–22.

diligence accordingly to prevent crimes, if they have the capacity to prevent the crimes, or if it was not unreasonable for the corporations to take preventive measures; c) there is a corporate culture that tolerates or encourages the crimes, fails to discourage the crimes, or fails to establish a corporate culture requiring compliance with the law.[49]

4.2.2 *Bases of Corporate Criminal Liability*

According to the classifications provided in the literature, different bases of corporate criminal liability can be distinguished. First, liability can be established on the basis of corporate vicarious liability.[50] According to the vicarious liability doctrine, a corporation is liable for acts committed by its employees, regardless of the employees' position within the corporation. The *mens rea* and *actus reus* of the employees are imputed to the corporation.[51] Based on this theory, a corporation will be held liable for acts committed by its employees, as long as the employee acts within the scope of their employment. A serious drawback of this theory is the necessary link to individual liability. The legal person is only made liable through the criminal liability of some individual employee; corporate liability can therefore not arise if no individual liability can be established.[52]

Under the second model, the so-called *identification theory*, corporate liability emerges when criminal actions of directors, superiors, officers with high-ranking positions within corporations are considered the same as the actions by the corporations themselves.[53] In contrast to the vicarious liability model, individuals whose actions can result in corporations being charged with criminal responsibility are limited to individuals in certain positions. Another difference is that this theory does not shift the officers' faults to the corporation. Instead, the acts of corporate high-ranking officers or directors are

[49] See James Gobert, "The Evolving Legal Test of Corporate Criminal Liability", in: John Minkes and Leonard Minkes (eds.), *Corporate and White-collar Crime* (London, 2008), p. 79.

[50] It is the theory of corporate criminal liability in England and Wales. See Roef, *supra* note 45, pp. 341.-344.

[51] One could, for instance, refer to Part 2.5 section 12.2 of the Australian Criminal Code Act which stipulates that: "[i]f a physical element of the offence is committed by an employee, agent or officer of a body corporation acting within the actual or apparent scope of his or her employment, or within his or her apparent authority, the physical element must also be attributed to the body corporate."

[52] Roef, *supra* note 45, p. 343.

[53] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (London, 2003), p. 39; Cristina de Maglie, *supra* note 46, p. 556; Roef, *supra* note 45, pp. 346–352.

regarded as the acts of the corporation itself.[54] Also, this theory has particular shortcomings, the most important one being that when no leading member can be considered to have committed the offence, the legal entity cannot be found liable.[55]

Gobert argues that the third model, the so-called ''aggregation theory'', functions as a bridge from corporate liability derived from individuals' actions to liability of corporations for their own conduct. This is because although the aggregation theory is still based on employees' actions, so that it is still somehow related to vicarious liability, liability under this theory nevertheless arises out of the collective actions of the employees; this means that the aggregation theory does not require the existence of a perfect criminal act from one individual. In this regard, Gobert concludes that with the aggregation theory, a corporation can remain liable even though no employee has committed a crime. For this reason, corporate liability is no longer a derivative from an individual's crime, but rather is a result of the corporation's own faults.[56]

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[54] The explanation of identification theory can be seen in Lord Reid's decision in *Tesco Supermarkets Ltd. v Nattrass*, which states that, ''A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.'' See: [1972] A.C. 153 (1971). The Identification theory was first applied in *D.P.P. v Kent & Sussex Contractors, Ltd* [1944] 1 K.B. 146, *R. v I.C.R. Haulage Co Ltd* 1944] K.B. 551, and *Moore v I Bresler Ltd* [1944] 2 K.B. 515. *Tesco Supermarkets Ltd. v Nattrass* reiterates that the individuals whose actions can be regarded as the actions of the company are high-ranking officers who act and speak for the company and are involved in the management of the corporation.

[55] Roef, *supra* note 45, p. 349.

[56] James Gobert (2008), *supra* note 49, p. 71. One could see the aggregation model in the following passage of the Court in *United States v. Bank of New England, N.A.* (1st Cir 1987), ''If Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So, if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.'' See: *United States v. Bank of New*

A fourth model proposed in the literature is the so-called *organizational models theory*''. With this theory, the criminal liability of the corporation is based on the characteristics of the corporation, its corporate policy, and the practices within the corporation.[57] This theory is distinguishable from the previous theories as it does not require a fault from any individual.[58] De Maglie categorizes four models to hold corporations criminally liable: corporate policy, corporate culture, preventative fault, and reactive corporate fault.[59] Under the corporate policy model, a corporation is liable if its policies intentionally enable the commission of a crime.[60] Under the corporate culture model, a corporation can be held liable if the culture of the corporation, including its norms, habits, and values, which reflect the personality of the corporation, encourages its agents or the employees within the corporation to commit a crime.[61] Under the preventive-fault model, a corporation is liable when it fails to implement an internal system to control or prevent a crime.[62] The reactive corporate fault imposes criminal liability on corporations for failing to act upon crimes committed by individuals.[63]

Footnote 56 continued
England, N.A., 821 F.2d 844, p. 855 (1st Cir 1987). The Court further explains the collective action in the following passage, ''A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability...The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this.... Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation.... Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.'' See: *United States v. Bank of New England, N.A.* (1st Cir 1987), p. 856.

[57] Cristina de Maglie, *supra* note 46, p. 556.

[58] *Id.*

[59] *Id.,* p. 558.

[60] *Id.*, p. 558.

[61] *Id.*

[62] *Id.,* p. 559. Also see: Brent Fisse and John Braithwaite, *Corporations, Crime, and Accountability*, (Cambridge, 1993), p. 48. This model can be found in the U.S. Sentencing Guidelines *section* 8B2.1(a)(6)(B), which hold corporations liable ''for failing to take reasonable steps to prevent or detect criminal conduct.

[63] Cristina de Maglie, *supra* note 46, p. 559.

Apparently, Indonesian scholars are also familiar with these theories on corporate criminal liability. The majority of Indonesian textbooks on corporate liability have discussed these theories quite extensively.[64] Some rulings even directly mention vicarious liability or the identification theory as the basis for liability.[65] Hence, although these theories of corporate liability have probably originated from common law countries, this paper observes that such theories have nevertheless been discussed, adopted, and applied in Indonesia to attribute criminal liability to corporations and their officers. However, this paper also finds that Indonesian literature, courts, and lawmakers fail to distinguish between corporate criminal liability and the criminal liability of corporate officers.[66] This failure leads to an inaccurate implementation of corporate criminal liability, where corporate liability is construed in the form of corporate officers' liability.

