



A Philosophical Analysis To Uncover The Meaning And Terminology Of Person In Indonesian Criminal Law Context

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A B S T R A C T

Definisi orang dan bukan orang selalu mengalami perubahan dalam sepanjang sejarah hukum. Zaman dulu orang tidak mengakui budak sebagai person. Baru-baru ini budak diterima sebagai subjek hukum secara sah menurut hukum. Artikel ini membahas persyaratan orang dihadapan hukum berdasarkan tujuan khusus, dan kemudian membahas makna dari manusia sebagai subjek hukum dalam hukum pidana. Untuk melakukan pembahasan tersebut, metode yang digunakan dalam kajian ini adalah penelitian doktrinal digabungkan dengan pendekatan filosofis. Beberapa teori mengenai orang sebagai subjek hukum dianalisis dan konsen orang dihubungkan dengan definisi tentang subjek hukum yang terima akhir-akhir ini dalam rancangan KUHP Indonesia. Dari kajian yang sudah dilakukan dapat dikemukakan bahwa orang dalam hukum pidana berkaitan dengan norma yang menjadi tujuan dari hukum, seperti pelaku perbuatan atau yang melalaikan perbuatan dan tidak hanya sebagai pemegang hak. Subjek hukum tersebut harus seseorang atau sesuatu dengan kemampuan untuk berfikir secara rasional dan kemampuan untuk bertanggung jawab atas pilihannya. Rancangan KUHP mengakui orang dan korporasi sebagai subjek hukum. Akibatnya, hal itu memasukkan tidak hanya badan sebagai subjek hukum melainkan juga kumpulan tanpa person hukum. Lagi pula termasuk korporasi, segala bentuk perkumpulan seperti negara, lembaga negara, partai politik, perusahaan negara, sehingga dapat dipidana.

1. Introduction

When we talk about person in criminal law, traditionally we will only talk about human or natural person. And as for the common use of the word 'person', we will never really think about something else besides human being as part of homo sapiens species. In criminal law, essentially questioned individual

responsibilities that connect action and guilty mind. However, now criminal law recognizes person that is not only human but also other type of person. Therefore, criminal law nowadays, recognizes real persons, fictitious persons, artificial person, moral persons, juristic persons, legal persons, corporations or no person at all.

Indonesia in its drafted penal code states that persons are natural person including corporations. Who are these other persons that are recognized by criminal law as persons and non-persons? What are sufficient conditions of being person in the eye of law according to its particular purposes? What exactly is corporation? What entities may fall into the meaning of corporation? How do other countries apply the concept of corporation as responsible subject in criminal law?

This paper attempts to answer those questions. It will examine the meaning of legal person and moral person in criminal law particularly from philosophical perspective. Whether we will just have to think in legal formal meaning and separate the meaning of legal person and moral person, or is there another theory that can explain the legal personality of an entity to be responsible criminally. Matambanadzo asserts that there are various ways to determine who counts and how we take account of the meaning of person. Citizenship, legal rights, and legal subjectivity, are some ways to speak about who counts in law and how we take account of them; another way is accomplished through the concept of legal personhood.¹ Which way is the most appropriate to be adopted to explain the legal status of legal person in criminal law. There is something that concerned some legal theorists regarding consequences of the different approach in accepting the meaning of legal and moral person, just like there is debate about differences between immoral conducts, illegal

behaviours and real crimes, which require evil mind and mental element of the offenders.

In order to discover the appropriate meaning of corporation, this paper will explore the legal history of the concept, analyse on how experts define it, and other countries adopt corporation terminology in their laws and regulations.

2. Analysis

2.2.1 Subject and Object in Law

In the language of law, there is distinction in addressing object and subject. The discussion about subject and object is a vital topic in almost all legal theories. Because the concept of personhood not only affects human interactions, but also determined the rights, obligations, and legal protections given to a subject or object.² Differences about the concept were first noticeably elaborated on Roman Law Codification.³

Object would generally be thought as property, such as house, land, money, pet, car, and so forth.⁴ Objects can be owned, traded, transferred, and transposed. If a person owns an object, then the owner will have full control of the object, and others must respect its ownership.⁵ The law provides assurance to the owner of a property to be able to utilize it, to take advantage of it, and to ensure that others will not get benefit of it without permission from the owner.⁶

¹ Saru M. Matambanadzo, 'Embodying Vulnerability: A Feminist Theory Of The Person' (2012) 20 *Duke Journal Of Gender Law & Policy* 45 at 46.

² Brendan (Bo) F. Pons, 'The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?' (2013) *South Dakota Law Review* at 121.

³ Ngaire Naffine, *Legal Theory Today, Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) at 48.

⁴ The relation between object and subject is a legal relation between persons and those that are considered as things; person and thing relations. If a thing is defined as under the exclusive power

of a person, with this property-owner relationship, other person is forbidden from accessing this property and is obligated to respect this proprietary powers. See Hans Kelsen, *The Pure Theory of Law, Its Method and Fundamental Concepts*, translated with an introduction by Charles H. Wilson (1934) 50 *The Law Quarterly Review* at 494.

⁵ Hans Kelsen, *General Theory of Law and State*, 6th printing, translated by Anders Wedberg, (The Lawbook Exchange Ltd, 2003) at 494.

⁶ Stephen R. Munzer, 'Theory of Property', in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) at 198.

On the other hand, subject is something that can signify anything that has certain consequences.⁷ In the field of law, the consequences that are signified by the subject are social consequences in character; these consequences are controlled and modified because they hold rights and obligations, privileges and immunities.⁸ With this meaning, can be understood that inanimate objects such as molecules or tables or trees are not qualified to be the subject of law, because they may have certain social consequences for their surroundings, but those social consequences do not appear because they carry rights and obligations. Inanimate objects will continue to behave exactly as they behave with or without the rights and obligations that existed at those. In contrast, human, singular person or group of people, obviously going to act differently, or may bring different consequences, depending on certain rights and obligations they possess, and according to certain rights and obligations given to them.⁹

