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Working Paper

Corporate Liability in Natural Resources Sectors: A Review

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YAYASAN AURIGA NUSANTARA

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ABSTRACT

Specific to natural resources sectors, corporate crime is regulated under several laws relating to natural resources, including: (1) Law No. 32/2009 on Environmental Protection and Management (UU PPLH); (2) Law No. 39/2014 on Plantations; (3) Law No. 4/2009 on Mineral and Coal Mining; (4) Law No. 45/2009 on Fisheries; and (5) Law No. 19/2004 on Forestry. Considering the formulations of provisions in these five laws it is apparent they differ from each other in regulating corporations as subjects of offences in natural resource crime.

Inconsistencies in how these five sectoral natural resources laws position corporations as legal subjects impacts on their implementation by law enforcers. Therefore, it is necessary to reformulate provisions on corporate criminal liability. In regulating corporate liability in natural resources sectors in future, law reform can focus on uniformity in forms of corporate criminal liability in natural resources sectors, and their consistency with penal policy formulation concepts.

Key words: Criminal liability, corporation, natural resources

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I. Introduction

Indonesia is an archipelagic nation with abundant biotic and abiotic natural resources potential. It has a wide variety of mineral resources in terms of both quality and quantity. These mineral resources, including oil, gold, coal, silver, tin, etc., are extracted and used to increase human wellbeing. Natural resources constitute fundamental capital in national development and should therefore be used in the greatest interests of the people by considering the preservation of the surrounding environment.

However, in natural resources governance there are two major factors causing environmental degradation, i.e., natural events and human behavior. The destruction of nature can be defined as a process of deterioration or decline in the quality of the environment. This environmental deterioration has been marked by the loss of land, water and air resources, the extinction of wild flora and fauna, and the degradation of ecosystems. This destruction of nature impacts directly on human lives. In 2014, the United Nations High-Level Panel on Threats, Challenges and Change included environmental degradation as one of ten threats to humanity. The World Risk Report released by the German Alliance for Development Works (Alliance) and the United Nations University Institute for Environment and Human Security (UNU-EHS) did the same thing. Prior to that, in 2012, The Nature Conservancy (TNC) named environmental degradation as an important factor in determining how high the risk of natural disaster is in any given area.[1]

Examined further, disasters like flooding, abrasion, forest fires and landslides can very easily result from human interference, and such man-made degradation is actually greater than degradation resulting from natural disasters, considering it is continuous and on an upward trend. This degradation is generally caused by environmentally unfriendly human activities, such as forest destruction and changing forest land use, mining, air, water and soil pollution, etc.

Reading the natural resources governance issues above, reviewed from a legal perspective, the Constitution, as the highest source of law in Indonesia, does not explicitly regulate how natural resources should be utilized and managed, although it does have a fundamental provision relevant to this. Article 33 paragraph (3) of the 1945 constitution states, "The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people." Despite this article in the Constitution saying natural resources should be controlled by the State, there is no further explanation about what it means by "controlled". The constitution only says the State's control right is used for the greatest benefit of the people.

1 Buleleng District Environment Office, "Environmental Degradation and Its Causes," accessed on 25 August 2020, https://www.bulelengkab.go.id/detail/artikel/kerusakan-lingkungan-dan-penyebabnya-29

Both aspects described above are inextricable, as both are one entity that is systematic in nature.[2] The State's control right is instrumental in character based on the phrase "exploited to the greatest benefit of the people", which is the objective[3] originating from the overall nature of the Constitution. The word constitution itself means formation, and what is formed is the State. Therefore, constitution means the basis for all regulations on which to build the grand edifice named the State.[4]

Government, as the subject of State control rights, must be based on the authority it possesses and have the following essential functions

a. power, authority, and responsibility over the management, utilization and extraction of mineral and coal mining materials.

b. to carry out law enforcement efforts starting from reprimands, warnings, up to ordering cessation of all mining business activities (minerals and coal) that break rules and disregard principles of sustainable development.[5]

In carrying out these two essential functions, an absolute balance is never attained. Nevertheless, the expectation is to at least provide something more in the form of regulative policy, which can be followed by other corrective policies with the aim of correcting the imbalance.

In the context of South Kalimantan, which is one of Indonesia's abiotic natural resource-rich regions, mining operations are the main source of regional own-source revenue (PAD) in those districts with sufficient natural potential for mining activities. However, the province has one of the worst Environmental Quality Index values in Kalimantan. This is the result of poorly controlled mining operations.

