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IMPLEMENTATION OF SHAREHOLDER'S ALTER EGO AND ITS ACCOUNTABILITY ACCORDING TO PIERCING THE CORPORATE VEIL DOCTRINE IN INDONESIA

Sandi Nugroho[1], Ningrum Natasya Sirait[2], Bismar Nasution[3]*
Ph.D in Law Program, Graduate School, University of Sumatera Utara,
Jalan Abdul Hakim No. 4, Medan, Indonesia
sandis3usu@yahoo.com*, ningrum.sirait@gmail.com, bismarnasution@gmail.com

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ABSTRACT

The doctrine of piercing the corporate veil on Law Number 40 of 2007 (Limited Liability Company Law) is widely interpreted as to include all the shareholders' personal property as their responsibility for company liabilities. The application of the corporate veil doctrine can be found in cases such as fraud, inadequate capitalization, and failure to comply with corporate establishment formalities and of authority within the company as a result of the dominance of one or more shareholders (*alter ego*). This paper used a normative legal method by using an approach comparing common law with a civil law system. The data obtained through a library literature review. The findings show that there is disharmony between the principle of shareholder responsibility within the company and the legal norms. Limited liability company are only responsible for as much as the amount of their capital included in the company and shareholders could also be responsible for more than their shares. In conclusion, although limited liability company law can be used as a legal basis to impose criminal liability against shareholders, however, the Criminal Court has, to date, been reluctant to recognize and apply the rules.

INTRODUCTION

Limited Liability Company means that "shareholders of a corporation are not personally liable for debts incurred or torts committed by the firm" (Bainbridge, 2002). Therefore, Limited Liability Company which is metaphorically referred to as a corporate veil is a separate legal personality whose purpose is to protect shareholders (Posner & Scott, 1980).

This is in line with the doctrine of a separate legal personality of a company which confirms that, between the company and the shareholders, there is a separating veil (Nasution, 2016). There is a principle of a limited liability of the shareholders in the company (Anderson, Fox & Twone, 1995).

Such thought is generally based on the opinion that "a corporation may exist and act as an entity or legal unit of separate and apart from its shareholders" (Cox, Hazen & O'Neal, 1997).

The doctrine of separate legal personality of a company must be understood as the doctrine that does not totally protect shareholders from their personal accountability. Shareholders responsibility may turn into condition of piercing the corporate veil pursuant to the doctrine (Bendremer, 2005), i.e. shareholders' personal responsibility, due to the actions of the company influenced by the shareholders (Miller, 1995). Such condition may follow if the shareholders become the alter ego, where the existence of the shareholders becomes part of the company and consider it as their own assets (Thompson, 1991).

Piercing the corporate veil doctrine will take place if the company is utilized by the shareholders to commit a fraud by making the company as the shareholder alter ego (Leigh, 1965). The application of piercing the corporate veil and alter ego doctrines requires strong and deep thinking in order that its application will not encounter any difficulties.

The alter ego and piercing the corporate veil principles in Law Number 40 of 2007 on Limited Liability Company are basically the result of a foreign legal transplantation (legal transplants, legal borrowing or legal adoption)[1] Watson (1974) whose implementation in Indonesia is experiencing constraints and conflicts of legal system. This is in terms of requesting the shareholders accountability for the existence of unlawful acts committed by the company due to the shareholders' influence based on the principles of alter ego and piercing the corporate veil.

The political law system in Indonesia is dominated by the civil law system of Dutch heritage which has been cultivated in the legal system in Indonesia especially in terms of accountability of unlawful acts. A civil law is characterized by codified law and legal system (de Cruz, 2010). This is in line with Freund (1974) opinion that the success of a legal transplantation depends primarily on the related political system. Meanwhile Legrand (1997) and Seidman (1998) view law as a culturally established construct that cannot be transplanted into another culture (Menski, 2016).