Legal subjects are usually referred to as persons. Historically, person meant mask commonly worn by Greek and Roman actors on the stage of a show.¹⁰ Person then meant actors who wore

that mask with the characters and roles attached to it. The term person ultimately used as legal terminology, which means something that can bear legal rights and legal duties. These legal rights and duties are differentiated by certain circumstances, similar to actors on the show with its different characters and roles.¹¹ Almost all legal literatures, both Indonesian and western literatures, define legal subject (*subjectum juris*, *rechtspersoonlijkheid*, or *person*), as the bearer of legal rights and/or duties.¹² A legal subject is a right holder and at the same time is also an obligation holder.¹³ A subjective right shall not exist without a parallel obligation relates to it. Thus, a right exist only if there are others who have duty corresponds to that right. For this reason, state passes legal provisions to ensure that the natural rights of each individual are protected, by formulating parallel obligations with those rights.¹⁴

Where are these rights and duties come from? Some theories say that these rights and duties are natural law that vested in person from its birth.¹⁵ It is automatic rights that attach to a person, some example of these rights can be found on The Universal Declaration of Human

⁷ The concept of subject does not only apply in legal science but prevails in all sciences. It developed initially in mathematics and physics. The word 'subject' has been used in legal theory as a descriptive term, meaning a right and duty-bearing unit. But actually word 'subject' has not been widely used in legal discussion. It has been considered important particularly in German theory, which has applied first to describe what makes anything appropriately a subject, as a qualification of having right and duties, and in German theory of "subjectivity" is itself discussed in depth particularly in Kant writings. John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 *The Yale Law Journal* 655 at 659-661.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ PW Duff, *Personality in Roman Private Law* (Cambridge University Press, 1938) at 3.

¹¹ John Austin, in R. Campbell (ed), 5th edition, *Lectures on Jurisprudence* (John Murray, 1885) at 164.

¹² Mochtar Kusumaatmdja dan Arief Sidharta, *Pengantar Ilmu Hukum: Suatu Pengenalan Ruang Lingkup Berlakunya Ilmu Hukum (Introduction to*

Legal Studies: A Preliminary to Applicable Sphere of Legal Science), Book I, 3rd printing, (PT. Alumni, 2013) at 80; Soebijono Tjitrowinoto, *Hukum di Indonesia (Law in Indonesia)*, (Rahma Kongsi, 1953) at 17; Riduan Syahrani, *Seluk-Beluk dan Asas-Asas Hukum Perdata (Subtlety and Principles of Private Law)*, 3rd edition, (PT. Alumni, 2006) at 41. Bryant Smith, 'Legal Personality' (1928) 37 *Yale Law Journal* 283 at 283: 'a person is a capable of rights and duties,' Maitland also states that person is 'a right and duty bearing unit,' see Frederic William Maitland, in H.A.L. Fisher (editor), *The Collective Papers of Frederic William Maitland* (The University Press, 1911), Michoud asserts that 'for legal science, the notion of person... signifies simply a subject of rights -duties,' cited from John Dewey, *supra* note 9 at 659.

¹³ Kelsen, *Pure Theory...*, *supra* note 6 at 116.

¹⁴ *Ibid* at 118-119.

¹⁵ The theory of natural law can be traced back to the Greek logic, the theory of Plato, Aristotle and their followers, where each theory had varied widely through history. And according to this theory, obligation or duty is moral duty, which binds an individual by reason of the validity of a moral order.

Rights, for instance right to life, liberty, and security without distinction of any kind, such as race, colour, sex, religion and so on.¹⁶ Other theory, the legal positivism, asserts that legal rights exist only when legislature codifies the rights, it will not bind the person, unless the law already creates it, which is legal right.¹⁷ While, Roscoe Pound argues that the law does not create them, it only recognizes them. The more civilized the notion, the richer he is in rights; therefore, it is a pressure upon the law to meet these increasing scope and character of legal rights.¹⁸

Brown asserts that there are several classes of person in law.¹⁹ In legal speaking, we can divide entities into two categories. First, persons²⁰ and

secondly, non-persons. To put it simply, legal persons are someone or something which can act in law, and non-persons are ones or entities which cannot act in law. Fall into first category are real persons that are humans or natural persons;²¹ and artificial legal persons (sometimes address as fictitious legal person, even though these terminologies have different meanings),²² such as corporations, universities, states, provinces, municipalities, religious bodies, association of government officials, social associations, etc.²³

In the second category there are human that are not accepted as person in law such as one with insanity,²⁴ slaves and outlaws (outside the protection of law). Some literatures embrace the

¹⁶ United Nation, The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>. Last access at May 15, 2017.

¹⁷ This theory is introduced by Kelsen in his famous "The Pure Theory of Law" or "Legal Positivism" where he tried to purify law from natural law, or moral law, social, anthropological, history, political, and so on. Kelsen unlike natural law that view rights and obligations are two different things that come from different resources, asserts that right and duty are unity in the sense that it is specified by the law, See Hans Kelsen *supra* note 3 at 495-496. See also James Goetz, 'Natural Unity and Paradoxes of Legal Person' (2013) 27 The Journal Jurisprudence at 31.

¹⁸ Roscoe Pound, 'Interest of Personality' (1915) 28 The Harvard Law Review 343 at 344.

¹⁹ Brown, W. Jethro, 'Personality of the Corporation and the State' (1905) 21 Law Quarterly Review 365 at 376. Also reprinted in (2008) 4 Journal of Institutional Economics 255.

²⁰ Legal persons are sometime addressed as moral persons or jural persons or juridical persons. It is used interchangeably. However, those words have emphasizing meaning, which are different from one to another. French writers prefer to use '*Les Personnes Morales*' or moral persons, even until now, their Penal Code recognizes moral persons instead of legal persons.

²¹ As noted by Austin that 'a human being considered as invested with rights, or considered as subject to duties,' see Hans Kelsen, *General Theory...*, *supra* note 7 at 94. There are many debates relating the ability of human being to qualify as person, the requirement of humanity. For example they are born and not yet dead, and

the meaning of born and dead are legally formulated with certain conditions. For example, do foetus, embryo or zygote be determine as person that carry the same constitutional legal rights and duties with men who has born? If it is included in the meaning of natural person in law, then, abortion, medical experiments on foetal parts will count as illegal activity. See Charles I. Lugosi, 'Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence' (2006) 22 Issues in Law and Medicine 119 at 125. See also Michael Stokes Paulsen, 'The Plausibility of Personhood' (2012) 74 Ohio State Law Journal 13.

²² Fictitious will refer to something that is not real and only there in the fantasy or imagination, like fiction novel, the story is there, but we cannot really see it in reality. While artificial indicate something that is made to imitate the real one, like artificial lake, it is meant to imitate the real lake but it is actually made by men, but we can see the lake, there is this artificial lake in front of our eyes. In this sense, of course artificial would be more suitable to address other legal persons besides human. However, the realist would not agree with the term artificial to address legal entity because according to realist, the development of normal group personality is essentially growth and not manufactured.

