

THE EXISTENCE OF A COMPANY IN THE SOCIETY AND ITS LEGALITY IN INDONESIAN LAW

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Abstract

The existence of a company, being an economic institution which has a multiplayer function, has become one of the main aspects of the societal and national lives because of the business activity conducted by the company. This situation has enabled the society to fulfil their needs, to conduct their economic activities, including the absorption of employment by the company which leads to the necessity of the legality of law in the law in Indonesia.

Keywords: the Company's Existence, the Legality of Law, Indonesia

INTRODUCTION

The society has recognized the existence of companies. A company can be considered to be one of the society's organs. The society plays an active role and interact in their relationship with the company. The company actively provides the necessity of the society and in turn the society expects the products from the company. Consequently, the company becomes more productive, thus decreasing unemployment. Companies can be considered as the centers of the activities of the society. Their existence in the society is governed by corporate law. The law derives from each party that creates its principles and rules. Corporate law consists of principles or rukes which are found in regulations, contracts, jurisprudences, and conventions in business activities.

The regulations included in the corporate law are any regulation governing everything which is related with companies, like those found in Civil Codes, Commercial Codes, and other regulations.

The contracts included in the corporate law are those produced by parties involved in the company's business. The company's contracts are at all times related to the regulations in the laws based on the complementary principle. The principle comprises the agreements among parties.¹ However, if there are items which are not regulated in the contract, the regulations in the law will be applied.²

Jurisprudences that are included in the corporate law are those stipulated by the judges when making verdicts from cases which are related with disputes involving companies. They can be viewed as fair grounds for resolving disputes of rights and obligations between the conflicting parties.³

Customs which are included in the corporate law are those meeting the following requirements:

- 1) Civil conducts which involve rights and obligations which are ideally fulfilled;
- 2) Customs which do not conflict with the applicable laws and decency;
- 3) Customs which are voluntarily accepted by the parties since they are logical and have tendency to create desired legal outcomes by both parties.

When there are items regarding the rights and obligations which are not yet regulated in the laws and agreements, both parties can refer to applicable and developed customs among the businesspeople in order to proceed to the agreeable ends.

From the economic perspective, a company is regarded as an organization. Earnest Dale defines an organization as a planning process which includes organizing, developing, maintaining a structure or work relationship patterns of the people involved in a working unit. Therefore, an organization is a clear and fixed collection of roles, relationships, and responsibilities, although at least in a

¹ Ricardo Simanjuntak, *Teknik Perancangan Kontrak Bisnis* (The Techniques of Business Contract Designs). PT. Gramedia, Jakarta, page 172.

² *Ibid*, page 27.

³ Ridwan Khairandy, 2009, *Perseroan Terbatas: Doktrin, Peraturan Perundang-undangan, dan Yurisprudensi* (Limited Liability: Doctrines, Regulations, and Jurisprudences), *Kreasi Total Media*, Yogyakarta.

short term. It is established not only to regulate the members, but also to form and modify a structure in which there are tasks they need to perform. In this case, there must be a role division to achieve a certain communal goal. Cyril Soffer offers a clearer definition of organization for the matter which states that an organization is a union of people who possess different roles in a given work system and work division in which the work is divided into tasks, distributed among the role holders which are then combined into several result forms (an organization as a role system). The position of law is in the role distribution, work system and work division. The law governs the occurring relationship patterns and sets sanctions to the existing violations.

The corporate law is an important precept in supporting the economic growth of a country. The corporate legal regulation basically regulates the economic subjects considering that a company is one of the economic subjects. The types of company which are especially regulated in the Civil Codes book III are Limited Liability and Civil Fellowships. Those regulated in the Commercial Codes (KUHD) in article 16 are Firms and Limited Partnerships, and the remaining is governed in the Limited Liability Act which governs companies in the form of Limited Liability, in the Cooperative Act which governs companies in the form of cooperatives.⁴

Basically, there are clear criteria to determine whether civil fellowships a company or not, besides categorized based on their names, the most important thing is that they are categorized based on their functions and goals. The Act no 3 of 1982 on Corporate Mandatory Registration has given clear borders to determine if a civil fellowship a company. Therefore, the objective of naming the company beside to ease the management is to enable the society to recognize them based on their characteristics. In addition, the most important thing is their responsibility consequences towards their founders. The positive law recognizes several forms of companies like sole proprietor (Business Venture), Civil Fellowship, Firms, Limited Partnerships, Limited Liabilities, and Cooperatives.

