

THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY IN INDONESIA: CORRUPTION CASE

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I. INTRODUCTION

Corruption is recognized as a world phenomenon where its existence follows the history of human kind.¹ There is no primordial indigenous culture without corruption; there is no system (from that of the USA to that of Japan) which is free from vast areas of corruption; there is no center of government (from the prairies of America to the communist collectivization) which has not been vitiated or distorted by corruption; there is no religion (eastern, Judeo-Christian or Islamic) which has not had to confront evils connected to corruption; there is no empire (be it Persian, Roman, British or Soviet) which has not experienced and has not been damaged by corruption.

Corruption is a serious phenomenon in Indonesia. Corruption used to be defined as “the use of public power for private profit, in a way that constitutes a violation of the law. This covers the case not only of an official who receives bribes either to act or not to act, but also of the one who takes none, but uses his offices to enrich himself illegally”. The term of private is to be understood as not limited to the official, but also including a group or class with which he identifies, while profit should be taken to cover all forms of advantage or benefit, not merely financial.²

It is an undeniable fact that corruption has been widespread over all dimensions of life in the nation. However, the most worrisome fact is that corruption does not originate from people at the lower social level, who may need more income to meet their living needs, but, on the contrary, it originates at first from the elites.

Law enforcement frequently deals with corruption, and prosecutors routinely send the offender to jail, but the assets which are the result of the crime or a predicate to crime, are not identified and traced properly. Sending people to jail has become mainstream in the work of the criminal justice system. Of course, the fact that the proceeds of the crime are often not recovered is worrisome. So we need a paradigm shift.

In dealing with the effort to confiscate these assets, corporate criminal liability is important.

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¹ Adolfo Beria, “Global Strategies Against Corruption”, in *Responding for Corruption: Social Defence, Corruption, and the Protection of Public Administration and the Independence of Justice*, updated documents on the XIII International Congress on Social Defence, Lecce Italy, 1996, edited by Paolo Bernasconi, 2000, page 23.

² Leslie Palmer, *The Control of Bureaucratic Corruption, Case Study in Asia*, Allied Publishers Private Limited, New Delhi Bombay Calcutta Madras Bangalore Hyderabad Ahmedabad, 1985, page 1.

II. CORPORATE CRIMINAL LIABILITY UNDER THE ANTI-CORRUPTION LAW

For a long time, Indonesia has had regulations establishing corporate criminal responsibility, such as those founded on tax fraud, economic fraud, banking fraud, etc., including in corruption matters. However, implementation has not been done effectively.

Under Law No. 31 Year 1999 regarding the Eradication of the Criminal Act of Corruption, as amended by Law No. 20 Year 2001 (the Anti-Corruption Law), a company and/or individual directors may be exposed to potential criminal charges for corruption.

Articles 2, 3 and 5 through 16 of the Anti-Corruption Law delineate the perpetrator of a criminal act of corruption with the phrase *setiap orang* (any person). *Orang* (person) itself is defined under Article 1, point 3 of the Anti-Corruption Law to include a company. Pursuant to Article 1, point 1 of the Anti-Corruption Law, a company is a group of persons and/or assets organized either as a legal entity or as a non-legal entity. Therefore, any person, which includes a company committing a criminal act of corruption under one of the foregoing provisions of the Corruption Law may be punished with criminal sanctions.

The liability of a company for criminal acts under The Anti-Corruption Law is specifically enshrined in Article 20 of the law, which, in the relevant part, reads as follows:

1. If a criminal act of corruption is committed by or in the name of a company, the criminal charges and verdict may be made against the company and/or its officers.
2. Criminal acts of corruption are committed by the company if such criminal acts are committed by persons based on an employment relationship or other relationship, acting in the corporate scope, whether alone or in concert.

Despite the clear language of the Anti-Corruption Law, there are very few cases in which the Indonesian courts have subjected a company to criminal liability for corruption.

Thus, while the anti-corruption law permits the bringing of charges against a company, the fact remains that law enforcement agencies have been reluctant to invoke its provisions against companies as opposed to individuals.

A. Strengthening Measures

1. Capacity Building

Prosecutors, investigators from the AGO, National Police and also investigators from the KPK have undergone a comprehensive training programme to enhance their knowledge and capacities to address corporate corruption in Indonesia. The training came on the back of a landmark legal development that strengthened legal mechanisms to investigate and prosecute corporate corruption offences.

2. Providing Guidelines

We realized that we already have regulations for corporate criminal liability based on Law No. 31 Year 1999 regarding Eradication of the Criminal Act of Corruption, as amended by Law No. 20 Year 2001, but the regulation lacks complete detail, which is why we need guidelines.

In December 2016, the Supreme Court of Indonesia issued a set of regulations (the Supreme Court Regulations No. 13 Year 2016), which addressed legal ambiguities that were impeding prosecutors and investigators from pursuing corporations for committing criminal offences, including corruption. Particularly this regulation makes criminal procedure in corruption cases more efficient, and guides prosecutors and law enforcement in the handling of corruption cases.

The important provisions found in the SCR are:

(a) Group and Successor Liability

The SCR apply to any type of corporation, whether it is in the form of a limited liability company or a partnership. The SCR do not differentiate between local and foreign corporations. Given the broad definition of corporation and the non-differentiation of local and foreign corporation.

The SCR define the corporate criminal offence as a criminal act done by any person who, based on an employment relationship or other relationship, acts whether alone or with others, for and on behalf of the corporation within or outside the corporation business environment.

Criminal liability is not only limited to corporations, but can also be applied to a group of corporations.