[64] See, for example: Muladi and Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi*, 3rd ed. (Jakarta:, 2015); Sutan Remy Sjahdeini, *Ajaran Pemidanaan: Tindak Pidana Korporasi dan Seluk-Beluknya*, 2nd ed. (Jakarta, 2017); Dwidja Priyatno, *Sistem Pertanggungjawaban Pidana Korporasi dalam Kebijakan Legislasi* (Depok, 2017).

[65] In *Republic Indonesia v. Eddy Sutjahyo Busiri, et al.,* the court relied both on vicarious liability and the identification theory as the basis of attributing criminal liability to the defendants. See: *Republic Indonesia v. Eddy Sutjahyo Busiri, et al.* (Supreme Court Cassation) [2016], Decision No. 2634 K/Pid.Sus.LH/2016, 279.Meanwhile, the appeal court in *Republic Indonesia v. Kosman Siboro* clearly mentioned vicarious liability as the basis for the defendant's criminal liability. See: *Republic Indonesia v. Kosman Siboro*, *supra* note 30, pp. 45–46.

[66] None of the Indonesian literature on corporate liability mentioned earlier has made a clear distinction between corporate liability and the liability of corporate officers. Failure to make such an important distinction can also be seen in, for example, a seminal paper of Reksodiputro, who states that in the case of a corporate crime, liability can be attributed to the corporation itself, or the corporate officers, or both the corporation and its officers. See: Mardjono Reksodiputro, "Tindak Pidana Korporasi dan Pertanggungjawabannya: Perubahan Wajah Pelaku Kejahatan di Indonesia," speech at the anniversary of Indonesian College of Police Science, 1993, pp. 15–16. A different opinion is given by Sjahdeini, who argues that corporate officers or both the corporation and corporate officers can be held liable, but the corporation alone cannot be held criminally liable. See: Sutan Remy Sjahdeini, *supra* note 64, pp. 256–261. The Draft Criminal Code seems to take a position similar to Reksodiputro's opinion in attributing liability of a corporate crime. See discussion in Section V.As one can see later, the problem with these possibilities of attribution of liability lies primarily in its failure to specify conditions under which a corporate officer might be held liable. Without such conditions, the Indonesian experience shows that a corporate officer could be held criminally liable simply because of the officer's position in the corporation, regardless of his role in the criminal conduct.

4.3 *Corporate Criminal Liability from a Law and Economics Perspective*

4.3.1 *Economic Reasons for Corporate Criminal Liability*

From an economic point of view, designating the liable party is unimportant so long as sanctions are freely transferable, and the parties are fully informed. With transferable sanctions, either the corporation charges the liable employee for the fine that it paid, or the employee asks the corporation for reimbursement of the fine that they paid. According to this line of reasoning, it is unimportant whether the fine is imposed on the corporation or the individual, because the contractual relationship between the individual and the corporation governs these matters.[67] This is referred to as the "irrelevance principle". According to this principle, the structure of sanctions is irrelevant if there is a frictionless transfer of funds between the principal and the agent.[68] It follows therefore that from an economic perspective, it does not matter whether the principal or the agent is held liable, so long as they can bargain to distribute the sanctions. The irrelevance principle might be seen as the application of the Coase theorem to corporate criminal liability.[69]However, this Cosean solution to penalties within corporate entities may not always work in practice. One problem is that monetary sanctions are not always freely transferable between the employer (the corporation) and the employee. Sometimes the law prohibits paying someone else's fine. A contractual transfer may thus not always be possible; in these cases, it does matter to whom the penalty is directed.[70] The most important reason for corporate criminal liability is the danger of an employee being insolvent and therefore unable to pay fines. As it is the case that employees usually have fewer assets than corporations,

[67] See Michael Faure, "Environmental Crimes" in: Nuno Garoupa (ed.), *Criminal Law and Economics*, *Encyclopedia of Law and Economics, Second Edition, Vol. 3* (Cheltenham, UK, 2009), p. 331.

[68] Wallace P. Mullin and Christopher M. Snyder, "Corporate Crime", in: Nuno Garoupa (ed.), *Criminal Law and Economics*, *Encyclopedia of Law and Economics, Second Edition, Vol. 3* (Cheltenham, UK, 2009), p. 226.

[69] Michael G. Faure and Marjolein Visser, "Law and Economics of Environmental Crime: a Survey", May 2003, available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.549.9704&rep=rep1&type=pdf>, accessed in Au gust 2016, p. 20.

[70] K. Segerson and T. Tietenberg, "Defining efficient sanctions", in: T.H. Tietenberg (ed.), *Innovation in Environmental Policy* (Aldershot, UK, 1992), pp. 63–65.

holding the corporation liable means that costly fines can be applied in reaction to corporate (environmental) crime.[71]

According to Shavell, there are several situations in which a criminal's assets can be lower than the optimal fines. Firstly, when the agent's assets are already limited compared to the sanction necessary to deter the agent from committing the crime. Secondly, when the probability of escaping liabilities is high, the law needs to compensate it by increasing the monetary sanction such that the benefits of committing a crime will be lower than the costs of conducting the crime. The increased monetary sanction will also increase the possibility that the agent's assets will be lower than the necessary sanction to deter. Third, the larger the agent's private benefits from conducting a crime, the higher the sanction needed to deter the crime, and hence, the more likely it is that the agent's assets are less than the necessary sanction.[72]

The corporation (employer) which is held criminally liable for the crimes committed by its employees can in turn apply sanctions to the employee, such as refusing promotion or termination of the contract. Corporate liability is therefore justified when the corporation is in a better position compared to the state in controlling the agent's behaviour. [73] This is especially the case when the corporation can observe the employees' conduct in relation to the operation of the corporation, through internal controls, monitoring, or sanctioning. It should be noted, however, that when the principal (corporation) cannot control the agent's conduct, it might be desirable to impose non-monetary sanctions on the agent although the principal's assets are sufficient to pay the monetary sanction.[74]

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[71] Wallace P. Mullin and Christopher M. Snyder, *supra* note 68, pp. 229–230 and Faure, *supra* note 67, p. 331.

[72] Steven Shavell, "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent", *Columbia Law Review*, 85:6(1985), pp. 1236–1237. Also: Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Ma., 2004), p. 510. It should be noted here that the references above are actually Shavell's explanation on cases where non-monetary sanctions are preferable to monetary sanctions. This paper, however, borrows the explanation for the justification of corporate criminal liability because it also explains conditions where assets of a criminal agent are less than the necessary monetary sanctions.