Most mining operations do not have refuse management facilities, let alone community industries that extract coal independently. Poor refuse management results in environmental contamination. Coal mining activities leave mining refuse in the form of heavy metals, such as mercury, arsenic, nickel, manganese and other residues in mining pits. According to the Indonesian Forum for Environment (WALHI), 41 percent of the Meratus Forest and other forests in South Kalimantan are currently subject to mining licenses. Based on spatial data on karst ecosystems in South Kalimantan, karst ranges cover an area of 610,766 hectares, where 356,552 hectares are currently subject to mining licenses belonging to corporations.[6]

A corporation is an organized group of people and/or assets, either in the form of an incorporated or unincorporated legal entity. With the passing of Supreme Court Regulation No. 13/2016 on Procedures for Handling Corporate Crime (Supreme Court regulation on corporations), there is a strong foundation for ensnaring corporations that commit crimes. Article 4 of the Supreme Court regulation on corporations stipulates that corporations can be subject to criminal liability in accordance with corporate criminal provisions in laws regulating corporations. Whereas corporate crime is when a director uses a corporation or its infrastructure or assets to perpetrate a crime that benefits the

2 Abrar Saleng, *Mining Law,* UII Press, Yogyakarta, 2014, p. 22.

3 *Ibid*.

4 Anwar. C., *Constitutional Theory and Law*, Intrans Publishing, Second Edition, Malang, 2011, p. 58.

5 *Ibid.,* p. 67.

6 WE Online Editorial, "WALHI: Natural Resources Emergency in South Kalimantan," *Warta Ekonomi.co.id*, accessed on 25 August 2020, https://www.wartaekonomi.co.id/read174453/walhi-darurat-kerusakan-alam-di-kalsel.

corporation. Therefore, corporate crime leans more towards violations of the law committed by a corporation or its director(s) in the interests of the corporation.

Methodology

This paper uses a normative law research method with an interdisciplinary or "hybrid" approach between aspects of normative research with a sociological approach using qualitative analysis by analyzing legal materials both in depth and holistically.[7] This is to meet the need for a more detailed and meticulous explanation of more meaningful legal issues by comparing *law in books* with *law in action.*[8] The consequence of law research using a socio-legal paradigm as its main paradigm was combining normative juridical methods with qualitative sociological methods. First, this research analyzes several legal documents relating to corporate liability in natural resources management.

The legal materials collected were analyzed qualitatively by using descriptive analytical methods with legislative and conceptual approaches.[9] Analysis began by carrying out legal material reduction, in the form of selection, simplification, coding, organization, and updating of legal materials. After that, the collected legal materials were ordered in texts that were expanded, explained and then analyzed to draw conclusions.

7 David M. Fetterman, *Ethnography Step by Step*, London, Sage Publishing, 1998, p. 19.

8 *Ibid*., p. 175.

9 Winarno Surakhmad, *Bases and Research Techniques*, Tarsito, Bandung, 1978, p. 132.

II. Corporations as Natural Resource Managing Business Entities in Indonesia

A. Natural resources management in Indonesia

Indonesia being a welfare state can be evidenced through the Preamble and Body of the 1945 Constitution, where values in these two provisions are colored by and derived from living values within society. An opinion also exists that our concept of welfare is also colored by the result of adopting concepts from Western Europe.[10] In the early days of independence, Mohammad Yamin strived to explain this, saying:[11]

"The welfare of the people constituting the foundation and objective of the independent Indonesian state is essentially societal justice or social justice... this is the new welfare state..." It appears the difference between the new welfare state mentioned by Mohammad Yamin and the concept that exists in Western European countries is not so significant. "If it cannot be named, then it does not actually exist."[12]

Introducing another term for the welfare state in Indonesia, Max Boli Sabon called it a "development constitutional state". Sabon says it is inaccurate to classify the type of constitutional state in Indonesia referred to in the Preamble and Body of the 1945 Constitution as a welfare state because welfare states generally place more emphasis on the role of government to achieve a prosperous society.[13] This concept of welfare state seems to suggest that society can have a passive attitude without striving hard to actualize welfare; while government, on the other hand, is extremely busy preparing all kinds of community welfare services. Under the *gotong royong* or mutual cooperation embodied by Article 33 of the 1945 Constitution, both the government and the people must strive together to actualize societal welfare.

10 *Ibid*.

11 Mohammad Yamin, *1945 Constitution Preparatory Text: Volume 1*, 2nd Edition, Siguntang, 1971, p. 106.

12 Jonker Sihombing, *Op. cit.*, p. 97.

13 Max B. Sabon, *Kongruensi Hak Atas Pembangunan, Pasal 33 UUD 1945 dan Tipe Negara Hukum serta Implikasinya Terhadap Negara Hukum Materil, Tulisan Doktor Ilmu Hukum,* UNPAD Postgraduate Study Program, Bandung, 2006, p. 499-500.