²³ Goetz, *supra* note 19 at 27

²⁴ In some cases 'the insane' can be held accountable criminally. For example to be put in compulsory detention, or sometimes the courts take the defence of mental illness as a reason for reducing the sentence. Wells, *Corporations and Criminal*

terminology of human nonperson for this category.²⁵ They are human, but do not get the title of person in law. The history of slavery has developed issue of legal personality in human. If slaves are considered as person, how one could regards them as part of property.²⁶ And the last category is legal non-person that is artificial. The examples of this type are partnerships, clubs, family that are not considered as having personality in law, particularly in civil law. They can acquire property for certain purposes, whether by will or by gift. The ability of obtaining this property consequently will arise rights and duties. They might also have psychological unity like corporations, but the law do not recognize it as person.²⁷ Therefore legal person do not always human being, and being human does not guarantee that he/she be regarded as a person in law.

To be a person, a particular legal regime may accommodate different requirements from another legal regime. The concept of who, what and what capacities should be possessed to be a person, can be discussed from historical, political, moral, philosophical, metaphysical, theological perspective. Theological philosophers view person as sacred being that must be respected and protected. This notion tends to include a foetus as person. Health law often embraces the meaning of person as this sacred being.²⁸ Liberal moral philosophers claim that person is a moral agent, an intelligent and reflective being who can make rational choices. This conception greatly influenced the notion of person in the field of law, particularly criminal law; with the idea of responsible agent that can be accountable for the crimes they committed. Whereas legalists reject all form of metaphysical theories; to them, person simply entities that bear legal rights and duties.

Responsibility, 2cd edition (Oxford Univerisy Press, 2001) at 65.

²⁵ For example Harvard Law Review's Notes, When We Talk about When We Talk about Persons: The Language of a Legal Fiction, (2001) 114 Harvard Law Review 1745 at 1747.

²⁶ *Ibid*.

²⁷ Brown, *supra* note 21 at 258.

2.2.2 The Theory of Person and Legal Person

What requirements do legal theorists provide to clarify which substance is person in the eye of law, who bear rights and duties, and who is not included as person, are still very unclear. The conception that anything can be a person, must essentially acquire certain conditions, the existence of which is necessary to constitute anything a person. Particularly for criminal law, this examination will also answer the question of what kind of entities that can hold responsibility for a crime. Naffine in her work "Who are Law's Persons? From Cheshire Cats to Responsible Subjects to Responsible Cats,"²⁹ identifies three approaches regarding how law defines legal person. The first, legal person in the meaning of legal formal meaning, secondly, person as a reasonable creature, and third, person is a responsible subject.

The first theory describes legal personality as the ability of legal person to have formal capacity to bear the legal rights in order to participate in legal relations.³⁰ Legal persons are not different entities of their rights and obligations, but it is a personification of unity, and because the rights and obligations of a legal person, in this context also called unity personification of a set of legal norms.³¹ According to this definition, we should see physical and juristic person as identical in nature, because person is not seen from whether they have physic or psychological matter, but person is seen as the bearer of the rights and duties that is norm complexes.³² Moreover, regarding the freedom or autonomy of the physical person, which is comparable to freedom of the will, this theory does not accept it as part of legal theory, instead it is said to be a political theory as the fundamental quality of the State.³³ Proponents of this definition, tend to view purely legal character by separating legal theory from moral, social, political and historical aspects. Person exists only as a capacity to

²⁸ Naffine, *Legal Theory...*, *supra* note 5.

²⁹ Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Cats to Responsible Subjects' (2003) 66 Modern Law Review 346.

³⁰ *Ibid* at 350.

³¹ Kelsen, *Pure Theory...*, *supra* note 6 at 91.

³² Kelsen, *General Theory...*, *supra* note 7 at 496.

³³ *Ibid* at 497.

operate in law, granted the competence by the law itself.³⁴

With this understanding, then anything could possess legal personality because legal persons designated or defined by the law. So, it could include animals, fetuses, dead people, environment, corporate, whatever according to law necessary to be included into legal persons. There is no particular character that makes the difference between being and non-being that keeps them from becoming persons. There is no special character to become persons. One object can be person enough when legal gives them the ability to bear the formal rights or obligations. According to Kelsen, 'persons exist as long as they have the rights and obligations; regardless of whether they do not even have the existence.'³⁵ Ideally, in this condition, law have to be responsive to the progress of the civilization, where the growth of law and the growth of individual interest walk together. However, as Pound said that often the recognition of individual or social interests relatively late in the development of law.³⁶

The second definition of legal persons is being reasonable. This notion is generally accepted as a formal legal sense of the persons. One thing that is conventionally accepted in law that a person may be subject to law at the time he/she was born and it stops being legal subject as its whole brain dies.³⁷ The dominant conception of person in this second sense described by Thomas Aquinas (1224-1274) with, *vera persona est rei rationabilis individua substantia*³⁸ In this meaning every last word (rationalist, individual, substantia) has a technical definition where the discussion back to the concept of metaphysics by

Aristotle; regarding the nature of beings, indeed, is a very interesting topic for philosophers in the Middle Ages.

Reasonable means endowed with a natural ability to choose, as described by Aristotle that humans, as part of their natural properties must have free will.³⁹ Similar in many ways is the 'principle of alternative possibilities', according to which an individual may proper be held responsible for conduct only if he or she could have done otherwise. In criminal law, relating to the theory of responsibility, it is not fair to punish someone who has no capacity to understand what he/she is doing or has no capacity to will something that is evil. Therefore one can be liable for an action only if he/she has fundamental idea of fairness and individual liberty when did that action. That is why in some situations like self-defending against attack, or under duress, or suffer mental incapacity may remove criminal liability.⁴⁰

This human freedom according to Immanuel Kant led to moral and moral determination that can be said a self-determining moral agent.⁴¹ Moral in human beings differentiate them from inanimate objects or living things such as plants or animals. Therefore, when humans have reasonable element with free will; it can be said that they are autonomous individual; described as a separate, distinct and possess individualism.⁴² Moore argues that to be the subjects of criminal law, it must at least be rational agents that possess autonomy in four different senses: emotionality, unified character,

³⁴ *Ibid.*

³⁵ Kelsen, *Pure Theory...*, *supra* note 6 at 93.

³⁶ Pound, *supra* note 20 at 348.

