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Urgency of development of piercing the corporate veil doctrine to Governize a group company: Indonesian context

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Abstract
Various legal laxities in Indonesia have been exploited by entrepreneurs to expand their business domain. One of the many actions conducted by entrepreneurs is building a group company by combining several limited liability companies into one economic entity under their control. These companies are respectively independent entities, suggesting that they must submit to various prevailing corporate doctrines. However, a group company has not been considered as a legal entity. In fact, the result of a study concerning theories of legal entities concluded that a group company has been qualified to be viewed as a legal entity. In addition, a group company has not been regulated in a specific law, arising various barriers in applying various corporate doctrines, including Piercing the Corporate Veil (PCV) doctrine within a group company. Such a condition makes it difficult to hold the shareholders accountable. In order to apply the PCV doctrine within a group company, it is necessary to enact a law regulating a group company by developing the PCV doctrine into Piercing the Holding Company Veil.

Keywords: a group company, legal loopholes, piercing the corporate veil, piercing the holding company veil

1. Introduction
Breeden (1993) states that "Those who have the capital to invest will seek to maximize their return without regard for national boundaries or loyalties, furthermore, alternative opportunities will abound. Consequently, investors will have the luxury to be rather demanding". Relevant to the opinion of Breeden, in financial management, one alternative to invest is performing an equity capital in a company in the form of shares. This capital investment aims, among others, to obtain dividends and/or to take control products (services) belonging to the company. In case of this capital investment is conducted on some limited liability companies, the companies will group and are under control of a holding company.

Furthermore, it was known that companies merging process can be done through a variety of ways, including acquisitions, mergers, and spin offs. Until now, Indonesia does not have a standard term for group companies. This group of companies is often referred to as a business group or corporation. Group companies are increasingly dominating business activities in Indonesia. The dominance of group companies is shown by the increasing number of big companies scale operating in Indonesia. These companies are no longer run through a single corporate form, but it is in the form of group companies. According to Sulistiowati (2010), the definition of group companies refers to the combination or arrangement of companies judicially are independent and is viewed as a parent and subsidiary company which are closely related to each other, thus forming an economic unity that is subject to the head of a holding company as the central leader.

Companies belonging to a group company are subject to the legal principle of limited liability which is the basic foundation of the company law (Fuady, 2002). According to the principle of limited liability, the shareholders of the company personally have no responsibility for any loan or unlawful acts committed by the company. The existence of company legal status is a requirement for the applicability of the limited liability principle for the shareholders. The legal status applies only to the individual company, but not to the group company.

Furthermore, companies belonging to a group of companies, as legal entities, have their own rights, obligations and property which are juridically separate from the assets of its shareholders and it shall be subject to the doctrine of company law (Widiyono. However, all companies belonging to a group company directly or indirectly are controlled by the principal or ultimate shareholder. Ultimate shareholder is the principal owner of the capital or the major shareholder of companies belonging to a group company: although its shares ownership juridically may be obtained through a subsidiary. In this case, the shareholders of a business entity are mostly owned by legal entities which in general boils down to an individual or particular group of individual called the ultimate shareholder (Budiyono 2008).

Therefore, the excessive control of the ultimate shareholder against companies belonging to a group company will clash with various legal doctrines of the limited liability company such as legal doctrine of fiduciary duty, self-dealing transaction, corporate opportunity doctrine, business judgment rule, ultra vires, intra vires, and piercing the corporate veil. Violation of any of these doctrines should have legal consequences that must be legally accounted by the ultimate shareholder. However, since the group company has not yet been regulated by law, the application of the legal doctrine of Piercing the Corporate Veil is subject to obstacles. As a result, law liability of the ultimate shareholder is hard to implement (Widiyono, 2008).

This study aims to search the answers to following three questions: how is the legal doctrine of Piercing the Corporate Veil applied to expose the responsibility of the shareholder?, does the application of the legal doctrine of Piercing the Corporate Veil reveal the ultimate shareholder responsibility?, and how is the implementation of the legal doctrine of Piercing the Corporate Veil hit on group company?