National development activities based on principles of togetherness and kinship as laid out in Article 33 of the 1945 Constitution have a broad interpretation, where society cannot just leave efforts to achieve its welfare only in the hands of government. Law as a means for societal development or renewal does aim at regularity and order to avert chaos. However, every societal renewal accords with phases in societal development and will certainly lead to impacts, either positive or negative, with significant effects on the environment, morality, education, and so on, and necessitates regulation. In the specific context of natural resources governance, environmental degradation is an impact that arises from human exploitation. Licenses for coal utilization issued by the government are the legal administrative apparatus used by the government to control society so it can run in an orderly manner, so administrative devices are needed. One such device is organization.

In order for organization to run properly, it is necessary to assign tasks. The main connectors in assigning tasks are coordination and oversight.[14] The law plays a role in overseeing environmental impacts, hence the need for environmental impact analysis (*Amdal*) regulations. The law plays a role in overcoming forest degradation, so there are forestry regulations. The law plays a role in regulating land use, so there are spatial planning regulations. Similarly, the law plays a role in tenurial and other issues relating to the exploitation of natural resources.

B. Corporations as natural resource managing business entities

The definition of the word "*korporasi*" in Indonesia is the same as the definition of 'corporation" in the Anglo-American law model, which means a form of business organization owned by one or more shareholders, who do not have the right to manage the organization. Therefore, such business organizations are managed by boards of directors appointed by shareholders.[15] In the British Anglo-Saxon law model, the term "corporation" is commonly called "company". To secure status as a legal entity and to separate liability between their shareholders and directors, companies must be officially registered by law and/or legislation formulated by holders of legislative power.[16]

Based on etymology, the term "corporation" or "company" in the Anglo-Saxon system of Common Law can be translated into Dutch as *"corporatie"*. The term was translated into Indonesian as "*korporat*" or "*korporasi*". In criminal law, corporation is a term used for an incorporated or unincorporated "business entity" or "company".[17] In the continental European legal system, the term "corporation" can be called a "group of people".

In a corporation, invested parties are the members of the corporation, where members have powers laid out in statutes

14 Juniarso Ridwan *et al.*, *Spatial Law*, Nuansa, First Edition, Bandung, 2018, p. 107.

15 Tony McAdam, Cs. *Law, Business and Society,* Mc. Graw-Hill Irwin, New York, 2017, p. 785.

16 Walter Woon, *Basic Business Law in Singapore,* National University of Singapore, Prentice Hall, Singapore, 1995, p. 179.

17 Article 1 letter (b) of Law No. 3/1982 on Compulsory Company Registration stipulates that a company is any form of business that runs any kind of permanent and continuous enterprise, and is established, works and is domiciled in the territory of the Indonesian State, for the purposes of obtaining benefit and/or profit.

through member meetings as the highest control apparatus in corporate regulation. A corporation as a group of people is a legal entity (*rechtspersoon*), in same way as a state, an autonomous region, or a foundation. During the Dutch East Indies Administration, trade law experts laid out the following characteristics or criteria for a corporation as a legal entity:[18]

1. A corporation had assets or riches separate from the assets of individuals who became its members;
2. A corporation had interests that were not individual interests, but the interests of a unitary group of people;
3. A corporation was recognized and needed by the local community and/or recognized by law. As examples, *Staatsblad* (Stbd) 1870-64 regulated associations in a narrow sense (neither limited liability company nor cooperative) as legal entities (*rechtspersoonlijheid van vereenigingen*) if their statutes (*statuten*) were approved by government, while Stbd. 1939-570 *in conjunction with* 717 on "Native Associations" (*Inlandsche Vereeniging*) regulated associations that deviated from customary law but were necessary for social needs and the public interest. Under this regulation, to be approved as a legal entity, a native association had to be registered in the local district court.

A corporation, as a legal entity in Indonesia, is a business entity that by law has the legal authority or the same rights and responsibilities a person has as a legal subject with separate rights, responsibilities, and assets to its members or shareholders. Such corporations as legal entities have their own assets, and those assets are managed by the people who constitute its organs to generate added value for the corporation.

In the *Burgerlijk Wetboek voor Indonesie* (BW) or Indonesian Civil Code (KUHP) and Commercial Code (KUHD), corporations in forms other than legal entities are known by the term "civil alliances" comprising *maatschap* and "company", i.e., limited partnerships (*commanditaire vennootschap* or CV) and firms (*vennootschap onder firma*, VOF or Fa).[19] Meanwhile, legal entity corporations include nominee companies (*naamlooze vennootschap* or NV), now known as *perseroan terbatas* or limited liability companies, which were originally regulated under twenty articles (articles 36 to 56 of the KUHD), and later under Law No. 1/1995 on Limited Liability Companies (129 articles), which was replaced most recently by Law No. 40/2007 on Limited Liability Companies (161 articles).