[73] Wallace P. Mullin and Christopher M. Snyder, *supra* note 68, pp. 230–231.

[74] A. Mitchell Polinsky and Steven Shavell, "The Theory of Public Enforcement of Law", in: A. Mitchell Polinsky and Steven Shavell (eds.), *Handbook of Law and Economics, Vol. 1* (Amsterdam, 2007), p. 435.

4.3.2 *Applying Corporate Criminal Liability with Criminal Liability of Corporate Officers*

The law and economics literature therefore generally concludes that there are strong arguments for corporate criminal liability.[75] However, this does not imply that corporate criminal liability should exclude the liability of individuals within the corporation who have, through their individual acts or omissions, contributed to the corporate crime. One argument is that corporate entities may equally be unable to pay for the optimal fines; optimal sanctions may exceed the corporation's assets and (due to limited corporate liability) they may even organize their own insolvency. As a result, corporate criminal liability may not always have a deterrent effect and non-monetary sanctions may need to be applied. However, it is clear that particular non-monetary sanctions, such as incarceration, cannot be applied against a corporation. That is therefore a strong argument in favour of individual criminal liability for those individuals (like corporate officers) that contributed to the crime. This individual liability can provide additional deterrence by shifting criminal liability exclusively to (potentially insolvent) corporate actors.[76] Moreover, monitoring by firms may often be imperfect and, as a result, employees may not be induced to exercise socially optimal levels of care. The possibility of non-monetary sanctions being applied against employees (imprisonment) could therefore provide additional deterrence in addition to the fines applied to corporations.[77] In the words of Roef, ''Corporate and individual liability should not be understood as competing strategies, but as complementary approaches to fighting corporate crime. This prevents natural persons from hiding their own role in the corporate misconduct behind the so-called 'criminal corporate veil'''.[78]

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[75] See also L. Friedman, ''A defense of corporate criminal liability'', *Harvard Journal of Law and Public Policy*, 23 (2000), pp. 833–858 and D.M. Kahan, ''Social meaning and the economic analysis of crime'', *Journal of Legal Studies*, 27 (1998), pp. 609–622.

[76] The point has been made extensively by A.M. Polinsky and S. Shavell, ''Should employees be subject to fines and imprisonment given the existence of corporate liability?'' *International Review of Law and Economics*, 13 (1993), pp. 239–257.

[77] L.A. Kornhauser, ''An economic analysis of the choice between enterprise and personal liability for accidents'', *California Law Review*, 70 (1982), pp. 1345–1392.

[78] Roef, *supra* note 45, p. 340.

4.4 *The Common Law Approach*

In common law legal systems, such as the UK, the US and Australia, there are various means to attribute liability to corporate officers, which are largely in-line both with the theoretical framework presented at (B) as well as with the economic analysis presented at (C). It is interesting to sketch how these jurisdictions approach the allocation of corporate criminal liability in a concrete manner as it more easily allows us to see the problematic nature of the Indonesian case law.

4.4.1 *Direct Liability*

A corporate officer can be liable according to the doctrine of direct liability, which holds that an individual is liable for their own act.[79] In the context of the criminal liability of corporate officers, the corporate officers are not liable for the acts of the corporation and are only liable for their own actions in their capacity as corporate officers and within the scope of their corporate management; corporate officers will be directly responsible if the officers failed to comply with obligations directly imposed on them by the law.[80]

4.4.2 *Accessorial Liability*

Another possibility to hold the corporate officers liable is through the accessorial liability doctrine. Under thedoctrine, liability is imposed on an accessory for the crime committed by the principal.[81] Gillies describes the connection between a principal and an accessory as follows:[82]

> *"To reiterate, at common law the person who physically perpetrates a crime with the required guilty mind incurs liability for this crime. And the person who instigates, encourages or assists him in this while possessing the required guilty mind is likewise inculpated. The first of these parties is usually referred to as being a 'principal' and the second of them as an 'accessory".*

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[79] Amanda Pinto and Martin Evans, *supra* note 53, p. 20–21.

[80] See: Corporations and Markets Advisory Committee, "Personal Liability for Corporate Fault: Report", p. 13; *Personal Liability for Corporate Fault - Guidelines for Applying the COAG Principle,* p. 2 https://arp.nsw.gov.au/sites/default/files/Personal_Liability_for_Corporate_Fault_-_Guidelines_for_Applying_the_COAG_Principles.pdf, accessed on 26 April 2017.

[81] S.M. Solaiman and Lars Bo Langsted, *supra* note 97, p. 12.

[82] Peter S. Gillies, *The Law of Criminal Complicity* (Sydney, 1980), p. 2.

One of the provisions applying accessorial liability is section 11.2(1) of the Australia's Criminal Code Act of 1995, which stipulates that "[a] person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly." In England, accessorial liability can be found in section 8 of the Accessories and Abettors Act 1861 which states that: "[w]hosoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common-law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender".[83]

In the context of the criminal liability of corporations and corporate officers, a corporate officer is held criminally liable as an accessory to criminal acts committed by the corporation as the principal. The officer is responsible not because he committed the crime, but because he has contributed to a criminal act committed by the corporation.[84]

To be considered as an accessory to a crime committed by a corporation, it has to be proven that the corporate officers had the intention to aid, abet, counsel, or procure the commission of the crime.[85] Based on a number of English court decisions,[86] Solaiman concluded that in order to hold corporate officers liable it must be proven beyond a reasonable doubt that the accessory has knowledge

[83] The interpretation of the terms aids, abets, counsels or procures can be found in Attorney-General's Reference No. 2 Year 1975, which approaches "...*s.* 8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section also on the basis that if four words are employed here 'aid abet counsel or procure' the probability is that there is a difference between them, because if there were no such difference, then Parliament would be wasting time in using four words where two or three would do."

[84] An example of the implementation of this theory can be found in *Hamilton v Whitehead* (1988) 166 CLR 121, p. 128.

[85] Robert Cryer, "Imputation and Complicity in Common Law States: A (Partial) View from England and Wales", *Journal of International Criminal Justice,* 12 (2014), p. 8; Joachim Dietrich, "The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions", *Melbourne University Law Review,* 34:1 (2010), p. 128; *Giorgianni v The Queen* (1985) 156 CLR 473 p. 487–588; *Yorke v Lucas* (1985) 158 CLR 661 p. 667; *ASIC v Adler* (2002) 41 ACSR 72.