2. Research Method

This study is a normative law research. Muhjadi and Nuswardani (2012) state that normative legal research is a study aiming at examine in depth legal issues based on the legal science perspective against the established legal norms. Similarly, Marzuki (2007) asserts that legal research is a process which aims to find legal rule, legal principles, and legal doctrines to address the legal issues faced. In particular, the legal issues examined in this study concern with [1] the application of the legal doctrine of Piercing the Corporate Veil to disclose the responsibility of shareholders of a limited liability company, [2] the application of the legal doctrine of Piercing the Corporate Veil to uncover the responsibility of ultimate shareholders of a group company, and [3] the application of the legal doctrine of Piercing the Corporate Veil to include a group company.

This study aims to reveal the legal issues through a series of processes to find the legal norms should be established, including the legal rule, principles and doctrine concerning the existence of a group company and ultimate shareholder responsibility towards the group company they own. The legal rule is a collection of rules consisting of norms and sanctions with the aim of realizing order in human relationships, legal principles are the values underlying legal norms, while legal doctrine is legal source of jurists (Mertokusumo, 2009). In this study, the problem approach applied is statute approach. In particular, this approach is applied to review the Law of Limited Liability Companies and some of the laws governing the business entities associated with the object of research. The study also uses a legal conceptual approach to gain more insight concerning concepts related to legal subjects, legal entities, Group Company, holding company, and ultimate shareholders. All legal material is obtained from a library research. This material is then analyzed by constructing arguments based on the deductive thinking logic. The descriptive and qualitative method is applied to present, describe, and relate all the relevant materials with this study in a systematic, comprehensive and accurate to obtain the answers to the problems posed.

3. Results and Discussion

3.1 Corporate legal doctrines applied

In Indonesia, the standard term used to refer to a group company is not available yet. Some terms commonly used for naming a group company are business groups, corporations, and holding companies. The main characteristic of a group company is the presence of limited liability companies that join a group. Some of limited liability companies in a group company act as a subsidiary and one of the limited liability company serve as a holding company. As an independent limited liability company, although incorporated into a group company, is legally subject to the legal doctrine of the company. A limited liability company operating in Indonesia is subject to Law No. 40 of 2007 on the Limited Liability Company (hereafter LLCA 2007). The law applies corporate legal doctrine to be obeyed by every company. The following are various prevailing corporate doctrines.

a. Fiduciary Duty

According to Fuady (2002), the doctrine of Fiduciary Duty begins with a consciousness that there is no board of directors without the existence of a limited liability company: vice versa, there is no a limited liability company without the presence of the board of directors. Meanwhile, Tumbuan (2000) states that a limited liability company is the cause for the existence of directors board. Therefore, there is a trust relationship between a limited liability company and directors' board that gives rise to the position and duties of directors board. Similarly, Chatamarrasjid (2000) asserts that the position and duties of directors' board is based on two basic principles: namely the trust delegated by the company and their skills and concerns. Likewise, Widjaya (2000) claims that the task of directors' board is to manage a limited liability company comprising. The task is classified into two: i.e., management and representation tasks. Further, Widjaya divides the task of directors into three, namely trust based duty, skill, prudence and diligence based duty, and legal provisions based duty. This means that the directors must have intention, honesty, loyalty, and be cautious. The prevailing common standards are good of faith, high degree of loyalty, honesty, high degree of skill, and care of law enforcement.

b. Self dealing transaction

Directors often take a certain policy as part of their duties in administering the company. This doctrine emphasizes that in the decision-making process, the directors must perform their duties honestly, professionally, and refer to the company's objective and business stipulated in its articles of association. In particular, the policies adopted by the directors should not be solely beneficial to themselves, their families, and/or their group (Fuady, 2002). Similarly, Gautama *et al.* (1991) highlights that this doctrine prevents the emergence of company policies and transactions that only concern the interests of directors, including their families and groups. Importantly, this doctrine asserts that the policy should be taken in a transparent and legally accountable manner. Gautama *et al*. (1991) further confirms that this doctrine has an important role, especially if there is a conflict of interest between shareholder, board of commissioners and board of directors. In this case, these three parties shall not take any legal action which only benefits themselves.

c. Corporate opportunity

Another important doctrine to put forward is corporate opportunity doctrine. According to this doctrine, a director, commissioner, employee, or ultimate shareholder is not allowed to take advantage of personal gain when the action is actually an act which the company should carry out in running its business (Fuady, 2002). A similar opinion expressed by Gautama *et al*. (1991) who states that this doctrine rejects all acts conducted by the individual taking advantage of his position, especially on information obtained by the individual

as an official, which is then used to derive benefit from information received earlier than others, and thereby to the detriment of other transactions done by the relevant official. This doctrine requires the directors of the company to engage in profit-oriented actions. However, the directors must always adhere to the provisions stipulated in the articles of association and the applicable laws and regulations. In addition, the directors must be professional and take into account the stakeholder and shareholder interest.