18 Wiryono Prodjodikoro, *Hukum Perkumpulan Perseroan dan Koperasi di Indonesia,* Dian Rakyat, Jakarta, 1985, p. 8

19 Articles 1,653 to 1,665 of the Indonesian Civil Code and Articles 16 to 35 of the Commercial Code.

III. Corporate Criminal Liability in Various Natural Resources Laws

A. Criminal liability of a corporation

Sutan Remy Sjahdeini stated that when a crime perpetrated or ordered to be perpetrated by another person is an *ultra vires* act, i.e., does not accord with the purpose and aims of the corporation laid out in its statutes, then the corporation cannot be subject to criminal liability. Liability for *ultra vires* acts must be borne by the corporation personnel alone who perpetrates or orders another person to perpetrate the act.[20]

Adhering to the principles of good intention and Good Corporate Governance (GCG) in the Limited Liability Company Law shuts down the opportunity for the organs of a company (shareholder general meetings, directors, company commissioners) to use the *ultra vires* doctrine when a company director or employee breaks the law. The rationale is that all organs of a limited liability company in conducting their activities must be guided by GCG. Consequently, any mistake or negligence by directors in running company GCG is a business risk and legal risk that must be borne by the company itself. Therefore, there is no legal justification for a limited liability company to release itself from a third-party lawsuit on the pretense that corporate directors have overstepped their authority and/or deviated from corporate objectives.

Based on civil law concepts, a corporate entity, in addition to having a *legal personality* where it can own its own wealth, also has rights and responsibilities like a person does. A corporation can commit acts under the law and contribute to State revenues through taxes; a corporation also has "common sense and a conscience", which are personified by provisions in laws on participating in environmental and social activities for the benefit of communities and the State (*corporate social responsibility*), as stipulated under Article 74 of the Law on Limited Liability Companies and Article 2 of the Law on State-Owned Enterprises. There is "common sense and conscience" for directors and governors afforded authority by shareholders to practice the corporation's rights and responsibilities. Therefore, a corporation's directors and governors are its "common sense and conscience".

20 Sutan Remy Sjahdeini, *Corporate Criminal Liability*, PT Grafiti Pers, Jakarta, 2006, p. 120.

Based on this, it is apparent that for a corporate legal entity, the form of corporation recognized by legislation is the "body" corporate. Whereas directors and directors are its physical and spiritual organs, which can be called the "body, common sense, and consciousness" of the corporation.

In the past, many criminal law experts embraced the principle "corporations cannot commit crime" (*societas non potest delinquere*),[21] using the legal reasoning that corporations do not have the same "physique, soul and guilt feelings as humans", which constitute the elements of culpability. A corporation is a legal construct, a personification of human common sense, just like a man-made "mechanical robot" where its whole system can only move according to the wishes of a human as its controller.

The analogy of a corporation being like a "mechanical robot", and the argument that "corporations cannot commit a crime" were unacceptable to Hans Kelsen, who considered the concept "*mens rea*" or intention to not be without exception.[22] In the author's observation, it appears Hans Kelsen wanted to question whether corporations could be subject to bodily punishment, and how that would be implemented. "Would imposing fines on a corporation not basically be the same as imposing sanctions within the realm of civil law?"[23]

J.M. van Bemmelen had the view that a corporation is not a subject of criminal law. His reasoning was as follows:[24]

1. In connection to a crime, issues of intent and fault only apply to a person;

2. That material behavior constituting a condition in criminal punishment for certain offenses can only be carried out by a person (theft, assault, etc.);

3. That crimes and actions in the form of deprivation of a person's freedom cannot be charged to a corporation;

4. That charges and criminal punishment of a corporation might automatically befall innocent persons;

5. That in practice it is not easy to determine on which basis norms can be decided, whether it is just a director or the corporation itself, or whether both should be prosecuted and sentenced.

According to Barda Nawawi Arief, problems with criminal liability for a legal entity will arise because the Limited Liability Company Law does not contain the following provisions:

1 When or in what way a legal entity can be said to have committed a crime;

2. Who criminal liability should be charged to; whether it should be a director/ leader of the legal entity, a person carrying out an order, the legal entity, or all three."[25]

Roeslan Saleh was of the opinion that a corporation can be the subject of criminal law, with the following justifications:

21 Hans Kelsen, *Teori Umum Tentang Hukum and Negara*, translated from *General Theory of Law and State*, translator: Raisul Muttaqien, Nusamedia & Nuansa, Bandung, 2006, p. 151.