[86] Solaiman analysed the following decisions: *Giorgianni v The Queen* (1985) 156 CLR 473, 491; *R v Stokes and Difford* (1990) 51 A Crim R 25, 37–8, 41; *R v Coney* (1882) 8 QBD 534 p. 557; *R v Mills* (1985) 17 A Crim R 411, 440; *R v Phan* (2001) 53 NSWLR 480; *R v McCarthy* (1993) 71 A Crim R 395, 409; *R v Buckett* (1995) 79 A Crim R 302, 309.

of essential facts or circumstances that indicate that the principal committed a crime, and that they intentionally aided or encouraged the principal to commit the crime. [87] An accessory is not required to know that the action is a crime and to know the results that will be obtained from the crime.[88]

4.4.3 *Consent, Connivance, and Neglect*

Another way to hold officers liable is through the concepts of consent, connivance, and neglect. As an example, in the UK, a high-ranking officer may be held liable, along with the corporation, for a crime conducted on behalf of a corporation only when the crime was also conducted with "the consent or connivance of, or to be attributable to any neglect" on the part of the officer.[89] In the US, the officer is liable if they were involved in an employee's criminal conduct, provided assistance or motivation for the conduct, or failed to exercise control over the employee's conduct when they had the power to do so[90] These examples show that the officer cannot be held criminally liable simply because of their position.

In the UK, most regulations impose criminal liability on corporate officers when a corporation has committed crimes with the consent, connivance, and neglect of the corporate officers. This type of liability is meant to prosecute and punish not only corporations, but also individuals who are "...in control and hide behind the veil of incorporation."[91]

One of the examples is section 157 of the Environmental Protection Act 1990 which stipulates that:[92]

> Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was

[87] S.M. Solaiman and Lars Bo Langsted, *supra* note 97, p. 11.

[88] *Id.*

[89] Amanda Pinto and Martin Evans, *supra* note 53, pp. 81–82.

[90] Dan K. Webb, Steven F. Molo and James F. Hurst, "Understanding and Avoiding Corporate and Executive Criminal Liability", *The Business Lawyer*, 49:2 (1994), pp. 627–629.

[91] Amanda Pinto and Martin Evans, *supra* note 53, p. 81.

[92] *Environmental Protection Act* 1990 *section* 157. The same wording can also be found in section 52 Clean Air Act 1993, section 41 Environmental Permitting (England and Wales) Regulations 2010, section 217 Water Resources Act 1991, and section 22A Water Industries Act 1991.

purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

In New South Wales, Australia, the law requires certain elements to be proved to hold corporate officers liable for crimes committed by corporations. One of the examples can be seen in section 169A of the Protection of the Environment Operations Act 1997 which stipulates that for certain crimes committed by the corporation,[93] an officer also commits an offence against this section if:[94]

a) a corporation commits an executive liability offence, and
b) the person is:

i) a director of the corporation, or
ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and

c) the person:

i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
ii) fails to take all reasonable steps to prevent or stop the commission of that offence.''

As a result, corporate officers are not automatically liable for the corporation's crimes. In order to hold corporate officers liable, the prosecutor has the burden to prove the contribution of the officers to the crime committed by the corporation.

[93] *POEO Act, section* 169 A, par. 1 lists some sections in which corporate crimes could be conducted. *Section* 169 of the *POEO Act* does contain a provision which holds corporate officers liable for corporate crimes without requiring any elements to be proven; this section is only applicable for certain environmental crimes. However, unlike the provisions contained in Indonesian regulations, corporate officers may prove that they are either, ''a) not in a position to influence the conduct of the corporation in relation to its contra version of the provision, or; b. they persons, if in such a position, used all due diligence to prevent the contravention by the corporation.'' Therefore,, they will not *automatically* be punished for the crimes of their corporation and have the chance to satisfy the court that they are not guilty.

[94] *POEO Act, section* 169 A, par. 2.This type of liability can also be found in section 98 of the Contaminated Land Management Act 1997 No. 140 and section 53 of the *Environmentally Hazardous Chemicals Act* 1986 No. 14.

4.5 *Testing the Models*

After having presented various theoretical (B-C) and practical (D) approaches to corporate criminal liability we can now better explain the problematic nature of the Indonesian case law presented in the previous section.

4.5.1 *Theories of Criminal Law*

The above brief discussion of select theories to determine corporate criminal liability presented in subsection B showed that different legal bases can be used to justify corporate criminal liability. Different legal systems also use different theories as a basis for corporate criminal liability. The major problem is that corporate criminal liability as it is applied in Indonesia does not seem to fit with any of the present theories of corporate criminal liability. The problem does not stop here as the cases reviewed in the previous section make clear that there is no singular basis for corporate criminal liability in Indonesia.

According to the theories above, when a crime is thought to have been committed, the prosecutor should establish the evidence that the crime was carried out by the employee of the corporation within the scope of their employment (under the corporate vicarious liability approach), or by the officers of the corporation (under the identification theory), or by collective actions of the people within the corporation (under the aggregation model). Alternatively, corporate liability could arise on the basis of organization models, such as corporate culture, corporate polity, or even corporate fault in responding to criminal conduct.

One might argue that the Indonesian version of corporate criminal liability, in which the liability of a corporation is implied from the conduct of employees or corporate officers, resembles the corporate liability on the grounds of corporate vicarious liability and identification theory. However, the problem with this argument is that the courts in Indonesia typically do not indicate the basis for attributing criminal liability to the corporation. For example, in the *Kim Young Woo* case (2010) cited above, the Supreme Court held the corporation, PT DEI, liable although it was not the defendant in the case. In general, from the case law discussed in the previous section, it becomes clear that the criminal courts in Indonesia do not identify a particular legal basis for attributing criminal liability to a corporation which is problematic both from a theoretical and practical perspective.

Probably even more questionable is that in particular cases liability is attributed to individuals within the corporation, without indicating the legal basis for that criminal liability and in some cases even without the individuals being charged as defendants in the particular case. For example, in the *PT Adei Plantation & Industry (2013)* and *PT KPSS (2013)*, the courts imposed a sanction on the directors of the corporations, despite the fact they had never been tried. In the case of *PT KPSS (2013)*, the director was sentenced to five months imprisonment regardless of the fact that he was not the defendant in the case; this decision seems to embody individual vicarious liability.