d. Business judgement rule

This doctrine positions the directors on their proportion as human beings, where they may experience a failure in running the company's business. This doctrine considers that a business failure experienced by the company is a human failure. However, the directors carry out their functions and duties, they will always face operational risks, which are sometimes beyond their ability as human beings. Thus, it is appropriate that the directors is not generalized to be responsible for their mistake in making a decision without considering themselves as human beings. This doctrine protects the director's inability in running the company due to the limitation of themselves as human beings (Fuady, 2002). Furthermore, Gautama *et al*. (1991) states that this doctrine protects the directors of any business decision that constitutes a company transaction, as long as such action is exercised within their authority with due care and good faith. This doctrine considers that not every decision can provide benefits to the company; as is common in the business world, there is profit and loss. Nevertheless, directors should always base their decisions and actions only for the benefit of the company, not for personal gain.

e. Ultra and intra vires

According to Ranuhandoko (2000), ultra vires, also referred to as extra vires, is an action of corporate entity that exceeds its authority as set forth in the articles of association. On the contrary, an action of a corporate entity is classified as intra vires when such action resides in the scope of its authority. Further, Fuady asserts that intra vires coverage shall be all measures mandated in the Articles of Association containing company objectives and business activities and matters guiding the directors in carrying out the company activities. Meanwhile, Widjaya (2000) states that an action of the directors board is ultra vires if the action is beyond the board capacity and is not in line with the company's objectives as stipulated in the Articles of Association. Violation of the ultra vires doctrine can be a civil suit filed by the aggrieved parties, and can be sought for criminal responsibility both against corporations and corporate entities that commit such violations.

f. Piercing the corporate veil

According to Ranuhandoko (2000), in essence, PCV doctrine seeks to expose the corporate veil on legal proceedings in court, which usually ignores the immunity of corporate officials from corporate activity responsibilities. Based on this doctrine, limited shareholder responsibilities can be ignored. Chatamarrasjid (2000) states that if a mixture of property belong to shareholders and company occurred, or a company is established solely to be a medium for the shareholders to fulfill their personal objectives, it means that a violation of this doctrine occurred, then the person concerned must be responsible with his personal property. Furthermore, Usman (2004) argues that the PCV doctrine usually appears and is applied when there is a loss or lawsuit from a third party against the company. From the perspective of corporate jurisprudence, PCV doctrine could be referenced as a process to impose liability to individuals or corporations for legal acts committed by the company, irrespective of the fact that the act is actually perpetrated by the company. In this case, the court shall disregard the legal entity status of the company and assign the responsibility to the individual irrespective of the principle of limited liability of the company as a legal entity normally enjoyed by the individual.

3.2 Reviews on the theory of legal entity applied

According to Fuady (2009), there is a need to take a closer look at the development of legal entity theory to build a philosophical and theoretical foundation for the application of PCV doctrine in a group company. The following are some theories of legal entities applied in this study.

a. Organ theory

The first theory to be considered in this study is organ theory developed by Otto von Gierke. According to this theory, the characteristic of a legal entity is like human beings who really live in law enforcement. A legal entity is a body that builds its will by using its body's instruments or organs: e.g., its officers and members. A legal entity is like a man who expresses his will by his mouth or by his hand if the will is written on paper. What they (organs) decide is the will of the legal entity (Soemitro, 1993). According to Ali (2000), the organ of a company refers to the instruments owned by the company in running the company. In this case, the organs are [1] persons or group of persons having essential task and position, [2] their position is determined by the company's articles of association, and [3] has an authority to represent the company. Meanwhile, Article 1 paragraph 2 LLCA 2007 states that company's organs refer to General Meeting of Shareholders, the Board of Directors, and the Board of Commissioners.