⁴ Gunawan Widjaya, 2006, *Seri Aspek Dalam Hukum Bisnis (The Aspects of Business Law Series)*, Frenada Media, Jakarta, page 203

Companies are categorized according to their founders, capital mechanisms, and responsibilities, as well as working systems. Basically, the corporate law subjects to the law of engagement which derives from an agreement as stipulated in the law of agreement of book III of Civil Codes that whatever the form of a company is the result of an agreement of the civil code subjects in establishing a business.⁵ Even though the founders of a company are entitled to manage their own rights and responsibilities in the articles of association of the company, they must not conflict with the existing laws, regulations, and decency.⁶ Considering that the articles of association are forms of an agreement, they have to abide by the terms of legal agreement in article 1320 of Civil Codes. The article 1319 of Civil Codes gives a clearer view since it states that “Any agreement, either it has a specific name and is recognized with a certain name or not, must subject to general regulations stated in this chapter and the previous ones”.

As stated earlier, the forms of companies are regulated in the Civil Codes, Commercial Codes, Limited Liability Acts, Cooperative Acts. Thus, the provisions found in the codes and acts remain to be the legal sources for the management of companies according to their types. As an instance, it is not agreeable to determine the capital of a limited liability as much as Rp. 30.000.000 in the articles of association because the Act No 40 of 2004 article 32 on Limited Liability has mentioned that the minimum capital of a limited liability is as much as Rp. 50.000.000. Therefore, when a limited liability is unable to fulfill the initial capital of Rp. 50.000.000, the agreement is annulled by law. In the company’s business, businesspeople prefer to establish a limited liability, especially after having studied from the point of view of responsibility over the risk of the business as well as the ability of the company to grow fast and bring a huge profit.⁷ Entrepreneurs having considerable money tend to opt to a Limited

⁵ Agus Budiarto, 2002, *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas* (The Position of Law and Responsibilities of the Founders of Limited Liabilities), Ghalia Indonesia, Jakarta, page 37.

⁶ Ridwan Khairandy, 2009, *Perseroan Terbatas: Doktrin, Peraturan Perundang-undangan, dan Yurisprudensi* (Limited Liability: Doctrines, Regulations, and Jurisprudences), *Kreasi Total Media*, Yogyakarta.

⁷ Agus Budiarto, S.H., M.Hum., Op Cit., pages 13-14

Liability and not other forms of business. This condition is not only done by domestic investors but also by foreign investors. It leads to some questions like why it happens and what underlies it. In order to answer those questions, the writer tries to elaborate the strongpoints of a limited liability in comparison with other business forms. However, it is better to discuss the specific characteristics of the company and its classifications before going to a comprehensive understanding.

A company has acquired its existence within a society and its legality before the law in Indonesia. A company is also the center of society's activity.

a. The Juridical Analysis of a Company

1. The Characteristics/ Natures of Company's Activities

To understand the characteristics/ natures of an activity to be considered a company, the writer makes use of the definition of a company proposed by Molengraaff, Polak, and bill no 3 of 1982 on Corporate Mandatory Registration and Act No 8 of 1997 on Company's Documents.

a. Molengraaff's Formulation

According to Molengraaff (1966), a company is an entire behavior which is repeatedly conducted, extensively, to gain profit, by trading or handing over goods or making a trade agreement. He perceives the company's definition from the economic point of view since the company gains profits through:

- 1) Trading goods, which means that they purchase goods and resell them in order to earn in the forms of benefit and profit.
- 2) Handing over goods, which means that they release their possessions over the goods in order to earn like in a lease of goods.
- 3) Making a trade agreement, which relates one party with other parties in order to earn in the form of benefit and profit for the endorser and a wage for the endorsee like a broker, commissioner, company's agents.