Under individual vicarious liability in the context of criminal law, corporate officers are likely to be, automatically, held liable for a crime committed by their corporation. Vicarious liability constitutes a shifting of liability from the corporation to corporate officers, which is very different from the shifting of liability from individuals to corporations; while the latter is justified under various theories of corporate liability, the former is not.[95] Critics, such as Sarre, rightly argue that "[i]mposing criminal liability on corporations for regulatory breaches by its senior officers is one thing; imposing personal criminal liability on senior officers simply because their company has committed an offence is quite another".[96]This line of argument can also be found in the practice of corporate criminal liability in other countries. For example, under English law, as observed by Solaiman and Langsted, a corporate officer may not be held liable for corporate crimes solely because of their position as the leader of the corporation.[97] Similarly, Pinto and Evans explain that:[98]

> "The veil of incorporation does not protect a company officer from criminal liability, but equally such an officer will not ordinarily be criminally liable unless he himself has behaved culpably. In criminal law there is no parasitic liability of directors, so a director is not guilty of an offence simply because the

[95] James Gobert, "Squaring the Circle: The relationship between Individual and Organizational Fault", in: James Gobert and Ana-Maria Pascal, (eds.), *European Developments in Corporate Criminal Liability*, (London, 2011), pp. 141–143.

[96] Rick Sarre, "Penalising Corporate 'Culture': The Key to Safer Corporate Activity?", in James Gobert and Ana-Maria Pascal (eds.), *European Developments in Corporate Criminal Liability* (London, 2011), p. 86.

[97] S.M. Solaiman and Lars Bo Langsted, "Crimes Committed by Directors Attributed to Corporations - Why Should Directors be Accessory?: Viewing through the Complicity Rules in Common Law", *Criminal Law Forum*, 28:1 (2007), p. 19.

[98] Amanda Pinto and Martin Evans, *supra* note 53, p. 75.

corporation itself is guilty. A condition precedent to conviction of a director is some act (or omission) on his or her part.''

The Indonesian case law discussed in section III is therefore very problematic – not only is there no justification provided for the criminal liability of the corporation, but criminal liability for acts committed by the corporation is attributed to individuals simply because of their capacity, even when they were not sued as a defendant. This approach is problematic because it, first of all, violates the principle of guilt: criminal liability should only be allocated to individuals if they could have influenced the behaviour of the corporation. That influence on the commission of the crime could constitute a justification for attributing criminal liability to the individual; however, this factor was not present in those cases. Second, attributing liability to individuals who were not formally charged with a crime, obviously also violates their defence rights. Individuals may have appeared in court (or might even have been absent) simply to defend the corporation in their officer capacity as representatives of the corporation. Afterward, they may find themselves convicted, even though they could never put forward a defence against their individual criminal liability, as they were not officially charged. That approach clearly constitutes a gross violation of the human rights of the individual.

4.5.2 *Law and Economics*

It followed from the economic perspective presented in C that there are economic arguments in favour of corporate criminal liability, but that this should not exclude liability of individuals (like corporate officers) if their behaviour contributed to the corporate crime. However, the Indonesian cases discussed in the previous section show that Indonesia goes even further, by allocating corporate liability to corporate officers irrespective of any wrong-doing on their part; this *de facto* amounts to individual vicarious liability for acts of the corporation. This attribution of liability should be rejected for several reasons. First, criminal liability is based on the principle of guilt, implying that criminal liability is imposed because an individual had an alternative course of action (promoting compliance with the law) that was not pursued. Allocating a corporate wrong-doing to an individual without verifying whether that individual could influence (through his/her behaviour) the corporate crime runs counter to this principle. Second, it has already been mentioned that it is likely that the assets of individual employees will be lower than the optimal fine.

This could create a judgment proof problem which was exactly the reason to assign liability to the corporation. Third, imprisoning individuals, such as high-ranking corporate officers, for the conduct of the corporation runs against the basic economic justification for corporate criminal liability. Mullin and Snyder argue that it does not matter whether it is the principal or the agent that is held liable, so long as they can bargain to distribute the sanctions. According to these authors, what is most important is the total sanction $s_p + s_a$, i.e. the sanction received respectively by principal and agent. Hence, it is not necessary to know how the total sanctions are divided between the principal and the agent, since the enterprise can transfer frictionless funds using the internal payment, s_i.[99] However, one might assume that the internal payment, i.e. s_i, is absent when the sanction is imprisonment. Accordingly, there will be no internal sanction that can be employed to compensate for the loss of freedom on the side of a high-ranking officer, if the officer is to be held liable for the act of the employee. When such internal payment or sanction is absent, the ability of the principal or high-ranking officers to control the behaviour of its employees is also absent. Hence, if the sanction is imprisonment, the question of to whom liability is attributed matters a great deal. For these reasons, allocating criminal liability for corporate misconduct to high-ranking officers as it is done in Indonesia, should be rejected as it runs counter to the basic legal and economic principles of attributing criminal liability. Attributing criminal liability to corporate officers should be based on the guilt of the individual employee (i.e. the contribution to the corporate crime) and not merely on their position as a corporate officer.

Also, the discussion of the approach to corporate criminal liability in some common law jurisdictions presented in D makes clear that there is no such thing as an automatic liability of a corporate officer for a crime conducted by a corporation. The liability of a corporate officer only emerges if the prosecutor is able to indicate a specific role that was performed by the officer related to the corporate crime. Moreover, the liability of the corporate officer can obviously only be invoked if the corporate officer was formally charged with the crime and participated in the trial as a defendant. The conclusion is therefore relatively simple and straightforward: the approach followed in Indonesian case law, which allocates liability to corporate officers automatically for a crime committed by the corporation, does

[99] *Id.*

not conform either to the theoretical framework (B), or with the economic approach (C).

V NEW DEVELOPMENTS

Several new developments have taken place recently in Indonesia. In a recent case, the Supreme Court seemed to be aware of the misunderstanding between corporate liability and the personal liability of corporate officers. In *Republic of Indonesia v. PT KCI* (2015), the Court only gave sentence against the defendant, i.e., the corporation PT KCI, but refused to give a sentence against the director of the corporation who was not a defendant in the case (A). Moreover, Indonesia's Attorney General and Supreme Court also seem have begun to realise the flaws in the existing interpretation and implementation of corporate liability. To increase consistency, the Attorney General and Supreme Court issued guidelines for the application of corporate liability in 2014 and 2015 respectively (B-C). However, there seems to be a new threat, which is a draft of a criminal code dealt with further below(D).