³⁷ Naffine, *Who are Law's Person...*, *supra* note 30 at 357.

³⁸ Cited from Dewey, *supra* note 9 at 666.

³⁹ Aristotle of Greece (385 atau 384 B.C.-322 B.C) affirms '*man is subject to nature in as much as he is a part of the universe and, therefore, subject to the laws of matter and creation and man is subject to nature in as much as he dominates it by his spirit. His spirit enables him to will freely and, therefore, to distinguish between good and evil.*' Cited from Surya Prakash

Sinha, *Jurisprudence: Legal Philosophy* (West Publishing Co, 1993) at 86-87.

⁴⁰ J. Fischer, 'Responsibility and Control' (1982) 79 *Journal of Philosophy* 24. See also Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Science in Criminal Law Theory, (2001) 64 *The Modern Law Review* 350 at 353.

⁴¹ Immanuel Kant (1724-1808), cited from Freeman, *Llyod's Introduction to Jurisprudence*, 7th edition, (Sweet & Maxwell Limited, 2004) at 118.

⁴² Philippe Ducor, 'The Legal Status of Human Materials' (1996) 44 *Drake Law Review* 195 at 200.

unified consciousness, and intentionality.⁴³ With the reason that someone has, he can limit his personal demand that interfere the interest of others.⁴⁴ For example, with the reason that someone has, he/she will not take someone else's property just because he/she wants it.

Since rights and obligations encompass rational choice, the involvement of 'rational individuated substance' in the concept of person survived long after metaphysics and theology. French is one of the countries who consistently put moral personhood to be the meeting place for theories of group personality.⁴⁵ Although this concept according to Kelsen has the ambiguity of the mixing concept between human and person, humans and persons are different concepts from different considerations.⁴⁶ Human according to him exists in biological and psychological concept or in natural sciences, while person is a concept in law that refers to a social role, from the analysis of legal norms.⁴⁷

The third theory about legal personality is the responsible subject. According to this understanding, not all men (human beings) are eligible to be the persons, but only a rational and competent by law. According to Lacey, the second theory that focuses in the idea about human being and a set of values as rational and self-determining moral agent, fails to account the idea of responsibility and that the subjective, capacity conception is only one among others possible interpretations of human responsibility.⁴⁸ As Richard Tour employs the term 'full legal personality' which requires the person to be able to initiate an action in court, sue and be sued.⁴⁹ Meanwhile, according to Matthew Kramer, mentally competent human

adults are potential right holders where considerable moral significance attaches and can personally responsible for his/her civil and criminal actions.⁵⁰ When compared with the first theory, then in this third concept, there is an active subject and moral beings that is separated from the relationship: he who determines his will, which holds and determine its rights and the holder of a separate and distinct rights.

Legal persons according to the third theory is in line with the understanding of person proposed by John Locke, in which the actions and qualifications is owned only by the intelligence agent, capable of law, can be happy and sad.⁵¹ In other words, according to the third theory, legal person is intelligence agent and moral agent that can be responsible for his/her actions. In moral context, person is an individual who can make decisions and able to execute that decision independently. Additionally, in legal context, that person has the right to make decisions and execute it.⁵²

The third theory, which explains person as responsible subject, who has sufficient mental determination to consider his/her actions and can be accountable for all rational choices that he/she made, is the most acceptable concept about person in criminal law. Because criminal law discuss specifically subject who can commit a crime, able to be responsible for that act, and can bear criminal sanction.

As we have discussed some theories about legal personality, now, we will scrutinize issues regarding group of people personality, which is part of non-human legal subjects. We only focus on this legal person because criminal law accepts both natural person and group of people as person. Issue regarding group legal personality

⁴³ Michael S. Moore, *Placing Blame: A Theory of the Criminal law*, (Oxford University Press, 2010) at 611.

⁴⁴ Pound, *supra* note 20 at 355.

⁴⁵ In its Penal Code Article 121-2, French defines: "Moral persons (*Les personnes morales*), with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives . . . in the cases provided for by statute or regulations."

⁴⁶ Kelsen, *Pure Theory....*, *supra* note 6 at 94

⁴⁷ *Ibid.*

⁴⁸ Lacey, *supra* note 42 at 357.

⁴⁹ Naffine, *Who are Law's Person....*, *supra* note 30 at 347.

⁵⁰ M. H. Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 Canadian Journal of Law and Jurisprudence 29 at 36.

⁵¹ Naffine, *Who are Law's Person....*, *supra* note 30 at 347.

⁵² C.N. Nana, Constantine Ntsanyu. *Corporate Criminal Liability in the United Kingdom: Determining the Appropriate Mechanism of Imputation* (Robert Gordon University, 2009) at 44.

observes on how to associate human as natural person in law with other juristic persons. This discussion may be parallel to the topic of animal⁵³, intelligent agent⁵⁴, or foetus⁵⁵ as legal person. However this paper will focus only to the discussion of organizations as person in law. Organizations are association of people, such as business corporations, non-profit oriented organizations, states, universities, and so forth. The basic question is, whether this juristic person has mental element that give them the ability for moral consideration,⁵⁶ as being possessed by natural person, so they can be liable of its conduct.

Corporations have a unique characteristic, as Iwai argues that it is at the same time both a person and a thing; because it has the propensity to own and be owned. Corporation owns all asset of the corporation, which also can be done by a natural person; however, unlike natural person, who cannot be owned, corporation is in fact, and cannot be denied is owned by the shareholders.⁵⁷

French distinguishes different types of collective, the aggregate and the corporation.⁵⁸ An aggregate collectivise is a mere collection of people such as gang which cannot be seen as a moral agent. An aggregate identity will change whenever there is a change in its membership. A

corporation is a collective of individuals whose identity is not related to the identities of the members. Accordingly, to be a moral agent, a group of people should be able to have its own intentionality, or corporate intention that can be found in the corporation's internal decision making structure.⁵⁹ As Austin describes that responsibility is based on intentionality.