LITERATURE REVIEW

Piercing the corporate veil is an interesting topic to discuss which is closely related to the nature of the Limited Liability Company. Company with its legal entity status has its own assets and responsibility (Yani & Widjaja, 2000). The liability and capital of the Limited Liability Company are separated from the assets of the company's organs such as directors, board of commissioners and shareholders. This means that every obligation or debt is paid only from the limited company's own assets. It is different from company responsibility without legal entity status such as a firm (Ichsan,

[1] The term *legal transplants* was introduced by Alan Watson to name as a process of borrowing or taking over or transferring the law from one place or from one State or from one nation to another, then the law is applied in a new place together with the previous existing law. The transplantation of law may also occur because of the necessity to transfrom the international agreement (agreement in the form of law making). Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, America, 1974. Borrowing Roscoe Pound's views, Waston writes: "... and Roscoe Pound could write:" History of a system of law is largely a history of borrowings of legal systems and of the assimilation of materials from outside of the law".

1993). Activities carried on by and for the name of the firm (without legal entity) making a loss to a third party can be charged. Third party may request the owner of the company to be legally responsible, including requesting that the personal property of the owner to be confiscated and auctioned.

Piercing the corporate veil is sometimes referred to as lifting the corporate veil or going beyond the corporate veil. The term is a doctrine or theory which is defined as a process to burden the responsibility to the shoulders of other people or companies for legal acts committed by a corporate actors (legal entities), regardless of the fact that the act is actually done by the company's perpetrators (Fuady, 2014). In such cases the court will disregard the legal entity status of the enterprise and impose liability to the "private" and "perpetrators" of the company.

The basic and universal criteria for piercing the corporate veil legally could be imposed. In the event of fraud, obtained an injustice, the occurrence of oppression, does not eligible to fulfill the element of law (illegality), excessive stockholder dominance and the company is alter ego of its majority shareholder (Syafi'i, 2016).

Unveiling of the company's shade in English known as piercing the corporate veil. It is the theory used to penetrate the principle of limited responsibility that exist in the company. With the enactment of Act Number 40 of 2007 concerning Limited Liability Companies, the theory is legally recognized in the jurisdiction of Indonesian Law directed to shareholders, directors. In special terms also applies to the board of company commissioners. Only, of course, to apply the theory of piercing the corporate veil, it needs wisdom, prudence and discerning mind in legal horizon with a perspective and responsive vision of justice (Pramono, 2012).

Generally, this theory can be applied in the following matters (Chatamarrasjid, 2000):

First, if company does not follow certain formalities. Piercing the Corporate Veil can be applied because a company does not follow certain formalities as defined in the applicable Law. In this case the principle of piercing the corporate veil is applied not directly aimed at protecting certain parties, but solely for certain applicable formalities are fulfilled. Some examples of the application of this principle in the case of non-fulfillment of certain formalities, namely the non-completion of the formality of the establishment of the company, not the meeting, the selection of directors or commissioners, and others, not making deposits of capital and stock filings, shareholders too much interference the company's affairs and the mixing of affairs personal and corporate affairs.

Second, against legal entities which is only separated artificially. The principle of piercing the corporate veil applied to the actual company in a single state, but divided into several artificial companies. With the implementation of piercing the corporate veil, the burden of responsibility is given to all the interrelated companies.

Third, based on a contractual relationship. The principle of piercing the corporate veil can be applied when there is a contractual relationship with a third party. Without the application of this principle, the third party losses cannot be mitigated.

RESEARCH METHODS

This research is a normative legal research with the data obtained from a library research and literature reviews (Fajar & Achmad, 2010). Primary legal materials are legislation relating to the dominance of shareholders as the alter ego whose accountability is reviewed from the doctrine of piercing the corporate veil found in Limited Liability Company Law. Secondary legal materials are the views of the jurists that support the conceptual framework and the analysis. Secondary legal materials consist of relevant literatures, scientific writings such as theses, dissertations, journals, papers and research reports. Tertiary legal materials are those found in general dictionaries, legal dictionaries and scientific journals (Soekanto & Mamudji, 1985).