Likewise, Fuady (2009) argues that a legal entity is not a fiction and is not a property (rights) without a subject. A legal entity is a real organism and is living in a legal society. It can build its own volition by using the instruments it has (e.g., its board and members). The purpose of a legal entity is collective in nature, regardless of the objectives of persons who make up the legal entity. In similar, Budiyono (2011) asserts that every association of people who make up a unity is a legal entity. In other words, the ultimate shareholder, the management of a limited liability company incorporated in a group company, and the subsidiary supervisory director are organs of a group company. Therefore, based on the organ theory, a group company is eligible to be considered as legal entities.

b. Collective ownership theory

The second theory to be considered is the collective ownership theory developed by Rudolf von Jehring. According to this theory, a legal entity is not an abstract matter. All members of

a legal entity have joint ownership, responsibility, and rights. This theory asserts that legal entity's wealth is the common property of its members. The legal entity is a collection of people who are behind the legal entity. Accordingly, the interests of legal entity is essentially the same as interests of persons behind the legal entity Fuady (2002) explains that. A similar concept is proposed by Soemitro (1993), who argues that a group company, is a shared property of all its founding members: e.g. ultimate shareholders and other owners. Any interest of a group company, is basically the same as interest of all members incorporated in the legal entity. Therefore, the wealth of a group company, is the common property of individuals who make up the group company: i.e., the ultimate shareholders and other minority shareholders.

c. Wealth aims theory

Referring to this theory, Salim (2010) argues that a group company can be viewed as a business entity having property which is separated from the property belong to its owner. The entity is also has a purpose, according to the will of the owner. Further, Salim argues that a legal entity property may be designated for certain purposes. This theory considers that only humans can own property and can be subject to the law. Meanwhile, Muhamad (1996) asserts that according to the theory of wealth aims, a corporation is not a legal subject. The property granted to a legal entity in essence is not related to the legal subject. Importantly, a legal entity must be managed with a specific purpose. Based on this theory, a group company is property owned by its owners, which assign their properties to the company in achieving their goals. Indeed, a group company is considered as a tool for achieving maximum goals and benefits in an efficient way.

d. Property in position

According to this theory, a legal entity could be referenced as a body which has an independent treasure. This theory is a doctrine of property owned by a person in his position. The property is an inherent right to the person's position. According to this theory, a person may not have rights if he cannot exercise that right. In other words, if a person does not have the will power, that person is not a legal subject. This is a consequence of a theory that focuses on will power. In the case of a group company, the entity that wishes are the management. These administrators have the right due to the quality attached to the person's position (Muhamad, 1996).

e. Juridical reality

Theory of Juridical Reality is a teaching developed by Meyers. According to this theory, a legal entity is a reality, even though the entity is untouchable. A legal entity is a real entity and is a juridical fact. This theory is basically the development of organ theory. If organ theory asserts that the existence of organs is absolute, then the theory of juridical reality argues that the existence of organs is not absolute. The existence of organs is simply required by the legal process so that its existence is not absolute (Budiyono, 2011).

3.3 Legal Entity in Indonesia

In the context of Indonesia, a legal entity is defined as an organization or association established by an authentic deed. A legal entity juridically is treated as a person who has rights and obligations or is also called a legal subject. There are two legal subjects: person and legal entity. These persons and legal entity are referred to as legal subjects because they bear legal rights and obligations (Sulistiowati, 2013). Furthermore, Rizki, (2012) classifies legal entities into two: public and private legal entities. Public legal entity is a legal entity established under a certain public law or a legal entity governing the relationship between the state and/or its apparatus and the citizen concerning public interest. Meanwhile, a private legal entity is a legal entity established on the basis of civil law or an association of persons who enter into cooperation, or establishing a business entity, and constitute an entity that meets the requirements prescribed by law. Private legal entities themselves consist of two types: profit-oriented and non profit-oriented entities.

A group company is a combination two or more limited liability companies that function as a holding and subsidiary companies. Regulation of the Minister of Agrarian Affairs No. 2 of 1999 on the Location Licenses defines a group company as two or more business entities that are partly owned by the same persons or legal entity, either directly or through other legal entities. By the amount and nature of such shareholding, the person or legal entity may directly or indirectly determine the operation of a a group company. Meanwhile, the Indonesian Civil Code defines a group company as an economic unity in which legal entities or associations organizationally are related. A group company is interrelated legal entities and alliances within a group. In particular, Fuady (2002) defines a holding company as a company that owns a part or all shares of another company to control or participate in controlling the company.