The establishment of legal persons has been there for a long time. The state was the first legal person that is recognized by law.⁶⁰ State currently classified as a form of organization that has legal personality. This also true for state's subordinate, such as provinces, cities, regencies, state's departments, state's agencies and so forth. Looking at a state as a different legal person from its constituent is easier than observe it from a business organization. If, for example, a state owed some money, its citizens would not carry out the loan, and even if half of its citizen immigrates to another country, no one would have thought to pursue the citizens to pay his/her country's debt.⁶¹

Initially, non-human legal person is addressed as juristic person; the term of the fictitious person was occupied. The conception of fictitious person is a legacy from the Roman law, constructed and elaborated by the religious lawyers of the Middle Ages, and presented on

⁵³ Generally, animals do not account to be a legal person in criminal law. However, there are some rare cases that hold an animal to be liable of a crime. For example, a case in Argentina, a dog was sentenced to life in imprisonment for killing a three years old child of the owner. Cited from Wells, *supra* note 26 at 65.

⁵⁴ There are some discussion about the possibility to make computers and robots with its intelligent agent may be liable in criminal law because it is considered to have the same legal capacity with human. See for example Andrade, Francisco, et al. 'Contracting agents: legal personality and representation' (2007) 15 *Artificial Intelligence and Law* 357 at 371. See also Peter M. Asaro, 'Robots and Responsibility from a Legal Perspective' (2007) Working Paper University of Umea Sweden, can be accessed at <http://www.peterasaro.org/writing/>

⁵⁵ Many scholars are in the opinion that foetus in the womb should be regarded as a person under the law, and should get all the rights as human being

who have been born. See further Lugosi, *supra* note 23 at 125. See also Paulsen, *supra* note 23.

⁵⁶ Moral consideration sometimes being discussed with the topic of "Moral Considerability". See for example Mark H. Bernstein, *On Moral Considerability: An Essay On Who Morally Matters* (1998).

⁵⁷ Katsuhito Iwai, 'Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance' (1999) 47 *The American Journal of Comparative Law* 583 at 589-590.

⁵⁸ French, *Collective and Corporate Responsibility* (Columbia University Press, 1984), at 8

⁵⁹ *Ibid* at 39.

⁶⁰ Ugo Pagano, 'Legal Person: the evolution of fictitious species' (2010) 2 *Journal of Institutional Economics* 117 at 119.

⁶¹ Goerge F. Deiser, 'The Juristic Person. I' (1908) 57 *University of Pennsylvania Law Review and American Law Register* 131 at 134.

modern legal thought by Savigny. The theory has no concern for members and accordingly, the fictitious person cannot exist except by virtue of some act of the state. In the development, this theory was evaluated by the reductionist that is popular in the second half of the nineteenth century that holds that corporations are aggregates of natural person.⁶² And then, the examination of the legal literature criticized those two theories, by the realist such as Beseler and Gierke who set up an analysis of the conception of the corporation as a personality based not on Roman, but on a priori principle.⁶³ The real entity theory heated discussions from around 1900 to 1930. On this view, the corporation is neither a fiction nor an aggregate but a non-reducible real entity.

Therefore, generally there are three main approaches to explain the personality of group of people: formalist (concessionary) theory, reductionist (atomistic) theory and realist (holistic) theory.⁶⁴ In the formalist view, the personality of the organization is there because it is given by the state, so it is an exclusive creation of the law. The organization is like a reflection of the political state that gives it existence, constituted an autonomous institutional actor separable from those with an interest in it.⁶⁵ It is often associated with this view that the entity itself is not real, artificial being, invisible, intangible, so it is just a fictitious thing. Thus, the organization is simply an artificial description or an imaginary legal person that exists only in contemplation of law.⁶⁶

⁶² David Gindis, 'From Fictions and Aggregates to Real Entities in the Theory of the Firm' (2009) 5 *Journal of Institutional Economics* 25 at 26.

⁶³ Deiser, *supra* note 63 at 136-137.

⁶⁴ Meir Dan-Cohen, 'Epilogue on Corporate Personhood and Humanity' (2013) 16 *New Criminal Law Review* 300 at 302. See also Jothan A. Marcantel, 'The Corporation as a "Real" Constitutional Person' (2011) 11 *US Davis Business Law Journal* 221 at 222. Sometimes, the reductionist (atomistic) theory also addresses as the partnership theory and realist (holistic) theory that is also called entity theory. See Margaret M. Blair, "Corporate Personhood and the Corporate Persona" (2013) 3 *University of Illinois Law Review* 785 at 807.

They are given the position as independent individual according to the law, as given to companies, non-profit institutions, universities, hospitals, organization with cooperative, such as insurance, private clubs, and even to government agencies, such as city, province, state institution, state companies such as post office, state telecommunication, state television and so on.⁶⁷ Accordingly, corporation is no more and no less than what the law made it to be

Reductionist explains that organization or entity refer to aggregate of individuals and the interaction that occur between those individuals in that combined entity.⁶⁸ Further, this reductionist theory can be divided into aggregate view and nexus of contracts view. According to aggregate view, organization's property is property of the constituent entities, while in contractual view, the organization is a contract among the members.⁶⁹ Contract is broadly understood as any voluntary agreement involving some sort of exchange. Therefore corporation is a voluntary coalition of individuals, and a collection of contracts between various owners; it legally treated as persons signing the various contracts involved in the nexus.⁷⁰ Accordingly, corporations were emerged not because of the state, it was simply as individuals joined together to undertake some business enterprises, the basis is more like partnerships.⁷¹ Moreover, organization can be said as assemble or collection of wealth or assets as proposed by Grossman and Hart.⁷² The corporation consists of those assets that it owns

⁶⁵ Larry Catà Backer, 'The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality' (2005) 41 *Tulsa Law Review* 541 at 542.

⁶⁶ Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305 at 310.

⁶⁷ *Ibid.*

⁶⁸ Cohen, *supra* note 66 at 302

⁶⁹ *Ibid.*

⁷⁰ Gindis, *supra* note 64 at 27-29.

⁷¹ Blair, *supra* note 66 at 804.

⁷² Sanford J. Grossman dan Oliver D. Hart, 'The Cost and Benefits of Ownership: A Theory of Vertical and Lateral Integration' (1986) 94 *Journal of Political Economy* 691 at 692.

or over which it has control. Therefore, to identify a corporation, is to look at its assets.