RESULTS AND DISCUSSIONS

Arrangements of Shareholders' Alter Ego and Piercing the Corporate Veil in Indonesia

The provision contained in the Law Number 40 of 2007 on Limited Liability Company, particularly in Article 3 Paragraph (1), implies that there is a separating veil between a company and its shareholders. This description can be portray as follows: "Article 3 Paragraph (1) of Law Number 40 of 2007 on Limited Liability Company states that the Shareholders of the Company shall not be personally responsible for the engagement made on behalf of the Company and shall not be responsible for any loss of the Company exceeding their shares. Paragraph (2) states that the provision as referred to in Paragraph (1) shall not apply if: *First*, the requirements of the Company as a legal entity have not yet been met. *Second*, the Shareholders either directly or indirectly in bad faith exploit the Company for their personal use or benefits. *Third*, the Shareholders are engaged in an unlawful act committed by the Company. *Fourth*, the Shareholders directly or indirectly use the Company's assets unlawfully, resulting in the inability of the Company's properties to repay the Company's debt".

The provisions in Article 3 Paragraph (1) mentioned above are in line with the doctrine of separate legal personality of a company. Through such doctrine, there is an affirmation that there is a separating veil between the company and the shareholders. In this context, the principle of limited liability of shareholders in a company can be understood. In addition, based on the provisions in Article 3 Paragraph (1) of the Limited Liability Company Law and the doctrine of a separate legal personality of a company, it is understood that such limited liability is the determination of the limitation of the shareholders' personal liability for the company's obligations. This means that when the company is unable to fulfill its obligations, the shareholders are only responsible for as much as the amount of their capital incorporated in the company.

The position and role of shareholders are the key of conducting the company business activities to achieve the stipulated objectives that provide positive impacts to the economy as a whole. (Balqiah, Sobari, Astuti & Yuliati, 2017). Therefore, the position and role of shareholders in the company must be transparent and accountable. It is an indicator of their responsibility when the shareholders using the company to commit unlawful activities. The law should strictly regulate the responsibility of the company.

However, the regulation in the law of the Limited Liability Company still consists of conflicting legal norms, on the one hand the Limited Liability Company Law accommodates the doctrine of separate legal personality of a company and on the other hand, it accommodates the doctrine of piercing the corporate veil. In certain cases, the limitations of the shareholders' responsibilities do not apply, as stipulated in Article 3 Paragraph (2) of the Limited Liability Company Law mentioned earlier. The provisions in Article 3 Paragraph (2) become a measure that makes shareholders unprotected by the doctrine of a separate legal personality. Based on the doctrine of piercing the corporate veil, the shareholders' accountability also includes their personal properties.

Application of Piercing the Corporate Veil

The application of piercing the corporate veil doctrine can be done in cases such as fraud, inadequate capitalization, failure to comply with the formality of corporate establishment and abuse of authority within the company as a result of the dominance of one or more shareholders. In addition, the doctrine of piercing the corporate veil may also be imposed for cases of legal liability avoidance, violation of fiduciary duty and agency, unpaid dividend or excessive dividend paid to shareholders, and using personal guarantees for the liability of company's obligations by the majority of shareholders. Another factor is related to the extraction of corporate funds by the dominant shareholders whose example can be observed from the case of the Century Bank (Wiriadinata, 2012).

The Century Bank case began from the bank's failure to fulfill the pre-fund clearing at the Bank of Indonesia on November 13, 2008. On November 21, 2008, the Governor of the Bank of Indonesia finally announced that the Bank of Indonesia, through the Financial System Stability Committee (KSSK) decided to take over Century Bank by Deposit Insurance Corporation (LPS). Although Bank of Indonesia was aware that the financial condition of the Century Bank was detrimental, LPS asked the customers not to panic because the agency would guarantee all the needs of the Century Bank's liquidity with a fund allocation of IDR 1 trillion. Based on LPS data, the injection of the total funds that has been disbursed by the institution to the Century Bank was IDR 6.77 trillion. The evidence of the Century Bank's management irregularities in running its operations was increasingly visible when the suspect's status was determined to the former President Director of the Century Bank. Based on the investigations conducted by the police, there has been a proof of violation of banking crime which is injurious to the bank itself.