5.1 *A Different Route: Republic of Indonesia v. PT KCI (2015)*

In a recent ruling, *Republic Indonesia v. PT KCI (2015)*, the Supreme Court reached a different conclusion to the ruling in *Republic of Indonesia v. PT KPSS (2013)*. In *Republic of Indonesia v. PT KCI (2015)*, the defendant was PT Koyama Casting Indonesia (PT KCI), which was during the trial represented by Mr. Shigemi Koyama as the president director of the corporation.[100]

In this case, the Prosecutor relied on Art. 116 par. 1 a of the 2009 EPMA.[101] PT KCI was accused of piling up hazardous waste on open land, contrary to the applicable regulations.[102] As part of this crime, Mr. Shigemi Koyama the director, ordered his employee to put the waste into drums which would then be placed on the open land without proper treatment.[103] Despite its attempts to prove the involvement of the director in the crime, the Prosecutor did not sue the company's director (Mr. Shigemi Koyama) as a defendant, leaving the corporation as the only defendant in this case. Never-

[100] Supreme Court Decision No.2560K/Pid.Sus/LH/2015, p. 1.

[101] *Id.,* p. 4.

[102] *Id.*, p. 2.

[103] *Id.*

theless, in the indictment, the prosecutor only asked the court to punish the director, i.e. Mr. Shigemi Koyama, but not the corporation.[104]

The District Court rejected the claim. Instead, having found the defendant guilty of conducting the accused crime, the court gave sentence against the defendant corporation. The corporation was ordered to pay a fine of IDR 1 billion and to conduct certain measures related to waste management.[105] The prosecutor appealed to the High Court, requesting that the criminal sentence should not only be a fine for the corporation, but also imprisonment for Mr. Shigemi Koyama. In supporting the argument, the prosecutor referred to the Supreme Court ruling on *Republic of Indonesia v. PT. KPSS (2013)*, in which the request to punish the director was granted, although the director was not the defendant.[106] Since the High Court also rejected the appeal, the prosecutor finally submitted a cassation to the Supreme Court. Realizing that the director was not the defendant in the particular case, the Supreme Court upheld the lower court decisions.[107]

5.2 *The Attorney General's Guideline*

In 2014, the Attorney General issued the Attorney General Regulation (AGR) No. Per-028/A/JA/10/2014 on Guidelines for Handling Criminal Cases with Legal Subject of Corporation ("2014 AGR"). In the Appendix of the 2014 AGR, it is explained that a corporation can be held criminally liable. This includes criminal liability for: a) all acts based on the board's decision; b) a person acting for the benefit of the corporation; c) the acts using human resource, fund, or corporate supports/facilities; d) acts committed by a third party at the request or order of the corporation or corporate officer; e) acts to carry out day-to-day corporate activities; f) acts benefiting the corporation; g) acts normally accepted by the corporation and h) corporation apparently accommodating the commission of crime.[108]

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[104] *Id*., pp. 7–8.

[105] *Id.*

[106] *Id*., p. 11. For comments on *Republic Indonesia v. PT KPSS (2013)*, see discussions in Section III.

[107] *Id*., p. 13.

[108] Attorney General Regulation of RI No. Per-028/A/JA/10/2014 on Guidelines for Handling Criminal Cases with Legal Subject of Corporation, Appendix, pp. 3–4.

In contrast, the guidelines also provide criteria for holding the corporate officers liable, namely: a) when corporate officers commit, participate, instruct, encourage, or assist the alleged crime; b) when they have control and authority to take steps to prevent the crime but do not exercise such control and authority, while realising a considerable degree of risk if the crime occurs; c) when they have knowledge concerning a high degree of probability that the crime will be committed by the corporation; and/or d) all other acts for which the officers could be held liable according to Indonesian law.[109]

In addition, the 2014 AGR determines several criteria to hold corporate officers liable. These are: a) any person who commits, participates, orders, advocates, or assists crime; b) any person who has control and authority to take measures to prevent crime, but does not take the necessary measures, and c) any person who has knowledge of substantial risks and is aware that a criminal offence will be committed by the corporation.[110] Furthermore, the 2014 AGR also provides the template of an indictment letter, namely Form 1 if the defendant is a corporation, Form 2 if the defendant is a corporate officer, and Form 3 if the defendants are both the corporation and its officers.

The distinction between corporate liability and liability of corporate officers, which is clarified in the 2014 AGR, demonstrates that the Attorney General has started to realize that the two types of liability are not the same. More importantly, if the Guideline is observed by the prosecutors, it is no longer possible to insist that a corporate officer be held liable and sentenced when the officer is not the defendant. Accordingly, a corporate liability can trigger personal liability of the corporate officers only if the officers are also the defendants and have played a particular role in the accused crime.

The 2014 Attorney General's Guideline clearly distinguishes between corporate criminal liability on the one hand and criminal liability of corporate officers on the other. Moreover, the Guideline also determines specific criteria (based on the guilt principle) to allocate liability to corporate officers and makes clear that corporate officers have to be officially indicted in order to have a penalty imposed on them by a court. This Guideline is therefore largely in line with theoretical starting points discussed above and with developments in

[109] Attorney General Regulation of RI No. Per-028/A/JA/10/2014 on Guidelines for Handling Criminal Cases with Legal Subject of Corporation, Appendix, p. 4.

[110] Attorney General Regulation of RI No. Per-028/A/JA/10/2014 on Guidelines for Handling Criminal Cases with Legal Subject of Corporation, Appendix, p. 5.

other countries. However, with the formulation of corporate liability according to the Draft Criminal Code, it is likely that these guidelines may not be implemented.

5.3 *Supreme Court's Guidance on the Implementation of Corporate Liability*

The interpretation of law enforcement related to crime and corporate liability can also be seen in the Supreme Court Regulation No. 13 of 2016 on the Case Handling Procedures for Corporate Crimes (hereinafter referred to as the "2016 SC Regulation"). Although its provisions are mainly about the procedural aspects of how to handle a case, the 2016 SC Regulation does make a distinction between corporate liability and the liability of corporate officers. The 2016 SC Regulation stipulates that "an examination of the Corporation as a suspect at the level of investigation is represented by the corporate officer".[111] This provision shows that the corporate officer is merely a representative of the corporation. The indictment remains aimed at the corporation.[112] A corporate officer representing the corporation can also be charged only if the officer is also a defendant. In this regard, the 2016 SC Regulation states that "[i]n the event that a corporation is filed as a suspect or defendant in the same case as the corporate officer, then the corporate officer representing the corporation is the corporate officer who is a suspect or defendant."[113] The 2016 SC Regulation also states that the summons and cross-examination of corporate officers who are suspects and/or defendants must be carried out in accordance with the Criminal Procedure Code ("KUHAP"). It is stipulated that an "Examination at the stage of investigation and prosecution of Corporations and/or Corporate Officers can be carried out individually or jointly."[114] Further, the 2016 SC Regulation provides that "a judge can impose a criminal penalty against a corporation or a corporate officer, or a corporation *and* a corporate officer."[115] This shows that the 2016 SC Regulation acknowledges that corporate officers who are representing the corporation during trials are not necessarily suspects or defendants. However, Art. 23, par. 2 states that criminal imposition "is based on

[111] The 2016 SC Regulation, Art. 11, par. 1.