22 *Ibid*.

23 *Ibid*., p. 152.

24 J.M. van Bemmelen, *Hukum Pidana I: Hukum Pidana Material Bagian Umum,* Binaci Perseroana, Bandung, 1987, p. 233.

25 Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan,* Kencana Prenada Media Group, Jakarta, 2007, p. 126.

1. Punishment of only a director is insufficient for suppressing offences perpetrated by or with a corporation. Consequently, it is also necessary to have the possibility of punishing a corporation, a corporation and director, or just a director.

2. Corporations play an increasingly important role in social and economic life.

3. Criminal law must serve a function in society to protect the community and enforce societal norms and provisions. If the emphasis of criminal law is only on individuals, applicable only to people, then that aim is ineffective. Therefore, there is no justification for suppressing and opposing punishment for corporations.

4. The sentencing of a corporation on criminal charges is one way to avoid legal proceedings against its officers. [26]

The inspirational ideas of Roeslan Saleh regarding the necessity for corporations to be able to be charged with criminal liability seems to be based on the perspective that criminal law can be an instrument or a means for social engineering, and community economies in Indonesia. In this regard it is apparent that Roeslan Saleh, in the same way as Mochtar Kusumaatmadja,[27] wanted criminal law to also constitute an essential instrument for progress in society and hoped it could play a role in and contribute to socioeconomic development in Indonesian society.

Romli Atmasasmita stated that rapid developments in contemporary national and international or global economies necessitate legislation that not only regulates corporations, but also prevents and punishes behavior by stakeholders that deviate, damaging stakeholders and governments with good intentions associated with the business activities of the corporation. To do so, legislation in economic activity sectors should include provisions on administrative sanctions, civil sanctions, and criminal provisions.[28]

Therefore, based on legal reasoning, all corporate activities that break laws in the fields of economics and/or natural resources management should be subject to punishment. Sanctions or criminal punishment against a corporation are "administrative sanctions" that can take the form of administrative fines, compensatory fines, and temporary or permanent revocation of a corporation's license to exist or conduct particular activities as a legal entity by the government as regulator and holder of authority. In this paper the author subscribes to the legal thinking that sanctions in the form of administrative fines, compensatory fines, and temporary or permanent license revocation stopping a corporation engaging in trading are actually "sanctions that take the form of criminal punishment against a corporation".

Another civil sanction; cancellation of contracts and the resulting legal consequences can only be proposed by stakeholders who feel harmed by a corporation, director, owner and/or shareholder of the corporation by filing a civil lawsuit in the courts, based on Article 1,365 of *Burgerlijk Wetboek voor Indonesie*.[29]

26 Roeslan Saleh, *Beberapa Asas Hukum Pidana Dalam Perspektif,* Aksara Baru, Jakarta, 2003, p. 11.

27 *Ibid.,* p. 33.

28 Romli Atmasasmita, *An Introduction to Corporate Criminal Law,* Prenada Mulia, Jakarta, 2003, p. 2.

29 Article 1,365 of the Indonesian Civil Code states that for any

Corporate criminal liability, is divided into several forms: where a director of a corporation is the perpetrator, the director is liable; where a corporation is the perpetrator, a director is liable; where the corporation is the perpetrator, the corporation is liable; and where the corporation and director are perpetrators, the corporation and director are liable.

On a practical level, establishing corporate liability is difficult for law enforcement authorities. In charging corporate liability, law enforcers need to consider whether a corporation, in conducting its business, has failed to carry out its duties and responsibilities; whether the corporation has committed a public disturbance; and whether criminal punishment will achieve the aims of criminal law, as well as the socioeconomic inefficiency resulting from the application of corporate criminal liability?

When a corporate crime becomes *ultra vires* and constrains progress in criminal law, there is always debate over whether *mens rea* is necessary, and imposition of obligation becomes the target of identification for corporations committing crime. This means *mens rea* and *actus reus* elements must arise from the perpetrator of a crime, and the perpetrator must constitute a *directing mind* or the brain or controller of officers of the corporation. Forcing criminal liability on a corporation must be individualistic, meaning the company if and only if a violation can be linked to a controlling officer and not the other way around. This provision originates from the *principle of attribution* or *identification*. This concept contains a weakness, namely: how can you identify the existence of individual *mens rea* when fault is met collectively or cumulatively by perpetrators, or when a perpetrator is not an individual who operates as a directing mind in a company?