(b) The Requirement for Corporation Liability

There are 3 (three) requirements to hold a corporation liable for a criminal offence: (1) the corporation might receive profit or benefit from the criminal act, or the criminal act was done on behalf of the corporation; (2) the corporation let the criminal act be performed; (3) the corporation failed to take necessary steps to prevent the criminal act, to prevent a greater impact, and failed to ensure compliance with applicable laws in order to prevent a criminal act; (4) during the investigation of a suspected corporation, the corporation will be represented by a member of the Board of Directors. Summonses or subpoenas will be addressed and delivered to the address of the corporation's seat or where the corporation operates.

The SCR adopts a broad interpretation of management, as it is defined not only to include people having the authority to manage or represent a corporation, but also those that have control over or who can influence a corporation's policies or decisions. This means that management is not only limited to members of the board of directors of the corporation being prosecuted.

(c) The Punishment for Corporations

The SCR also provide that sanctions can be imposed on the corporation, management or both. The punishment could be basic and additional punishment. The basic punishment imposed on a liable corporation is to fine the corporation. Thus, the corporation is not sentenced to imprisonment or light imprisonment. Additional punishment can include seizure of evidence or the corporation's assets or an order to pay compensation or restitution.

If a fine is sanctioned against a corporation and it fails to pay, the prosecutor's office can confiscate the assets of the corporation to be auctioned off. However, if a fine is sanctioned against a member of the management and he or she fails to pay, he or she will be put in confinement.

III. BEST PRACTICES

A. The First Corporation Corruption Case, PT GJW (AGO cases)

PT GJW entered into a contract with the Banjarmasin City Government for the development of Antasari Sentra Market for a period from 1998 to 2008. Under the contract, the PT GJW is obliged to pay a replacement levy of IDR250,000,000 per annum, repay the Antasari Central Market Credit amounting to IDR3,750,000,000, and build Antasari Central Market within a 24-month deadline. The development project included 3,459 kiosks / stalls built over a 25,171 sqm area. On 15 August 2000, an addendum of the contract was made:

- a. The PT GJW paid IDR250,000,000 per year for the replacement levy subsidy;
- b. The number of units built was increased to 5,145 units over an area of 34,992.36 sqm;
- c. Units would be sold to merchants under a 25-year lease, which for 25 years is a lease-free period;
- d. For 25 years as a replacement subsidy, the PT GJW paid IDR2,500,000,000 in compensation, and if the department store is not rented, then the compensation is only IDR2,000,000,000.

Until December 2002 the construction of Antasari Sentra Market had not been completed so the Mayor of Banjarmasin extended the deadline until February 10, 2003. But by August 2003 it was still not finished, so the Mayor of Banjarmasin revoked the legal order appointment of the PT GJW as partners and canceled the contract. According to the addendum, PT GJW should build only 5,145 units but without the approval of Parliament Banjarmasin, 6,045 units were built by PT GJW, meaning that an additional 900 units were built. A total of 900 units were sold at IDR16,691,713,166, which was not deposited into the local treasury. The PT GJW had the obligation to pay compensation amounting to IDR500,000,000, which included paying rent of IDR2,500,000,000, and making the credit repayment of Inpres Pasar Antasari in the amount of IDR3,750,000,000. The total amount to be paid was IDR6,750,000,000, but PT GJW only paid IDR1,000,000,000, so there was a shortfall of IDR5,750,000,000. The PT GJW gave false information by stating that the construction of Antasari Sentra Market had not been completed yet. But according to the Project Manager of Market Building and the completion report as of September 2004, the development had been 100% completed and as of October 2004 there was a surplus of IDR64,579,000,000.

The PT GJW deliberately did not pay the money management of Antasari Sentra Market and provided information that was not true as if the project was operating at a loss. According to the financial statements of July 2004–December 2007 collected funds amounted to IDR7,650,143,645. Based on the calculation of government auditor, PT GJW had failed to pay the Banjarmasin City Government in an amount equal to IDR7,332,361,516,00.

The PT GJW used Banjarmasin municipal assets in the form of land and market buildings to guarantee credit obtained from M Bank amounting to IDR100,000,000,000. In accordance with the agreement, PT GJW had the obligation to deposit all proceeds of cash and credit sales in an escrow account at M Bank, but PT GJW only deposited a portion of the proceeds of sale. As of February 19, 2010, related to the use of the working capital loan from M Bank, PT GJW still had a principal liability of IDR83,429,070,000,00, interest payable of

IDR 63,732,298,096.66, and a penalty of IDR52,374,696,578.99 the total amount of IDR199,536,064,675.65.

On May 23, 2011, the case of PT GJW was decided by the judge. PT GJW was found guilty and was ordered to pay a fine of IDR1,300,000,000 and was temporarily closed for 6 months. This is the first case of corporate corruption in Indonesia in which a corporation was found guilty by a judge.

B. PT DGI (KPK Case)

In July 2017, the Corruption Eradication Commission of the Republic of Indonesia (KPK) opened an investigation of PT DGI under suspicion of corruption as a result of the development of a criminal corruption case investigation connected with the project work of the Special Education Hospital of Infectious Diseases and Tour Travel Universities Dayan in Fiscal Year 2009-2010. The company allegedly lost the state IDR25 billion from the IDR138 billion project budget. Currently PT DGI has changed its name to PT NKE. This is the first case of the KPK in a criminal act of corruption with a corporation suspect.

In the previous stages, the corporate executives, the PT DGI executives were designated as suspects several months before, and the former Director of PT DGI has also been made a suspect. In the previous case in the decision of the Marketing Manager of PT DGI, MEI, mentioned that this company gave IDR4.34 billion to NZ for PT DGI to be the winner in the procurement of development projects Wisma Atlet and Multipurpose Building of South Sumatra. PT DGI first appeared when the KPK managed to uncover the alleged bribery case in the Wisma Atlet project. The case began from a KPK red-handed operation against MRM, MEI, and WM.