The objectives of the company's activities here are to gain profits. The company's activities which are run to achieve these objectives are trading goods, handing over goods, or making a trade agreement. These activities are conducted

continuously, extrinsically, making legal relationships not only within the company but also with outside parties.

b. Polak's Formulation

Polak (1935) viewed a company from the commercial point of view, which means that an entity can be considered as a company if there is a record of profit and loss in the bookkeeping. Polak added a "bookkeeping" element to other elements proposed by Molengraaff. Polak recognized the other elements as seen in his explanations about what a company is and if it does not operate clandestinely. If there are some elements absent, the nature of the company from the company's law is dismissed.

A company activity, in this case based on Polak's idea, is the making a bookkeeping which contains calculation of profits and loss. The bookkeeping element is an absolute element in order that a company can exist according to the provision of the Act No 8 of 1997 on company's documents.

c. The Formulation based on the Law

In the article 1 letter (b) of Act No 3 of 1982 on Corporate Mandatory Registration is mentioned that "A company is any form of business venture running any business which is fixed and continuous, established, working, and located in the Indonesia's territory aiming to gain benefits and profits". Based on the article's provision, there are two main elements found in the definition of the company, they are:

- a) A form of business like an organization or a business entity, which is established, working and situated in the Indonesia's territory is called a company.
- b) A type of business like an economic activity (industrial, trade, service, finance) which is run continuously by a business entity is called business.
- c) A company's activity is done by a form of business entity or is run by a business entity in an economic sector. Based on the applicable law, even though there is an activity which is done continuously, explicitly, involving a third party, having a goal of earning benefits and or profits, when there is no business entity, it cannot be called as a company but only

a work. Any individual running a company is called an entrepreneur. Entrepreneurs can be an individual, a collection of people called a fellowship, or a legal entity (corporate body).

- d) In the article 1 number 1 of Act No 8 of 1997 on Corporate Document, it is mentioned that: “A company is a form of business which acts in a fixed time and continuously, aiming to earn benefits and profits, either run by an individual or by a legal entity, which is established and situated in the territory of the Republic of Indonesia”.

The elements of a company found in the definition are a form of business run by a legal entity or by individual, which is established and situated in the territory of the Republic of Indonesia. The company’s activities are conducted by a business entity. They are continuous and fixed, aiming to earn benefits or profits.

We can say that both law’s formulations substantially have similar meanings, but they use different wordings.

Based on the definition of a company stated by Molengraaff, Polak, and Policy Makers, we can understand and discuss the characteristics/ natures of an activity in order to be called a company’s activity. They are as follows:

a. A Business Entity

An activity can be said as a company’s activity if it is done by an economic business entity. A business entity running an economic activity can be in the form of a firm, a limited partnership, a limited liability, a public company, a limited liability company, and a cooperative. The form of business can be seen through the deed of incorporation of the company (a business entity). Molengraaff and Polak did not complicate the element of “business entity”. In fact, in the reality a business entity is required for a business activity to be called a company. Otherwise, it is just a work.

b. An economic activity

This activity covers industrial, trade, service, and financial activities. The details are as follows:

- 1) Industry includes activities like oil explorations and drillings, fishing, timber, handicraft, canned foods, medicine, vehicles, recordings and filming, as well as printing and publishing,
- 2) Trade includes activities like buying and selling export and import, stock exchange, restaurants, supermarkets, foreign exchange, and rentals.
- 3) Service includes activities like transportation, banking, machinery, clothing, consultation and beauty.

In Molengraaff's definition, economic activities include a trade (buying and selling, rentals) and service (connecting one party to another).

c) Continuous

The economic company's activity is done continuously. Molengraaff, Polak, or the policy makers agree on this aspect. It means that the activity serves as a means of earning a living, not incidental and not a side job.

d) Fixed

A company's activity must be fixed. It means that the activity does not change or alternate in a short time but in a long period of time. The range of time depends on the deed of incorporation or the enterprising permit.

e) Explicit

A company's activity is done explicitly. Being explicit means that the activity is understood and recognized by the public. The company is able to make relationship with others. It is acknowledged and confirmed by the government based on the regulations. This condition can be seen from the deed of incorporation, enterprising permit, business site permit, and corporate registration certificate. Molengraaff used a term "act outside" which means that a company involves another party (a third party), but he did not necessarily mention which form of business is being used. If this element is absent, the company is said to a rogue one and violating the law.

f) Benefits and profits

Molengraaff mentioned a term "income". Polak preferred using a term "profits", while the policy makers opt to using a term "benefits and profits".