[112] The 2016 SC Regulation, Art. 12.

[113] The 2016 SC Regulation, Art. 18.

[114] The 2016 SC Regulation, Art. 19, par. 1.

[115] The 2016 SC Regulation, Art. 23, par. 1.

each law that regulates criminal threats against Corporations and/or Administrators.“[116] Criminal imposition of both remains based on the relevant law, which, as discussed earlier, still uses the theory of individual vicarious liability.

5.4 *A New Threat: The Draft of a Criminal Code*

The Attorney General and Supreme Court guidelines are likely to be ignored, or amended, if the Draft Criminal Code is enacted in its current version. The Draft Criminal Code is an ongoing draft of Indonesia's criminal code that is intended to replace the old Dutch-Indie Criminal Code (*Wetboek van Strafrecht voor Nederlandsch-Indië*). The formulation of the Draft Criminal Code has been going on since 1964,[117] with the latest draft published on September 15, 2019.

According to Art. 46 of the Draft Criminal Code, a corporate crime is ''a criminal act conducted by officials who have functional positions in the organizational structure of a corporation or any person based on an employment relationship or other relationship, acting for and on behalf of the corporation or acting in the interest of the corporation, within the scope of business or corporate activities, either individually or jointly.''[118] The Elucidation of Art. 46 defines the term ''functional position'' as the person that ''has the authority to represent, authority to make decisions, and the authority to implement supervision on the corporation. Included in this meaning are the people in the position to order, participate, procure, or provided aid to the criminal act''.[119]

The definition of corporate crimes above indicates that the Draft Criminal Code seriously undermines the scope of implementation of corporate crimes and liability. From the definition, it follows that a corporate crime is a criminal act committed by only corporate officers, referred to as ''people who have a functional position''. Accordingly, it can be concluded that the Draft Criminal Code only

[116] The 2016 SC Regulation, Art. 23, par. 2.

[117] https://hukum.tempo.co/read/1057807/setengah-abad-lebih-melahirkan-rkuhp .

[118] Draft Criminal Code, Art.46. The Article reads as follows: ''*Tindak Pidana oleh Korporasi adalah Tindak Pidana yang dilakukan oleh pengurus yang mempunyai kedudukan fungsional dalam struktur organisasi Korporasi atau orang yang berdasarkan hubungan kerja atau berdasarkan hubungan lain yang bertindak untuk dan atas nama Korporasi atau bertindak demi kepentingan Korporasi, dalam lingkup usaha atau kegiatan Korporasi tersebut, baik secara sendiri-sendiri maupun secara bersama-sama*.''

[119] Draft Criminal Code, Elucidation of Art.46.

adopts the theory of identification as the rationale of establishing corporate liability.[120] Thus, according to the general definition of a corporate crime in the Draft Criminal Code, there is no corporate crime if the criminal acts are committed by employees, as suggested by corporate vicarious liability, or by the corporation itself, as suggested by the corporate organization model.

It is true that article 48 of the Draft Criminal Code also states that a corporate crime can be accounted for if the criminal act conducted " (a) is within the scope of the business or activity as stipulated under the articles of association or other provisions applicable to the corporation; (b) benefits the Corporation illegally; and (c) is accepted as a corporate policy."[121] In this way, the article also opens the possibility of holding a corporation liable according to both vicarious liability or the organization model. However, a careful reading of the elucidation of the article reveals that the Draft Criminal Code still requires the functional position, and hence the corporate officers, as the basis of liability. Since Art. 48 does not explain what it means by "Corporate Crime", one needs to look again to Art. 46 which pro-

[120] A clearer position or tendency of the drafters of the Draft Criminal Code toward identification theory can be found in General Elucidation, par. 5, which states that: "*...Dalam hal ini kesalahan korporasi diidentifikasikan dari kesalahan pengurus yang memiliki kedudukan fungsional (mempunyai kewenangan untuk mewakili korporasi, mengambil keputusan atas nama korporasi dan mempunyai kewenangan menerapkan pengawasan terhadap korporasi), yang melakukan tindak pidana dengan menguntungkan korporasi, baik sebagai pelaku, sebagai orang yang menyuruhlakukan, sebagai orang yang turut serta melakukan, sebagai penganjur maupun sebagai pembantu tindak pidana yang dilakukan bawahannya di dalam lingkup usaha atau pekerjaan korporasi tersebut, termasuk pengendali korporasi.*" [In this regard, the corporate's fault can be identified from the fault of corporate officers, namely those with functional position (having the authority to represent the corporation, take decisions on behalf of the corporation, and authority to control the corporation), which committed a crime benefitting the corporation, or involved in a crime as the perpetrator, as the person who did procure, order, or give aid to the crime committed by the employees within the scope of business or work of the corporation]. By deriving the corporate's fault from the fault of corporate officers, the Draft clearly understood corporate liability within the identification doctrine. The Draft failed to see the possibility of implementing corporate liability on the grounds of corporate vicarious liability or the organization model.