The last theory regarding legal entities personality is realist theory. Within the last decade of the nineteenth century, scholars began to articulate the idea that corporations were real entities that came as a result of the nature tendency of human beings to organize themselves into groups.⁷³ According to realist, a collective entity is a real and natural entity just as real as individuals.⁷⁴ It is an organic social reality with separate and distinct bodies that possessed their own values and desires independent of its changing shareholders.⁷⁵ It is an autonomous, self-sufficient and self-renewing body, and it can determine and enforce its common will. It regards the corporation as a unit recognized in the law with its individual characteristic, like those of natural person. This theory refuses to reduce reality into individuals and relationship among those individuals. Corporation is more than either a creation of the state or just an aggregate of the shareholders.⁷⁶

When we say that corporate person is not a legal fiction, we imply that it is a representation of physical realities, which the law recognizes rather than creates.⁷⁷ Even Machen argues that the corporation existed prior to law; all the law can do is to recognize it or refuse to recognize it.⁷⁸ When two, three, four or more body of men unite themselves together to act in a particular way for common purpose, they create a body, which by no fiction, but by the very nature of things, differs from the individuals of whom it is constituted.⁷⁹

2.2.3 Persons in Criminal Law

Somewhat confusing when connecting existing legal subject concept, which mean the bearer of legal rights and duties, with legal subject within the context of criminal law. In general, criminal

law regulate act that is prohibited to be done by its legal subject in social life; it concerns with individual defendant as author of acts and omissions. If the subject did what is forbidden or abandoned its obligations, then the person will get punishment from the state. Thus, in the context of criminal law, the subject of law is consequently the subject of the norms or addressee of the provision (norm addressat) or who is required to do or not to do something.

If there is someone who is obligated to do something to others, then, the norm addressat is the first one, the person who is obligated to do something, and not the last one. In this case, the person who owns the right is the object of the provision.⁸⁰ For instance, article 21 of Indonesian law on Conservation of Biological Resources and Ecosystems, declares that 'everyone is prohibited from catching, harming, killing, storing, processing, maintaining, transporting and selling protected animals alive.' Norm addressat of this provision is 'everyone', while 'the protected animals' are object of the norm. The protected animals are right holders, because, under this act, it has right not to be arrested, injured, killed, and so on. If we adopt formalist view, the protected animal in this case, may be referred as the subject of law because it has legal rights or the legal right holder. Therefore, criminal law subjects are narrower than legal subjects, since, it does not only concern with subject with legal rights and/or duties, but criminal law also takes into account the ability and capacity of the subject to act, be responsible, and be punishable.

Nowadays, laws regard all natural persons as having legal personality, although their ability to be responsible criminally may vary according to their age and status.⁸¹ Some individuals, who are in fact legal persons, may be excluded from criminal liability, such as the young and the lunatic.⁸² And in the Ancient time for some cases

⁷³ Mark M. Hager, 'Essays on Bodies Politic: The Progressive History of Organizational "Real Entity" Theory' (1988) 50 University of Pittsburgh Law Review 575.

⁷⁴ Arthur W. Machen, 'Corporate Personality (continued)' (1911) 24 Harvard Law Review 347 at 363.

⁷⁵ Marcantel, *supra* note 66 at 228.

⁷⁶ Blair, *supra* note 66 at 806.

⁷⁷ Brown, *supra* note 21 at 372.

⁷⁸ Machen, *supra* note 76 at 361.

⁷⁹ Deiser, *supra* note 63 at 133.

⁸⁰ Kelsen, *Pure Theory..*, *supra* note 6 at 128.

⁸¹ Wells, *supra* note 26 at 81.

⁸² Being legal person does not make it automatically responsible in criminal law. In relation with

there were also slaves and women who were omitted from the meaning of subject. Moreover, in the criminal law of Ancient Roman, the magistrates in office who had imperium, were totally immune from criminal accusations during their term; that is also true for the emperor.⁸³ However, nowadays, criminal law holds that in the meaning of persons, it includes natural persons and legal persons. It cannot be denied that political pragmatism shapes so many decisions about criminal policy.⁸⁴

Pertaining what kind of organization that can be served as criminal legal subject, Indonesian drafted Penal Code and some existed regulations use corporation terminology to accommodate legal person other than natural person. These laws explain corporation as 'organized group of persons and/or property, either has legal personality or no legal personality.'⁸⁵ We will scrutinize two aspects of this regulation, first, to examine the utilization of the terminology of corporation, and secondly to connect the meaning of corporation that is embraced by the legislators to group personality theories that we have discussed previously.

The concept of corporation is discussed in depth because it is the contemporary terminology used by many Indonesian new laws to refer to legal person. To find out the meaning and definition of corporation, I will investigate the history of the concept and accumulate many definitions of this terminology from various academic sources.

Historically, corporations were created to regulate the Roman Catholic Church and other religious institutions in Europe in middle ages.⁸⁶

corporations, being legal persons, do not make corporations automatically liable, unless it deserves punishment because of its conduct. See Joan MacLeod Heminway, 'Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability,' (2011) 41 *Stetson Law Review* 137 at 144.

⁸³ O.F. Robinson, *The Criminal Law of Ancient Rome* (Duckworth, 1995) at 16.

⁸⁴ Nicola Lacey, 'Principles, Policies, and Politics of Criminal Law' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford Scholarship Online, 2012) at 20.

The institutions were granted personality by charter issued by local authority or by the king. With such charter, the religious institution can operate as an independent entity and can hold properties in its own name. With this feature, guaranteed the certainty that the property will not be inherited to the decedents of the member who administered and controlled the property on behalf of the institutions. Moreover, it will ensure that the property will not be returned to the authorities if the administrators died.⁸⁷ Therefore, with the issuing of the charter, assert that institutions are independent entities that have long-term sustainability.

This concept, where a group of people can act together as single entity with an unlimited lifetime, at least for the benefit of owning property or wealth, then applied to a city or municipality or community group. Until the sixteenth century, corporations were used for various institutions such as cities, districts, universities, colleges, hospitals, social organizations, bishops, deans, monasteries, and other institutions.⁸⁸ Besides the intention of continuing sustainability, another goal of the establishment of a corporation is for the purpose of self-governance. For example, the charter issued to municipalities in the Middle Ages explicitly given for the purpose of this management independency.

Margaret M. Blair asserts that the word corporations come from the Latin word *corpus*, meaning body, because the law recognized the group of people who formed the corporation

⁸⁵ Indonesian Ministry of Law and Human Rights, *The Draft of National Penal Code, 2015*, Article 190, see also Indonesia, Law No. 31/1999 on the Eradication of Corruption art 1.