Corporate criminal liability referencing the concept of vicarious liability occurs with the actions of an officer of a corporation. An officer committing an act must be an individual who acts within the sphere of their work, acts at least in part to benefit the corporation, and acts with deeds and intention that can be accountable to the corporation. A corporation is liable for the actions of its employees even when it explicitly prohibits such actions. Therefore, a company is obligated to monitor the actions of its employees.

A corporation is criminally liable for the conduct of its employees, in that there is an obligation to conduct either direct or indirect prevention as provided by laws, or there is tolerance for directors or senior officials who act on behalf of the corporation in the scope of their duties. However, if such conduct harms the corporation or is a violation of responsibilities established by the corporation, then the corporation can proffer legal justification that eliminates the element of culpability.

Supreme Court Regulation No. 13/2016 on Procedures for Handling Cases of Corporate Crime states that a corporation can be charged with criminal liability in accordance with corporate crime provisions in laws that regulate corporations, and can be deemed guilty when:

1. A corporation secures profits or benefits from a crime committed in the interests of the corporation;
2. A corporation allows the commission of a crime; or
3. A corporation fails to take the necessary steps to prevent, prevent greater impacts

illegal act which causes damage to another party, the party committing the act shall be obligated to compensate for losses incurred.

or ensure compliance with applicable legal provisions to forestall the incidence of crime.

A question that frequently arises is: who becomes liable in the event of a corporate crime? Supreme Court Regulation No. 13/2016 stipulates that a corporation or director, or corporation and director can be charged (Article 23). Nevertheless, it does not preclude the possibility of a sentence being imposed on another perpetrator who, based on legal provisions, is proved to be involved in the crime. Sentencing can take the form of a primary sentence and additional sentence. A primary sentence against a corporation is a fine, whereas an additional sentence can take the form of compensation or restitution to parties harmed by the crime. All sentences are carried out in accordance with provisions in applicable laws.

In the theory of identification and theory of corporate organs, one theory says the actions and awareness of a limited liability company's functionaries are identical to those of the limited liability company itself. Therefore, all functionaries are the brains and hands of the company. This gives rise to the question: Which functionary officers are considered the brains and hands of a corporation? According to Article 1 number 2 of Law No. 40/2007 on Limited Liability Companies (the Limited Liability Company Law), organs of limited liability companies are shareholder general meetings, directors, and boards of commissioners. According to Article 2 number 5 *in conjunction with* Article 98 paragraph (1) of the Limited Liability Company Law, organs with the authority to represent a limited liability company internally and externally are directors, so directors function as proxies by law to represent the company.

According to the theory of organs, a limited liability company is organized and represented by its directors. A director of a limited liability company is identical to their company as per the theory of identification. Directors are positioned as limited liability company organs that can be identical to the company itself. So, if a director of a limited liability company has *mens rea* (culpability), then that *mens rea* can be considered the *mens rea* of their corporation. In this case, the corporation can be charged with criminal liability.

In what way does a corporation commit a crime against another corporation? Generally, a corporation's standing is understood to be closely tied to economic and business aspects. Accordingly, a deviation from a corporation's economic and business behavior committed by a director and their supervisor which results in a misdemeanor or crime in violation of provisions in laws should be able to be subject to criminal punishment in the form of a fine and compensation as an economic and business legal risk for the corporation.

When a corporation commits a criminal act against another corporation, the perpetrator's actions should be considered case by case (casuistry) according to the specific nature of the crime(s) which can be functional and more administrative in nature, or non-functional and more physical. It is also necessary to realize or consider that the actions of an individual can be charged to a corporation, if those actions are reflected in social traffic as corporate actions:

1. When the nature and purpose of regulation already shows indications, for the final substantiation of the perpetrator, in addition to whether the action accords with the objectives of a corporation's statutes and bylaws and/or corporate policy, in terms

of the action or deed according with the scope of a job from a corporation;

2. Prohibited acts in a framework of carrying out duties and/or achieving a corporation's objectives the responsibility for which is charged to the corporation;

3. Actions of a corporation director are deemed the actions of a business entity itself in terms of the director of the business entity having authority or power to determine whether an action is carried out or not, and the action must constitute a part of actions that are accepted in reality or typically accepted by the corporation;

4. Corporate intent occurs in terms of the intention being covered by corporate politics or objectives or exists in tangible activities of the corporation. Corporate intent can also arise in terms of individual intent *(natuurlijk persoon)* carried out on behalf of a corporation;

5. Intent of an organ of a corporation can be accounted for by law. In certain instances, intent from a subordinate, even from a third party can incur corporate intent. This means, not only intentional acts of corporate functionary leaders can be attributed to a corporation, but also the actions of lower-level employees;

6. Criminal liability also depends on the internal organization of a corporation and how its responsibilities are divided. The same applies to omission;

7. Shared knowledge from a majority of directors or directors of a corporation can be deemed to be corporate intent, even down to recklessness or *opzet bij mogelijkheidsbewustzijn* or *dolus eventualis*.