As a comparison with other state's experience on the practice of piercing the corporate veil doctrine can be learnt from Salomon vs. Salomon & Co Ltd case. Mr. Salomon established Salomon & Co Ltd, where one of the Debtor, Mr.Broderip requesting that Mr. Salomon should provide company assets as collateral, however Mr. Salomon did not render the requested collateral. Mr Broderip as a debtor holder conclude that Salomon & Co Ltd is acting as a "tool" or "agent" of Mr. Salomon, and therefore could be eligible to be liquidated or declared bankrupt. The case taken to the court and based on that legal reasoning, Court of Appeals affirmed the decision by considering Mr.Salomon's and his family member bad motive and intention in managing the company. Kay LJ, Judge of Court of Appeals projected that other six family members did not have the intention to be involved in the business but solely acting as passive shareholder to fulfill the technical requirement for establishing the company to comply with the Joint Stock Companies Act 1844. Based on the Court of Appeals decision, it is determine that Mr. Salomon should bear responsibility to pay the company loss (Dignam & Lowry, 2010).

The above case shown that the Courts of Appeals was able to go beyond piercing the corporate veil doctrine on company limited liability, of course, must be with certain pre-requisites. The practice of piercing the corporate veil is not only apply to the shareholders, directors or even commissaries, however it can be applied to the company itself as a legal entity (*persona standi in judicio*). The approach used with the former assumption that a company could be used as a vehicle for criminal or malicious intent by a wrongdoer.

From this case, it is clear that the perpetrator, who was made as a suspect, is the President Director who runs the management of Century Bank, without involving the shareholders endorsement. In practice, running the Century Bank management should be done under the dominant influence of the shareholders even though the shareholders have no responsibility for the act against the law which they involved in. This is happened because the legal system adopted in the Indonesian law enforcement attributes a particular act (*actus reus* or guilty act) and to prove the element of *mens rea* (malicious or criminal intent) which is very different from piercing the corporate veil principle.

In addition to the above case, in order to apply the principle of piercing the corporate veil and become an indicator in some cases, it is usually required that there is an element of "unusual circumstances" in the company's activities. Such unusual circumstances could be one of the following (Fuady, 2010):

First, the third party is deceived when making a transaction with the company, the company's business actions are confusing, the company's capital is not stated properly/not paid, the personal guarantee as the dominant form of the shareholders, the company is operated inappropriately.

Second, it is applied due to unlawful acts or criminal acts. If the activities of a company are considered as a crime or unlawful acts, although it is done by the company itself, then based on the principle of piercing the corporate veil, justified by law if the responsibility is requested to other parties, such as directors, commissioners and its shareholders. Actions against the company law, such as large-scale corporate activities, but the capital is very small, the company is formed specifically to conduct dangerous activities without authorized endorsement.

Third, in the relation with holding companies and subsidiaries. Piercing the corporate veil principle can also be applied to companies within a business group. In legal terms is known as "instrumental doctrine". According to the doctrine, the theory of piercing the corporate veil can be applied. In such circumstances, it means that the responsible is not only the legal entity that carries out the legal act, but the shareholder (holding company) is also responsible if any of the following elements are fulfilled:

express agency, or estopel, or direct tort, or it can be proved that there are three elements existed as follows: 1) controlling a subsidiary by holding company. 2) use of control by the holding company to commit fraud, dishonesty or other unfair conduct. 3) there is a loss as a result of the breach of duty of the holding company.