⁸⁶ M. Blair, *supra* note 66

⁸⁷ As Mark explains that by giving a charter to an institution, there will be distinction between public property and private property that cannot be mixed up. See Gregory A. Mark, 'The Personification of the Business Corporation in American Law' (1987) 54 *University of Chicago Law Review* at 1449

⁸⁸ Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organizations, 1720 – 1844* (Cambridge University Press, 2000) at 1459.

could act as one body or one legal person.⁸⁹ It reveals the process of giving a body to something through the mechanism of incorporation.⁹⁰ Formally, Robert Hessen affirms that corporations, unlike other organizations, are creature of the state because they require governmental permission to exist.⁹¹ This approach also accommodated by Black's Law Dictionary that states that corporation is an entity having authority under law to act as a single person, a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, and has the legal powers according to its constitution.⁹²

From the above meanings, it can be understood that corporation is legal entity that has legal personality, independent from its members, obtained its personality in accordance with the applicable law. It is confirmed that not all collective groups are corporations, such as 'trust' as it is known in Western civil law, cannot be called corporation but unincorporated body. This concept is very important to be highlighted to provide an understanding that corporations are not the same as unincorporated bodies or groups of peoples, which cannot be called legal person.

Initially, the notion of corporation includes all forms of organized group that have legal personality. For example, states, social purpose corporations, business oriented corporations, or corporations engage in religious affairs. However, in economic and business field, the terminology of corporation shaped into a more narrow meaning. Post, Preston and, Sachs explain that corporation is 'an organization

engage in mobilizing resources for productive uses in order to create wealth and other benefits for its multiple constituents or stakeholders.'⁹³ Many experts in the United States in discussing the corporation refer to big business, and not to the other forms of associations. For example, Peter F. Drucker affirms that corporations are large-scale business enterprise usually owned in corporate form.⁹⁴ According to Gower, lawmakers in the United States prefer to use the term of corporation to refer to business entity, compared to the lawmakers in the United Kingdom who tend to use the term of company.⁹⁵ This principle can also be found in Australia, where experts when discussing corporation law, refer to big business, which existence requires the incorporation process.⁹⁶

Although in general the corporation is a group of persons acting as a legal entity that have legal personality, there are exceptions to that concept. Maitland clarifies that in history and theory of law, the terminology of corporation is not always an aggregate corporation, but it also recognizes sole corporations, which attached not to collective but to particular individual. Corporation sole, first applied to a parish church (*rector ecclesiae parochialis*), and then the title is also given to king or the crown. Pursuant to Blair, the purpose of establishing corporation sole is to make clear that the controlled property is not a private property, but relating to such corporation sole position and all contracts made are not in their personal position, but as their official capacity in the corporation sole. So that all properties, rights, and obligations arising from contract made by the corporation sole, will be proceeded to the successor of the

⁸⁹ M. Blair, *supra* note 66 at. 788.

⁹⁰ Christopher Harding, *Criminal Enterprise: Individuals, Organisations And Criminal Responsibility* (Willian Publishing, 2007) at 33.

⁹¹ Robert Hessen, *In Defense of the Corporation*, Second Printing (Hoover Institution Press, 1979) at xiv.

⁹² Bryan A. Garner (editor in Chief), *Black's Law Dictionary*, ninth Edition (Thomson Reuter, 2009) at 391.

⁹³ J.E. Post, L.E Preston, and S. Sachs, *Redefining the Corporation* (Standford University Press, 2002) at 17.

⁹⁴ See Peter F. Drucker, *Concept of the Corporation*, Seventh Printing, (Transaction Publisher, 2008) at 4.

⁹⁵ See Gower, L.C.B. 'Some Contrast Between British and American Corporation Law' (1956) 69 *Harvard Law Review* 1369.

⁹⁶ Roman Tomasic, Stephen Bottomley & Rob Mcqueen, *Corporations Law in Australia*. Second Edition. (The Federation Press, 2002) at 5.

corporation.⁹⁷ However, Maitland affirms that the concept of corporate sole itself is the reckless development of the theory of corporation as *persona ficta*⁹⁸.

Indonesian drafted Penal Code explains corporation as “organized group of persons and/or property, either has legal personality or no legal personality.”⁹⁹ This definition gives broader meaning of corporation, as it is understood earlier, where corporation is legal entity that has legal personality. It may include generally, a group of people like clubs, associations, partnerships, do not have legal existence separate from its individual members. In this meaning corporation of course goes beyond that definition, and include not only profit oriented company, but also states, governmental bodies, political parties, unions, non-profit organizations, non-economic orientation public authorities, all types of organizations. Organizations that exist for the reason of managing governmental powers are known as public corporations. Those that are organized for the purpose of enriching private individuals are known as private corporations.¹⁰⁰ Therefore subject of criminal law have autonomous meaning than that of civil law.

Countries like the United States, the United Kingdom, Canada, Singapore, and New Zealand, accept the distinction between corporations and unincorporated bodies. This can be seen from how these countries elaborate the meaning of its person. For instance, The United States in its Model Penal Code, §1.13, General Definitions, subtitle (8) states that “person, he and actor include any natural person and, where relevant, a corporation or an unincorporated association.” In US Code, Title 1, Chapter 1, § 1, describes the “words person and whoever include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”

⁹⁷ M. Blair, *supra* note 66 at 789-790.

⁹⁸ Maitland, *State, Trust and Corporation* edited by David Runciman and Magnus Ryan (Cambridge University Press, 2003) at xvi.

The United Kingdom, in its Interpretation Act of 1978, explains, ‘The word person includes a body of persons corporate or unincorporated.’ Furthermore, when viewing its *Corporate Manslaughter and Corporate Homicide Act 2007*, also demonstrate the different position of corporations and non-legal entities such as partnership, trade union, or employers’ associations. This act does not occupy the terminology of corporation or legal person, but organizations. The objective is to accommodate not only corporations or legal person but also to encompass entities without legal personality as the normadresat of this act.

Canadian Penal Code 2004, also embraces the terminology of organization to address group of peoples that can be subject to criminal law. As Section 2, 22.1 states that “everyone, person, and owner, and similar expressions, include Her Majesty and an organization.” The meaning of organizations described by this act is also not equating the corporation (body corporate) with other associations without legal personality. As this act explains that organizations are: ‘(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons.’

Furthermore, Indonesian drafted penal code section 214 states that persons are natural persons including corporations. It is interesting to see that not many countries put plainly corporations and natural persons side by side as subject to criminal law. Countries with civil law backgrounds do not use this terminology to refer to subjects other than human. The terms juristic person, legal person, or moral person are the terminologies most commonly used to define the organization through which corporate action is affected. For example, in Dutch Penal Code, natural person is contrasted with *legal persons* or *rechtspersonen*, where Dutch Penal Code at

⁹⁹ Indonesian Ministry of Law and Human Rights, The Draft of National Penal Code, 2015, Article 190 see also Indonesia, Law No. 31/1999 on the Eradication of Corruption art 1.

