

Analysis of Corporate Governance Concept according to Indonesian Hospital Law

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ABSTRACT: *This research aimed to critised the content of the regulation of corporate governance in hospital. This research compared articles within Indonesian Hospital Law and outside the Hospital Law to prove that there are many inconsistencies within the law and with other regulations that cause misconception in understanding corporate governance in hospital organization. This research used qualitative research method. Secondary data, especially primary legal sources will be the focus on this research. This research also uses comparative legal method in order to understand the concept of corporation and corporate governance and its application in hospital. The result proved that the term corporate governance has been used “contradictively” or “confusingly” in Hospital Law.*

Keywords: *corporate governance, corporation, governance in hospital, hospital*

I. INTRODUCTION

The law governing hospital in Indonesia is regulated in the Law No. 44 Year 2009 regarding Hospital (Hospital Law) (Indonesia, 2009)¹. If we read the content of Hospital Law, there is no provisions in Hospital Law that regulates governance for hospital organization. In the elucidation of Article 29 paragraph (1) point r of Hospital Law, there is a statement of “good corporate governance”. The Article 29 paragraph (1) point r of Hospital Law itself only regulates the obligation of hospital to make and implement hospital internal regulations named as hospital by laws. The elucidation of Article 29 paragraph (1) point r of Hospital Law says that:

What is meant by Hospital Internal Regulations (Hospital by laws) is Hospital Organization Regulation (corporate bylaws) and Hospital Medical Staff Regulation (medical staff bylaw) which is made to perform good corporate governance and good clinical governance. Hospital Medical Staff Regulation (medical staff bylaw) among others regulates clinical authority (Clinical Privilege).

Besides the elucidation of Article 29 paragraph (1) point r of Hospital Law, the elucidation of Article 33 paragraph (1) of Hospital Law, states that “Hospital organization is made for the purpose to achieve Hospital vision and mission by adapting Good Corporate Governance and Good Clinical Governance”. Article 33 paragraph (1) of Hospital Law itself regulates that every hospital shall have an effective, efficient and accountable organization. There is no further explanation about the term corporate governance. This paper try to reveal the meaning and content of corporate governance as mentioned in elucidation of Article 29 paragraph (1) dan Article 33 paragraph (1) of Hospital Law, through regulatory research. The unlocking of the meaning of corporate governance will show us that term “corporate governance” has been used inconsistently in hospital setting as regulated in Hospital Law.

II. RESEARCH METHOD

This research is qualitative research. It used secondary data, including laws and regulations on hospital, and corporate governance as primary legal sources. It also used secondary legal sources such as books, articles and journals; and tertiary legal sources such as encyclopaedias or dictionaries. Comparative legal method was conducted to understand the concept of governance in corporation and other legal entities as organizations, in order to explain the application of (corporate) governance in hospital organization. The primary legal sources used as basis of the research are as follows:

1. Indonesian Civil Code (Subekti and Tjitrosoedibio, 1985)⁷;
2. Law No.40 Year 2007 regarding Corporation (Corporate Law)⁸;
3. Law No.16 Year 2001 regarding Foundation⁹ as amended by Law No.28 Year 2004¹⁰;
4. Law No.19 Year 2003 regarding State Own Enterprise¹¹;
5. Government Regulation. No.45 Year 2005 regarding the Establishment, Management, Supervision and Dissolution of State Own Enterprise;
6. Government Regulation No.23 Year 2005 regarding Financial Management of General Services Body (BLU) as amended by Government Regulation No.74 Year 2012;

7. President Regulation No.77 Year 2015 regarding Guidance for Hospital Organization;
8. Regulation of Internal Affairs Minister No.61 Year 2007 regarding Technical Guidelines for Financial Management of General Services Body (BLU);
9. Regulation of State Minister of State Employee Empowerment No.PER/02/M.PAN/1/2007 regarding Work Unit Organization Guidelines at Government Institution which Apply Financial Management Pattern of General Services Body (BLU);
10. Regulation of State Minister of State Own Enterprise No. Per-01/MBU/2011 regarding The Implementation of Good Corporate Governance at State Own Enterprise; as amended by Regulation of State Minister of State Own Enterprise No. Per-09/MBU/2012;
11. Minister of Health Decree No.772/Menkes/SK/VI/2002 regarding Guidance for Hospital Internal Regulation (Hospital by laws).

III. THEORETICAL FRAMEWORK

The term corporate governance came from combination of corporate and governance. The term corporate refers to corpus which means body in Latin. Corporation itself can be defined as "a body of people"; that is, a group of people authorized to act as an individual. In Indonesia, corporation is regulated under Law No.40 Year 2007 regarding Corporation (Corporate Law) (Widjaja: 2008)¹². Governance came from Greek word, gubernatio. Gubernatio means management (Clarke: 2007)⁵. So corporate governance means management of a legal body known as corporation.