In addition to the above, in association with the corporate groups, piercing the corporate veil can also be applied in cases with misleading facts, fraud, and injustice, to protect minority shareholders. There are also other facts that can be suspected leading to the application of the principle of piercing the corporate veil in relation to group companies, such as (Fuady, 2014):

1. The holding company and its subsidiaries have the same board, commissioner, or employees.
2. Subsidiaries has very little capital.
3. The holding company pays the salaries, wages, losses and other expenses of the subsidiary.
4. The holding company owns all or nearly all of the subsidiary's capital.
5. The holding company finances the subsidiary.
6. The subsidiary has business only with the holding company.
7. The subsidiary has no other assets except the assets which transferred from the holding company.
8. The holding company use the assets of a subsidiary such as its own assets.
9. The executive party of a subsidiary is more concerned the interests of the holding company than the interest of the subsidiary.

The above factors could not stand alone but has to be proved interrelated one to the other. It is important for business practices to learn from the case that although the Directors possess the authority to manage the companies, but the shareholder's control remain essential. Shareholders meeting is not solely sufficient to control the director's performance. There should be more effective way to implement control such as through Commissioners oversight or develop an alarm mechanism if unusual circumstances arise.

Determining Piercing the Corporate Veil

The determination of piercing the corporate veil qualification can be seen in the following indicators: (i) fraud, (ii) alter ego or mere instrumentality, (iii) corporate entity, (iv) agency. These indicators can be explained as follow:

1. Fraud committed by shareholders. In this case, the Court will apply unlimited liability when shareholders use corporate entities to commit fraudulent acts, mislead creditors when conducting business transactions with companies, fraudulently redirect funds outside the company or commit fraudulent acts within the corporate entity.
2. Alter ego or mere instrumentality doctrines. Both of these doctrines demonstrate that shareholders will be subject to unlimited liability if there is a pooling of shareholders and corporate profits or if there is no separation of properties between shareholders and corporate entities.
3. Enterprise entity or enterprise liability doctrines that can be used to make the shareholders accountability including their personal property. Both

of these theories allow the courts to expand responsibilities within the group of companies, including the relationship between parent company and subsidiary company (parent company-subsidiary company) and other groups affiliated with the entity of the company.

The enterprise entity doctrine states that when two or more companies run business as a business entity, the plaintiff can make lawsuit outside the company's assets. Unlike piercing theory, enterprise entity theory provides a form of horizontal liability – i.e. the access to assets from affiliated entities which are not shareholders – and a form of vertical liability (for acquiring the assets of parent company as the shareholders in the subsidiary company or parent-shareholder). Although the court articulates the grounds for assigning responsibility to the parent company based on this theory, there must be at least a unified interest. This unification occurs when the parent company is in control of the subsidiary company's operational activities that exceed its authority. Thus, both companies have actually been running their business acting as a single company.

In addition, the shareholders' accountability can also be seen from the agency's principal indicators to make the shareholders' accountability including their personal property as the principal when the shareholders treat or use corporate entities as their agents. Corporations as legal entities certainly have their own legal identity. The theory of shareholders based on the relationship between the company and the shareholders which is defined as a certain group or individual who has the power to influence or at the same time can also be influenced by the activities of achieving the organizational goal (Pusparini, Soetjipto, Rachmawati & Sudhartio, 2018).

The legal identity of a corporation or a company is separate from the legal identity of its shareholders, directors, or other organs. Under the civil law system, it is clearly established that a corporation or a legal entity is a civil law subject that may engage in business, buying and selling activities, may enter into agreements or contracts with other parties, represent and act on behalf of the corporation and may prosecute and be prosecuted in the court.

Shareholders enjoy the benefits gained from the concept of limited liability and the ongoing corporate activity, in the sense that their existence will not change despite the addition of new members or the cessation or death of the existing members. The principle of piercing the corporate veil on shareholders can be done in case of any of the following : (Rastuti, 2015)

1. The requirements of the company as a legal entity have not or have not been fulfilled.
2. The shareholders concerned, directly or indirectly, in good faith use the company solely for personal gain.
3. The relevant shareholders are involved in legal actions conducted by the company.
4. The shareholders directly or unlawfully use the company's assets.