Officially, the regulation on Limited Liability Company is contained in Law Number 40 Year 2007 on the Limited Liability Company (LLCA 2007). LLCA 2007 also regulates the responsibilities of shareholders in a Limited Liability Company. According to Article 3 paragraph (1) LLCA 2007, the shareholders of a Limited Liability Company shall not be personally liable for any engagement made on behalf of the company and shall not be liable for any loss of the company's shares. The provisions of this article reinforce the character of a company in the sense that the shareholder is solely responsible for the amount of paid-in stock and does not include his personal property.

Nevertheless, there are several conditions under which the shareholder must be responsible for his personal wealth. Based on Article 3 paragraph (2) LLCA 2007, it is known that the provisions in Article 3 paragraph (1) shall not apply if [1] the requirements of the company as a legal entity have not been met, [2] the shareholders concerned directly or indirectly in bad faith exploits the company for their personal benefit, [3] the shareholders concerned are involved in illegal activities committed by the company, or [4] the shareholders concerned directly or indirectly are involved in illegal activities by using the company's assets resulting in the company's assets deficit to pay off the company's debt (Shofie, 2011).

In the context of a group company, to ask for the ultimate shareholder liability for their deed within a group company, it is important to examine whether there is a legal relationship between a group company and ultimate shareholders. The

liability of ultimate shareholders is not solely a matter of when the group company has become a legal entity. Indeed, the responsibility of ultimate shareholders will be more easily identified if a legal relationship is available (Sulistiowati, 2010). Such a legal relation is realized when an event qualified as a legal relationship is stipulated in a legislation. If the legal relationship does not materialize, it is difficult to link major shareholders with a legal event. In the absence of a legal event, there will be no legal consequences. The ultimate shareholder could be held their liable if they commit an act classified as a legal relationship, whether it arise out of an agreement or of a law. An engagement arises out of a law occur because the act is legally granted due to the act.

Therefore, in order to hold the ultimate shareholders liable in managing a group company, it is important to establish an applicable legislation for certain actions taken by the ultimate shareholders. Of course, the establishment of this law requires a philosophical and theoretical foundation as the legal basis for the necessity of law governing group companies, including the responsibilities of its ultimate shareholders. For this reason, it is important to develop piercing the corporate veil doctrine which applies to governing group company issues. With the development of this doctrine, it is possible to hold the ultimate shareholders liable of group companies when they directly or indirectly in bad faith exploit the company for their personal benefit; they are involved in illegal activities committed by the company, or they directly or indirectly are involved in illegal activities by using the company's assets resulting in the company's asset deficit (Widiyono, 2008).

4. Conclusion

A group company is a combination of several limited liability companies where each company stands alone as a legal subject. The group company consists of a company act as a parent company and several companies serve as subsidiary companies. The group company has a controlling shareholder based on a person or party referred to as the ultimate shareholder. A group company is also referenced as an economic unity in which legal entities are organically related. The application of corporate legal doctrines such as fiduciary duty, self-dealing transaction, corporate opportunity doctrine, business judgment rule, ultra and intra vires, and PCV shall be executed by companies belonging to a group company; although the application of such doctrine is potentially dealing with the ultimate shareholders' interests. The study considers that, in the context of group companies, PCV doctrine violations occur when the ultimate shareholders directly or indirectly in bad faith exploits the companies belonging to the group for their personal benefit, the ultimate shareholders are involved in illegal activities committed by the companies, or the ultimate shareholders directly or indirectly are involved in illegal activities by using the company's assets thus harming the company's assets

Furthermore, it was found that theories of legal entities, including organ, doel vermogens, vermorgen ambtelijk, and juridische realiteitsleer theories favor a group companies as a legal entity at the time when the group company has been ratified as a legal entity by the government. To ask for the ultimate shareholder liability for their deed within a group company, it is important to examine the existence of a legal relationship between the ultimate shareholder and the group company. Such a legal relation is realized when an event qualified as a legal relationship is stipulated in a legislation. If the legal relationship does not materialize, it is difficult to link the ultimate shareholders with a legal act. In the absence of a legal act, there will be no legal consequences. Therefore, Indonesia needs to establish a legislation that applies to certain actions committed by ultimate shareholders in managing a group company. Finally, this study found sufficient philosophical and theoretical foundations to be used as a legal basis and consideration to develop the PCV doctrine into Piercing the Holding Company Veil. Thus, the injustice arose as a result of actions conducted by ultimate shareholder in a group company can be minimized.

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