These three terms and economic ones which show a plus value (outcome) which is gained from using the capital (capital gain). Every activity which is run by the company is supported by its capital. Using its capital, a company can gain profits and benefits. This is usually the main objective of a company. Therefore, a company's activity is aimed at gaining benefits or profits.

g) Bookkeeping

This company's activity is related with the keeping a book. Molengraaff, in his company's definition, did not mention this element, but Polak added bookkeeping in his definition of a company. A bookkeeping is a record about the company's right and obligation which are related with its activities. The article 8 paragraph (1) of Act No 8 of 1997 on Corporate Document mentions that it is mandatory for a company to make a record as stated in the article 5. The article states that the record can be an annual balance, an annual profits and loss record, accounts, daily transaction journals, or any record which is related with the obligation and right as well those related with the business of the company.

All of the characteristics and nature of the company's activity are done/ possessed by the company in its existence in the society. A company will interact with many parties in the society. In addition, the interaction should be done under the applicable law. The society will always get involved in the company's activities, either as the producers, distributors, or even consumers.

2. The Company's Activity from the Economic Point of View

In the introduction of this paper, it is stated that from the economic point of view, a company can be seen as an organization. A company is one of forms of organization. To be more precise, it is a production organization which covers several functions coordinated to produce certain goods and services and its economic goal depends on the comparison of the power in the organization. From this definition, the emphasis of a company's activity is on the production of certain goods and services. This results to a narrower scope of company's activity than what has been discussed earlier using the definitions of Molengraaf, Polak,

and other policy makers. The activity of producing certain goods and services can be included in the fore mentioned industrial, trade, service, financial activities. While the role of law here is to regulate the activity of producing the goods and services, preventing crimes and conflicts from taking place.

b. The Characteristics and Types of a Company

To find out what the characteristics of a company are, we can see from the definition of a company as stated in the general provision of Act No 3 of 1982 on Corporate Mandatory Registration that a company is “any form of business which conducts fixed and activity continuously, fixed, established, working, also situated in the territory of the Republic of Indonesia aiming to gain benefits and profits”. Based on the company’s characteristics, all business entities except cooperatives differ in their profit seeking goals. In addition, a foundation which works for social purposes cannot be called a company. Moreover, to understand the characteristics of each company, the writer briefly elaborates its characteristics as follows⁸:

1) Private Corporation

It is grouped based on the number of its founders. It can be established by a person. This type of company does not necessarily require any agreement with other parties since it is founded by one person. The example of this type of company is a home industry which has a small capital, is situated in its founder’s house. This type of company is governed in the Civil Codes.

2) Civil Fellowship

Developed from a private corporation, a civil fellowship is established using an agreement. In a private corporation, there is only one founder, while in a civil fellowship, there are more than one founders. A civil fellowship is the pioneer of the emergence of companies like a limited partnership, a limited liability, and a cooperative. Like a private corporation, a company like a civil fellowship is governed in the Civil Codes.

3) A Firm

⁸ Gunawan Widjaya, 2006, *Seri Aspek Hukum dalam Bisnis* (Legal Aspects in Business Series), Prenada Media, Jakarta

A firm is a type of company with a shared name which functions to run the company as defined in Commercial Codes article 16 that “a firm is a company which is founded to operate under a shared name”. The specifics of this company are that it has a shared name and its functions as a firm makes it different from other forms of company.⁹ A shared name is usually taken from its founders, like SAFE which consists of its founder’s names: Satriawan, Fachrudin, Edo” or LHS which is “Lubis, Haryanto, Suwarno”. With its name, the founders’ existence in the firm is very important, because a firm will be dismissed automatically if one of the founders is not a part of the firm anymore.

4) A Limited Partnership

A limited partnership is in Indonesian translated into a passive fellowship and uses an acronym of CV (Comanditair Venounschaap). This company owns certain characteristics like the founders are known as a fellowship, and the existing fellowships can be divided into active and passive fellowships. There was no difference between active and passive fellowship in this type of company. An active fellowship is one responsible for the company’s management. The company is called active fellowship since it acts on behalf of the company’s name. A passive fellowship is different. In this fellowship, the founders just invest their money in the company. They are not responsible for the company’s loss or they don’t have any responsibility to the third party beyond their amount of investment.