In addition, the principle of piercing the corporate veil can also be applied to shareholders in the case of shareholders who take action that is (Fuady, 2005): First, not to deposit capital causing the company to lose money. Second, a mixture of personal affairs with the affairs of the company. For example, corporate funds are used for personal affairs, assets owned by the company on personal behalf and corporate payments with personal checks without clear justification. Third, alter ego. A situation in which the shareholder is too dominant in the company's activities beyond the proper shareholder roles and power. The company only serves as an "instrument" to seek personal gain from the shareholders. In this case, the company is said to be an alter ego of the shareholders concerned.

Until now, the concept of a corporate criminal liability is still a matter of the debate. Many parties do not support the view that a pseudo-form corporation can commit a crime and have a criminal intent that gives rise to criminal liability.

Implementing the alter ego and responsibility of shareholders based on the doctrine of piercing the corporate veil which transplanted from the foreign legal system into the Indonesian legal system have experienced conflict of law. The conflict issues may both be seen in the inconsistency of the law norms and the conflicting legal norms adopted in the Indonesian legal system such as legal responsibility of the shareholders for their misconduct. Hence, shareholders alter ego and their responsibility pursuant to the piercing the corporate veil doctrine cannot be implemented at the judicial system in Indonesia and only serve as a legal term. Consequently, criminal and fraudulent business practices performed by the shareholders will be the responsibility of the board of directors who might manage the company in good faith. Therefore, necessary actions to solve this problem should be made in two stages: *Firstly*, for short term purposes, to have a memorandum of understanding amongst the criminal justice systems requesting shareholder responsibility in the event of bad faith and unlawful acts committed by shareholders as alter ego. This proposal will resolve inconsistent and conflicting legal norms. *Secondly,* Supreme Court Regulation (PERMA) needs to be issued as a reference in implementing piercing the corporate veil doctrine to an unlimited shareholder responsibility. PERMA is needed to consolidate the judge's approach when they decide the cases on their bench. The correct and uniform approach will provide legal certainty which is critical in the business practices. PERMA is an instrument that the Supreme Court provide to the Court whenever there is a missing regulation in the law. The uniformity approach is critical for judges to provide legal certainty, something that the business really needed to ensure their risks and rights.

CONCLUSIONS

The implementation of Shareholder alter ego and shareholder's accountability on the basis of the Piercing the Corporate Veil principle in Indonesia encounters a legal conflict with the existing institutionalized legal system in relation to the accountability arising from unlawful acts. Therefore, the application of alter ego and Piercing the Corporate Veil doctrines is very difficult due to the difficulty in attributing a particular act (*actus reus* or guilty act) and in proving the element of *mens rea* (criminal intent or guilty mind) from an abstract entity such as a corporation in which there are shareholders. In Indonesia, although limited liability company law can be used as a legal basis to impose criminal liability against shareholders, the Criminal Court has, to date, been reluctant to recognize and apply the rules. This can be seen from the few cases of corporate shareholder in court which certainly impacts on very few court decisions that can apply shareholders' liability by placing alter ego and Piercing the Corporate Veil as the basis for determining shareholders' misconduct. As a result, no reference can be made as a precedent for the judicial milieu in Indonesia.

Therefore, it is necessary to make efforts which can be divided into 2 (two) stages. *First*, short-term effort, to have a memorandum of understanding between the criminal justice system in the framework of requesting shareholders' responsibility in the event of bad faith and unlawful acts committed by shareholders as alter ego. This is intended to overcome the obscurity and conflict of legal norms. *Second*, long-term effort, a Supreme Court Regulation (PERMA) that can be used as a reference is required to apply the doctrine of piercing the corporate veil to unlimited shareholders' liability. PERMA is needed to consolidate the judge's approach when they decide the cases on their bench. The correct and constant approach will provide legal certainty which is critical in the business practices.

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