¹⁰⁰ Deiser *supra* note 63 at 135.

Article 51 (1) states that “*offences can be committed by natural persons and legal persons (rechtspersonen)*”. French Penal Code occupies the terminology of *moral persons (Les personnes morales)*, it is articulated at Article 121-2 that “*Moral persons (Les personnes morales), with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives according to the distinctions set out in articles 121-4 and 121-7.*”

Indonesia is comparable to Australia in putting corporation alongside with natural person as legal subject. In Australian Legislation Act 2001, section 160 (1) declares, “References to people generally includes a reference to a body politic or corporate as well as an individual.” More specifically, Australian Criminal Code 2002, section 49 (1) states, ‘This Act applies to corporations as well as individuals.’ Neither Australian Criminal Code nor Australian Legislation Act provides the meaning of corporation. However, the meaning of corporation can be found in Australian Corporation Act 2001, section 57 A states that corporation includes company, body corporate, an unincorporated body that may sue or be sued, or may hold property. However, according to this act, public authority and corporation sole are excluded from the terminology.

It is not easy to give a complete definition of a terminology where it has developed into something different from its literal meaning. Hart affirms that there is often a difference between the meanings of a term in law with the same term outside the law. Even though they are interconnected in some aspects. As Hart states that ‘Corporation, right or duty... do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words.’¹⁰¹

From the justifications described, the elaboration of the terminology of corporation conveyed by some experts, and from the analysis of several laws from some countries, I

¹⁰¹ HLA Hart, *Definition and Theory in Jurisprudence*. (Oxford: Clarendon Press, 1953) at 5.

agree with Taslitz stating that corporation is undoubtedly the most striking organization treating as legal person and is a legal paradigm of a collective entity.¹⁰² If using the basic theory of personality of corporation, which states that corporation is the result of the process of incorporating where it has the personality before the law after that incorporation mechanism, thus it is inappropriate to adopt the term corporation for an entity that is not eligible to be called a corporation. I argue that term corporation is a term that has been solid for only legal entities that have been through a process of incorporation. Whereas associations that have no status as legal person is usually referred as unincorporated body. If we reconsider the theory of legal personality and if we want to make legal construction by utilizing this theory seriously, it is imprecise to parallel natural person with corporation. It will be more appropriate to embrace legal person or moral person, which includes corporation.

If we examine article 51 (3) of Dutch Penal Code declares that ‘equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purposes.’ It can be determined that theoretically organizations without legal personality are different with organizations with legal personality. Though, their status is equalized for the benefit of the practice of criminal law in the Netherlands. This is different with Indonesia on how it elaborates the status of legal person, where it embraces the terminology of corporation and defined it as organized group of people and/or wealth, with or without legal status. It is clear that corporation is defined and interpreted without full understanding regarding its history and philosophical development.

Assuming that the lawmakers wish to remove the dichotomy of the legal personality at all, by not discriminating between organizations with legal personality and organizations without legal personality status, and treat them equally

¹⁰² Andrew E. Taslitz, ‘Reciprocity And The Criminal Responsibility Of Corporations’ (2012) 41 *Stetson Law Review* 73 at 75.

in criminal law, I suggest adopting the term organizations to refer to collective actors in all its forms. Thus, in elaborating criminal liability to an organization, we do not puzzle with the theory of legal personality, whether an organization has legal personality or not, but the characteristics of organizations that will be the focused of the consideration. As some countries with its recent enacted laws, are prefer to adopt the terminology of organizations to refer to collective actors. As discussed above, for instance, Canadian Criminal Code 2004, UK Corporate Manslaughter and Corporate Homicide Act 2007, UK Bribery Act 2010, and United States Guidelines Manual 2005. Corresponding to the legal explanations given by Canadian Department of Justice, the term person or corporation do not cover all forms of bodies that may commit a criminal offence, the most suitable form to accommodate all forms of collective group that is subject to criminal code is organization.

3. Conclusion

Person as the bearer of legal rights and duties can include many entities that the law perceives sufficient enough to bear it. However, person in criminal law context means someone or something with the ability to reason, someone who can make free choices of some foreseen consequences. Criminal law theories distinguish offender, responsible agent and punishable agent. In analysing each subject of the criminal law, it is important to be able to identify which legal subject that can be an offender, responsible agent and punishable agent. Since not all subjects may commit a crime, not all offenders can be criminally liable for their actions, and not all responsible offenders are punishable.

Organizations have been accepted as legal subject in criminal law regime that may bear legal rights and duties, and may engage in legal relations. Organizations as independent legal subjects have specific objectives in interacting with other legal subjects. They may commit criminal acts to obtain those objectives, so they should be accountable for such acts, and incur criminal punishment to ensure the peacefulness of the society.

Theoretically, the capacity of an organization to be liable before the law linked to legal personality. There are at least three legal personality theories that serve as the basis for granting the status of independent legal subject to an organization, namely, formalist, aggregate, and realist. Although legal personality is an important ground in the ability of an organization to incur liability in some legal regimes, criminal law in its development begins to eliminate the dichotomy between organizations with legal personality and organizations without legal personality. It can be said that criminal law in recognizing the existence of an organization depend not on its legal formal prerequisite, but based on the factual existence and participation of that organization in the society. This concept is closely related to realist legal personality theory.

The latest Indonesian drafted penal code affirms that person is human and corporation. Corporation is defined with broad meaning as organized group of persons and/or property, either has legal personality or no legal personality. From this definition can be said that there are some sense of aggregate corporate personality theory. Corporations are undoubtedly the most noticeable organizations that are treated as legal persons. Corporation obtain its legal personality through the process of incorporation. Therefore, it is inappropriate to adopt corporation terminology to include entities without legal personality in its realm. Broad definition that is adopted by drafted penal code creates confusion about the theory of legal personhood, since it also accommodates organizations without legal personality into the meaning of corporations.

Criminal law in fact, does not question the dichotomy between entities with legal personality and without legal personality and treats them equally as both liable and punishable agent. Therefore, I argue that the most convenient terminology to refer to collective actor in criminal law is organization, instead of corporation. Thus, in constructing criminal liability we do not trapped in the concept of legal personality, but focus on the characteristic of its organization as independent subject.

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