Individual criminal liability for directors over a violation perpetrated by a corporation without the need to substantiate whether the director has fulfilled the mental element (for instance, knowledge, intent, or negligence) of the violation - Supreme Court Regulation No. 13/2016 regulates criminal punishment for corporations from fines to shutting down the corporation. In addition, other important substance regulated in this Supreme Court Regulation include legal formulations and criteria on corporations that commit crimes.

Article 3 of Supreme Court Regulation 13/2016 explains that a corporate criminal offense is defined as a criminal act perpetrated by a person or persons based on a work relationship, or based on another relationship, either individually or collectively, acting for or on behalf of a corporation within or outside the corporation workplace. Whereas, Article 23 paragraph 1 and paragraph 3 of Supreme Court Regulation No. 13/2016 stipulate:

> *"(1) A judge may impose a sentence on a corporation or director, or corporation and director;*
>
> *(3) The imposition of a sentence on a corporation and/or director as referred to in paragraph 1 does not preclude the possibility of a sentence being imposed on another perpetrator who, based on legal provisions, is proved to be involved in the crime."*

Based on the above provisions, we may conclude that subjects of law that can be charged with criminal liability are: (1) a corporation or director; (2) a corporation and director; or (3) another party proved to be involved in a corporate crime. In its burden of proof, this Supreme Court Regulation still references the system for burden of proof provided under the Criminal Code (KUHAP) and

specific procedural law regulated under other legislation. Further, this Supreme Court regulation also provides a guideline to judges in deciding that a judge, on the basis of existing evidence, can impose punishment on either a corporation or director, or directly on both a corporation and corporate director.

Article 1 number 10 of Supreme Court Regulation No. 13/2016 explains that: "A Director is an organ of a corporation who runs corporate management in accordance with statutes or laws, with authority to represent the corporation, including those who do not have decision-making authority, but in reality, can control or participate in influencing corporate policy or participate in making decisions in a corporation that can qualify as criminal acts."

Therefore, to determine whether a director can be charged with criminal liability over a corporate crime, it is necessary to look at the extent of the director's involvement in the crime committed by the corporation, reflected in the existence of intention (*mens rea*) and a criminal act (*actus reus*) committed by the director or commissioner in question.

Then, Article 92 paragraph (1) of the Limited Liability Company Law stipulates that "Directors run this management according to policies deemed appropriate, in limitations determined in the Limited Liability Company Law and/or statutes". From these provisions we may conclude that directors in a limited liability company have 2 (two) functions, namely management and representation.

When directors, in carrying out management, do so not in the interests of the limited liability company and not according to its purposes and objectives, then the directors' actions are *ultra vires* acts, and those *ultra vires* acts do not bind the company, but bind individual directors.

B. Criminal liability for natural resources corporations in laws relating to natural resources

As different pieces of legislation regulate corporate crime in natural resources differently, law enforcement uses the following theories/doctrines on corporate criminal liability systems:

1. Strict liability
   According to this doctrine, when a corporation perpetrates an action in violation of something formulated in a piece of legislation, then it can be held liable for is actions without the necessity to prove whether the corporation fulfils the culpability (intention/negligence) element.

2. Vicarious liability
   According to this doctrine, if an agent or employee of a corporation commits a crime within the scope of their work and with the intention of benefitting the corporation, then criminal liability can be charged to the company. Whether the company has profited, or whether the action is prohibited by the company are immaterial.

3. Identification doctrine
   According to this doctrine, if a person holding a senior position in the corporate structure or able to represent the corporation commits a crime in their field of work, then that person's action and intention can be attributed to the corporation. The corporation can be identified with the action and be held directly liable.

4. Aggregation doctrine
   According to this approach, a crime is not perpetrated with the knowledge of

or committed by only one individual. Therefore, it is necessary to assemble all relevant acts and intentions from people within the corporation to ensure their actions constitute one crime as if the action and intention is that of an individual.

5. Reactive corporate fault
   According to this approach, for an action constituting a criminal offence committed by or on behalf of a corporation, the court shall be afforded the authority to order the corporation to conduct its own investigation to determine who is responsible, take appropriate disciplinary action, and take steps to ensure the fault is not repeated. If the corporation takes the appropriate steps, then no criminal liability can be imposed on it.

   Criminal liability can only be imposed on a corporation if it fails to carry out the order of the court in earnest. Consequently, corporate culpability does not apply to the time the crime is committed, but to a corporation's failure to take appropriate measures over a fault committed by its employee(s).