5) A Limited Liability

A limited liability is previously known as *Naamloze Vennootschap* in Dutch or nameless fellowship.¹⁰ It is translated into a limited liability. *Perseroan* is another word for share and *Terbatas* means that the responsibility of the shareholders is limited. The company used to be governed in the Commercial Codes. However, in order to fulfil the business demand, the company is also governed in the Act No 1 of 1995 which is amended with Act No 40 Of 2007

⁹ *Ibid*, page 224.

¹⁰ Ridwan Khairandy, Op Cit. p. 1

on Limited Liability. As regulated in Limited Liability Act, a limited liability is a company with a legal entity which makes it a legal subject separated from its founders.¹¹ The legal entity characteristics adhered to the limited liability are that it has separated wealth from that of the founders, it has specific goals and interests, it has management, it is capable before the law and of other consequences.¹²

The responsibility of the founders which is limited basically becomes the distinctive factor between a limited liability from a private corporation, a civil fellowship, a firm. In addition, a limited partnership recognizes a personal responsibility and shared responsibility, which means that the responsibility of the founders is not limited since they are fully responsible for their personal wealth. In the limited liability, the founders' responsibility is limited to how much investment he or she has invested except in several cases which cause them to be accountable for their own wealth as stated in the article 3 paragraph 2 of Limited Liability Act. The conditions which require the founders to perform unlimited responsibility are when the company's requirement as a legal entity has not been fulfilled, the shareholders must not make use of the company for personal interest(s) either directly or indirectly, the shareholders are involved in a crime which is committed individually, the shareholder either directly or indirectly makes use of the company's assets which makes the company unable to pay its debts. In the capital cases, limited liability's characteristics are different from other types of business. A limited liability uses a share which has certain nominal values by considering the authorized capital, paid-up capital, and the issued capital.

6) Cooperatives

Beside a limited liability, there is another well-known company having a legal entity namely a cooperative. A cooperative is included as a company since it runs a business, either in the form of trade of goods or in providing

¹¹ Agus Budiarto, S.H., M.Hum., 2002. *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseoran Terbatas* (The Legal Position and the Responsibility of Limited Liability Founders), Ghalia Indonesia, Jakarta, p. 29

¹² Ibid

services. What differs a cooperative from other types of business is that a cooperative is based on mutual cooperation (*gotong royong*) principle in which the profits are not shared in the form of dividend or profit sharing but in deposits of business results. When compared with a limited liability, a cooperative has weaknesses in their capital because its capital is not in the form of a share which can be transacted in the stock exchange. Transactions in the stock exchange may boost the company's capital and it is the most supporting factor for the company's development.

CONCLUTIONS

1. Summary

It can be summed up from this paper that:

- a. The characteristics/ natures of a company in the economic aspect include trades, services, finance, which are done continuously, explicitly, aiming to gain benefits and profits. In addition, there must be a bookkeeping.
- b. From the economic aspect, the characteristics and natures of a company are focused on the activities of producing goods or certain services.

2. Suggestions

The activities of a company are supposed to be conducted by focusing on the existing provisions of regulations and other theories so that, in one hand, the company's activities which are conducted are legal before the law and, on the other hand, they can play their roles as expected.

BIBLIOGRAPHY

- Budiarto Agus., 2002, *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas* (The Legal Position and the Responsibility of Limited Liability Founders), Ghalia Indonesia, Jakarta.
- Khairandy Ridwan, 2009, *Perseroan Terbatas Doktrin, Peraturan Perundang-undangan, dan Yurisprudensi* (Limited Liability: Doctrines, Regulations, and Jurisprudences), Kreasi Total Media, Yogyakarta.

Simanjuntak Ricardo, *Teknik Perancangan Kontrak Bisnis* (The Techniques in Designing Business Contracts), PT. Gramedia, Jakarta.

Widjaja Gunawan, 2006, *Seri Aspek Hukum Dalam Bisnis* (Legal Aspects in the Business Series), Frenada Media, Jakarta.