Cadbury committee (1992)¹³ defines corporate governance as "the system by which companies are directed and controlled". The basic objective of corporate governance is to enhance and maximize shareholder value and protect the interest of other stakeholders. Organization for Economic Co-Operation and Development (OECD) Principles of Corporate Governance (OECD, 2004)¹⁴ defines corporate governance as the system by which business corporations are directed and controlled." It was further mentioned that "The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. It also means that corporate governance provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance." In The Indonesia Corporate Governance Manual (International Finance Corporation [IFC], 2014)¹⁵ corporate governance is defined as a system of relationships, defined by structures and processes. These relationships may involve parties with different and sometimes contrasting interests. Even though they may have different interest, all parties are involved in the direction and control of the company. These are done in order to properly distribute rights and responsibilities and thus increase long-term shareholder value.

Under NHS structure, each hospital is owned by board of trustees appointed by NHS. Such board of trustees has no organizational form except for its function as legal owner of the hospital. The management of the hospital is conducted by a Board of Directors appointed by the board of trustees. This board of directors manages the hospital as the sole organization, the only organization that exists. Un-like hospital established and owned by corporation, there are at least two organization that co-exists. One is the corporation as legal entity and the other is the hospital itself. The difference is mostly caused by the existence of trusts structured under common law tradition (in commonwealth countries) which are historically has never been part of civil law tradition (in continental Europe and other parts of the world). Under civil law tradition, as mentioned before, is hospital is not a stand alone organization. It is owned by legal subject, which could be individual person or legal entity. The legal entity could be profit-oriented legal entity (private hospital) or non-profit-oriented legal entity (public hospital) and government. Since 1990 every hospital under NHS has to adopt, comply and implement corporate governance, besides clinical governance and control assurance. The adoption and transplantaion of corporate governance into the management of hospital under NHS in 1990 can be understood in view that during the period of 1990 there is no other governance known besides the corporate governance. Nowadays, there are several kinds of governane that can be used and implemented in any kinds or types of organization besides the corporation itself.

In the Guide to Good Governance for Hospital Boards (American Hospital Association [AHA], 2009)¹⁶ hospital can be owned by corporation as a legal entity, or under a trust which is not a legal entity. In *Governing Public Hospital*, Saltman, Durán and Dubois (2011)¹⁷, state that there are many kind of ownership of hospital in the world. In England, a hospital can be owned by a trust, either in form of self-governing trust or foundation trust. In Sweden, hospital can be owned by public-stock corporation. In Czechoslovakia, hospital is owned by limited liability company or joint stock companies. In Germany and United States of America (Jeurissen, 2010)¹⁸, hospital can also be owned by person in form of proprietary or private hospitals, beside a network of hospitals owned by investor or corporate hospital chains.

IV. DISCUSSION

Indonesian Hospital Law differentiates ownership from management of hospital. Based on Article 7 paragraph (2) of Hospital Law, hospital can be established (built, erected and owned) by central government, local government or private. Meanwhile management of Hospital in Indonesia is regulated in Article 20 and 21 Hospital Law. Based on Article 20 and 21 of Hospital Law, based on the management, hospital can be divided into:

1. Public hospital is hospital managed by Central Government in forms of General Services Body (BLU), Local Government in form of Local General Services Body (BLUD) or non-profit-oriented (private) legal entity; and
2. Private hospital is hospital managed by profit oriented (private) legal entity in form of Corporation or State Own Enterprises (Persero).

For the purpose of easy reference in this Discussion:

1. the term “legal entity” shall refer to profit-oriented legal entity, non-profit-oriented legal entity, Central Government and Local Government;
2. the term “own” or “ownership” of hospital shall include to “manage” or “management” of hospital.

Elucidation of Article 33 paragraph (1) of Hospital Law was the first contradictive statements that raised the misleading concept of corporate governance in hospital organization. The elucidation states that hospital organization is made for the purpose to achieve hospital vision and mission by implementing good corporate governance and good clinical governance. This assumes that every hospital is the only organization that exists, just like hospital under NHS in England. If we refer to Article 7 paragraph (2) of Hospital Law, it is very clear that hospital is an organization owned by a legal entity as an organization. This means that hospital organization itself co-exists with and shall be governed by the legal entity that owns it. Hospital is not a stand alone organization. Its existence depends on the existence of the organization of the legal entity which builds and owns the hospital itself. The matter of corporate governance is the matter of the governance of the corporation as organization that owns or manages the hospital as organization. The hospital itself shall only concern about the clinical governance. The vision and mission of hospital shall not be inconsistent with the vision and mission of corporation that owns the hospital. Based on Article 7 of Hospital Law, not only corporation that can own hospital. There are other legal entities that may establish and own hospital.