6. Management failure model
   According to this approach, a corporation commits manslaughter when a fault of management or the corporation results in a person's death and the failure constitutes behavior beyond that rationally expected of the corporation. Such crimes are defined by referring to management failure (as opposed to corporate failure).

7. Corporate mens rea doctrine
   It has already been proffered that a company alone cannot commit a crime as it cannot think or have intent. Only people within a company can commit a crime. However, people can accept that all ideas on the personality of corporations are fiction but are made well and are extremely useful. Based on this view, a corporation can be believed to be an agent that commits fault acting through its staff and workers, where its *mens rea* can be found in corporate practice and policy. It is important to stress that both recklessness and intention can be found in policies, operational procedures, and weak corporate preventative measures.

8. Specific corporate offences
   In this regard, problems relating to confirmation of corporate culpability, such as proving intention or recklessness, can be overcome by making specific definitions that can only be applied to corporations.

Even though there may not always be criminal liability if a criminal offence is committed, when talking about criminal offences and criminal liability, these two variables are inextricable. The same applies when discussing corporate criminal liability, where it cannot be extricated from corporate crime.

For natural resources sectors, corporate crime is already regulated under several laws relevant to natural resources:

1) Law No. 32/2009 on Environmental Protection and Management (UU PPLH)
2) Law No. 39/2014 on Plantations
3) Law No. 4/2009 on Mineral and Coal Mining
4) Law No. 45/2009 on Fisheries

5) Law No. 19/2004 on Forestry.

Considering the formulations of norms in the five laws above it is apparent there are differences in how they regulate the issue of corporations as subjects of offences in natural resource crime. For instance, in Article 78 paragraph (14) of Law No. 41/1999 *in conjunction with* Law No. 19/2004 on Forestry, which stipulates that when a crime is committed by and/or on behalf of a legal entity/business entity, criminal charges or sanctions are imposed on its director(s). The same thing applies under Article 101 of Law No. 45/2009 on Fisheries, where if a crime is committed by a corporation, criminal charges or sanctions are imposed on its director(s). So, the Forestry Law and the Fisheries Law have the same concept in formulating corporations as subjects of offences.

A different provision on the position of corporations as subjects of offences can be seen in Article 113 of the Plantations Law, which stipulates that crimes committed by corporations are subject to additional fines of one third of the original fine amount. Meanwhile, Article 116 paragraph (1) of the Environment Law has its own character in formulating corporate criminal liability. When an environmental crime is committed by or on behalf of a business entity, criminal charges are imposed on the business entity and/or person who gave the order to commit the crime in question. In tune with the Environment Law, Article 163 of the Mineral and Coal Law stipulates that in the event of a crime committed by a legal entity, in addition to fines and prison terms for the director(s), fines are also imposed on the legal entity.

Each of the above laws has its own formulation in regulating corporations as subjects of offences. *First*, the fisheries and forestry laws have the same formulations whereby if a corporation is a perpetrator, then its directors are liable and can be punished. *Second*, the Plantations Law has its own formulation whereby if a corporation is a perpetrator, then the corporation can be punished or held liable. *Third*, the Environment Law adds that if a corporation is a perpetrator, then the corporation and the person giving the order can be punished. *Fourth*, the Mineral and Coal Law contains a simpler formulation whereby if a corporation is a perpetrator, then the director(s) and corporation are punished.

Considering the formulations of the above laws, it is apparent there are inconsistencies in how they position corporations. This phenomenon impacts on implementation by law enforcement authorities. Therefore, it is necessary to reformulate the regulation of corporate criminal liability through penal policy.

IV. Conclusion

Corporate crime is crime committed by a person or persons based on a work relationship, or based on another relationship, either individually or collectively, acting for or on behalf of a corporation within or outside the corporation workplace. However, in natural resources crime, regulation differs from one law to the next in regard to corporations as subjects of offences. The Fisheries Law and the Forestry Law have the same formulation where if a corporation is the perpetrator, then the director is liable and can be charged. Whereas the Plantations Law stipulates that if a corporation is the perpetrator, then the corporation is charged or is liable.

The Environment Law adds that if a corporation is a perpetrator, then the corporation and the person giving the order can be punished. Meanwhile, the Mineral and Coal Law contains a simpler formulation whereby if a corporation is a perpetrator, then the director(s) and corporation are punished. Criminal liability can be sought for acts that violate provisions in laws and criminal sanctions can be imposed on perpetrators. Criminal liability can be imposed on a corporation due to a corporate crime. In regulating corporate liability in natural resources sectors, law reform can focus on uniformity in forms of corporate criminal liability in natural resources sectors, and their consistency with penal policy formulation concepts.

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