[121] The Draft Criminal Code, Art. 48, reads that: "*Tindak Pidana oleh Korporasi sebagaimana dimaksud dalam Pasal 46 dan Pasal 47 dapat dipertanggungjawabkan jika: a. perbuatan tersebut termasuk dalam lingkup usaha atau kegiatan sebagaimana ditentukan dalam anggaran dasar atau ketentuan lain yang berlaku bagi Korporasi; menguntungkan Korporasi secara melawan hukum; dan c. diterima sebagai kebijakan Korporasi.*"

vides a general definition of a corporate crime. Thus, even according to Art. 48, corporate crime is a criminal act committed by the corporate executives, which are those who have functional positions in corporations. Furthermore, when a corporation has committed a crime, the criminal sanction will not necessarily be on the corporation alone. The Draft Criminal Code clearly states in article 49 that ''[l]iability for corporate crime as referred to in Article 48 shall be imposed on the Corporation, officers with functional position, those who give orders, those who have control over the corporation, and/or beneficial owner of the Corporation.''[122] This article needs also to be read with the Elucidation of Article 48, which states that:[123]

> ''Regarding the position as the perpetrator of criminal acts and the nature of criminal liability from the corporation there are the following possibilities:
>
> a. In this provision ''the scope of business or activity'' includes business activities that are generally carried out by Corporations.
> b. corporation as the perpetrator of the criminal acts and corporate officer is the one who is liable; or
> c. corporation as the perpetrator of criminal acts and therefore is responsible.
>
> Therefore, if a criminal act is committed by and for a corporation, the prosecution can be carried out and the penalty can be imposed on the corporation itself, or the corporation and its officer, or the officer alone.''

The problem with the elucidation is with the second possibility, in which the corporation is proved to have conducted a criminal act but it is, nevertheless, the officer who will be liable for the crime. As explained earlier, the extreme version of such an interpretation has

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[122] The Draft Criminal Code, Art. 49, states ''*Tindak Pidana oleh Korporasi , pertanggungjawaban pidana dikenakan terhadap Korporasi dan/atau pengurusnya, pemberi perintah, atau pemegangkendali Korporasi*''.

[123] The Draft Criminal Code, Elucidation of Art. 48, reads: ''*Mengenai kedudukan sebagai pembuat tindak pidana dan sifat pertanggungjawaban pidana dari korporasi terdapat kemungkinan sebagai berikut:*

a. *Dalam ketentuan ini ''lingkup usaha atau kegiatan*'' termasuk juga kegiatan usaha yang pada umumnya dilakukan oleh Korporasi. *;*
b. *korporasi sebagai pelaku tindak pidana dan pengurus yang bertanggung jawab; atau*
c. *korporasi sebagai pelaku tindak pidana dan juga sebagai yang bertanggung jawab.''Oleh karena itu, jika suatu tindak pidana dilakukan oleh dan untuk suatu korporasi maka penuntutannya dapat dilakukan dan pidananya dapat dijatuhkan terhadap korporasi sendiri, atau korporasi dan pengurusnya, atau pengurusnya saja*.''

led the court to impose sentences on corporate officers although they were not the defendant of the case in question.

The view of the drafters of the Draft Criminal Code on criminal liability can be seen in the 2009 Academic Paper of the Draft Criminal Code (''2009 Academic Paper'') and the 2015 Academic Paper of the Draft Criminal Code (''2015 Academic Paper'').[124] Based on the 2009 Academic Paper and the 2015 Academic Paper, we can see how the drafters of the Draft Criminal Code recognize the identification theory and corporate vicarious liability to attribute criminal liability to the corporation.[125] However, we are unable to find reasons as to why the drafters of the Draft Criminal Code merely recognize these two theories.

Further, the Academic Paper fails to distinguish between corporate vicarious liability, in which a corporation is liable for criminal act conducted on behalf of the corporation, and individual vicarious liability, where the officer is liable for corporate crime. The absence of a clear distinction between the two leaves room for people to interpret that the Academic Paper acknowledges individual vicarious liability.

VI CONCLUDING REMARKS

This contribution focused on the theoretical foundations for criminal liability of the corporation and its officers. We argued that a clear distinction should be made between the liability of corporations on the one hand and the liability of corporate officers on the other, as each of those liabilities requires different elements to be proven. In this regard, the contribution discussed various theories related to corporate criminal liability, i.e. corporate vicarious liability, the identification theory, and theories of the corporation's fault. The article also discussed various theories concerning the liability of a corporation's officers.

Based on these theoretical foundations, the contribution analyzed corporate criminal liability for environmental pollution in Indonesia. In this respect, the contribution looked at the criminal provisions of various laws related to environmental protection, focusing mainly on

[124] Pursuant to Law on the Formulation of Laws and Regulations No. 12 of 2011, every proposed law should be accompanied by an academic paper. The paper is an official study explaining particular problems under the proposed law.

[125] The 2009 Academic Paper of the Draft Criminal Code, pp. 94–95; The 2015 Academic Paper of the Draft Criminal Code, pp. 34–35.

the 1999 Forestry Act, the 2009 Environmental Protection and Management Act, and the 2013 Laws against Illegal Logging. In addition, it analyzed the provisions on corporate liability in the latest version of the Draft of a Criminal Code. The contribution also discussed how these provisions have been translated in court rulings. The contribution observed that both statutory provisions and court rulings in Indonesia fail to make a clear distinction between liability for the corporation and its high-ranking officers. This failure has resulted in some rulings where a corporation was held liable although it was not a defendant, and directors were given prison sentences although they were not defendants. Hence, such a failure leads not only to illogical interpretations of corporate liability, but also to the violation of fundamental human rights, as one can be held criminally liable without having been charged or indicted.

It appears that the failure occurs because of the use of individual vicarious liability in Indonesia, where a high-ranking officer is liable for the conduct of their employees simply because of their position as a high-ranking officer. No evidence is required to prove their involvement in criminal conduct, nor their failure to exert power to prevent the criminal conduct and control the behaviour of the employees. The case of Indonesia is an interesting one as it provides an important lesson to both legislators and courts in developing (and developed) countries: the enforcement of environmental law is of crucial importance, but needs to take place with respect for the rule of law. Simply allocating liability to corporate officers without verifying their contribution in the crime committed by the corporation (or even without being charged) not only violates human rights, but is also not effective as it does not correctly allocate liability to individuals who could have prevented the environmental crime committed by the corporation. Precisely because allocating criminal liability is expected to generate positive incentive effects for the behaviour of the corporation, it is important to allocate that liability only to those individuals who could have affected the behaviour of the corporation.

The main message of our contribution is that the way Indonesian law deals with corporate criminal liability is not in-line, with either legal theory, or with established economic principles of allocating liability. Another problem is that Indonesian law has no specific rules concerning the liability of corporate officers. That is why corporate officers are simply being made liable in connection to the liability of the corporation itself which is, as we have explained, problematic. An important point that still has to be discussed is how the criminal

liability of the corporation can be carefully distinguished from the liability of its corporate officers. There is no legal provision in Indonesia that deals with the liability of corporate officers separately from the corporation. Hence, the precise conditions to hold corporate officers liable have also not been determined in Indonesian law. This is undoubtedly an important point which warrants further research.

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