The second contradictive statement is the statement that misplaced the terminology of “corporate governance” as stipulated in Article 36 of Hospital Law. Article 36 of Hospital Law states that each hospital shall implement hospital governance and clinical governance. The elucidation of Article 36 of Hospital Law states that good hospital governance is the implementation of hospital management functions according to transparency, accountability, independency and responsibility, equity and fairness. It is very clear that Article 36 of Hospital Law even scrutinized the concept of hospital governance with corporate governance. The concept of transparency, accountability, independency and responsibility, equity and fairness are well known for the implementation of corporate governance. The use of the term “hospital governance” in Article 36 of Hospital Law should be read as “corporate governance”. The article that “misplaced” hospital governance term with corporate governance, is not in line with the elucidation of Article 29 paragraph (1) point r of Hospital Law. Article 29 paragraph (1) point r of Hospital Law states that corporate governance is part of hospital governance.

The third mistake on the concept of corporate governance in Hospital Law can be found in Article 34 paragraph (3) of Hospital Law. It states that the owner of hospital shall not at the same time manage the hospital. This article was made in order to separate between ownership and management which build up the concept of corporate governance. However if we read Article 34 paragraph (3) of Hospital Law in conjunction with:

- a. Article 7 paragraph (2) of Hospital Law, that clearly states that only legal entity can own hospital; and
 - b. Article 20 and 21 of Hospital Law, which state that only legal entity that can manage hospital;
- the content of Article 34 paragraph (3) of Hospital Law become meaningless. The fact also proves that almost all private hospital in Indonesia is owned and managed by the same legal entity.

Further analysis shows that Article 45 paragraph (1) and Article 46 of Hospital law are the last two articles in Hospital Law that proven to be inconsistent with underlying concept that makes up the governance for hospital. Hospital is not an independent legal entity and therefore does not have its own responsibility. Article 45 paragraph (1) of Hospital Law states that “hospital shall not be legally liable if patient and/ or his/her family refuse or stop medication that can result in the death of the patient after comprehensive medical explanation” and Article 46 of Hospital Law states that “hospital shall be legally liable for all losses incurred because of the negligence conducted by the health workers in the hospital.” Before the law, as explained before, hospital is not a stand alone organization that can exist by its own. The existence of hospital is in fact dependent to the existence of the legal entity that establishes and owns the hospital. Hospital organization and therefore its

governance and risk are attached to the governance and risk of the legal entity that owns or manages the hospital. Hospital never own assets, hospital itself is the assets that belongs to the legal entity that owns the hospital. Based on the concept, hospital will never be able to be held liable. It is the legal entity that owns the hospital shall be liable and not the hospital.

Finally, in conjunction to those 2 articles, Article 45 paragraph (1) and Article 46 of Hospital Law, Article 32 point q of Hospital Law mentions about the right granted to patient to sue and/ or claim hospital if the hospital provides service that is not in compliance with the good standard, through civil or criminal suit.” This article follows the same mistake made in Article 45 paragraph (1) and Article 46 of Hospital Law. It is not the hospital that can be sued or claimed, because hospital is not independent legal entity. It is the legal entity that owns the hospital that can be sued or claimed.

With respect to the content stipulated in Article 20 and 21 of Hospital Law, governance for hospital shall be implemented and conducted based on the legal entity that establishes, owns and manages the hospital, i.e.:

1. Law No.40/2007 for Corporation;
2. Article 1653 to Article 1965 Chapter IX Book III Indonesian Civil Code for Association as non-profit legal entity;
3. Law No.16/2001 as amended by Law No.28/2004 for Foundation as non-profit legal entity;
4. Law No.19/2003 juncto Government Regulation No.45/2005 juncto Regulation of State Minister of State Own Enterprises No. Per-01/MBU/2011 as amended by Regulation of State Minister of State Own Enterprises No. Per-09/MBU/2012 for State Own Enterprises in form of Persero;
5. Government Regulation No.23/2005 as amended by Government Regulation No.74/2012 juncto Regulation of State Minister of State Employee Empowerment No.PER/02/M.PAN/1/2007 for General Services Body (BLU).

It means that there is more than one kind of hospital organizations according to Hospital Law.

Article 35 of Hospital Law requires that President of the Republic of Indonesia shall issue a President Regulation in order to regulate the Guidelines for hospital organization. Since there are more than one hospital organizations, the Presidential Regulation, as referred by Article 35 of Hospital Law, shall regulate all kinds of hospital organizations and the governance system for each kind of hospital organization. Unfortunately the expected President Regulation No.77 Year 2015 regarding Guidance for Hospital Organization does not provide regulations on governance in hospital organization at all.

V. CONCLUSION

In general the terms governance is not the same as corporate governance. Corporate governance refers to governance conducted by corporation. In hospital business, (corporate) governance is governance applied for non-medical issues besides clinical governance. Hospital does not have its own (corporate) governance, because hospital is part of the legal entity that establishes, build, own and manage the hospital. Conceptually corporate governance is not part of hospital governance. Based on the type of legal entity that establishes and manages the hospital, hospital governance of hospital follows the (corporate) governance of the legal entity that owns and manages the hospital. And finally hospital is not legal entity that can be held liable in law. Hospital Law has inconsistently used the term corporate governance and hospital governance without providing any clear definition.

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