STATE DAMAGES IN CRIMINAL ACTS OF CORRUPTION MEMBERS OF THE BOARD OF DIRECTORS OF BANKS WITH PERSERO STATUS/OWNED BY THE REGIONS AND ITS SUBSIDIARIES IN THE PROVISION OF CREDIT/FINANCING

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Abstract

In Law Number 31 of 1999 as amended by Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, it provides a normative direction that one of the essential things that must be proven in a criminal act of corruption is the existence of "state losses". For members of the Board of Directors of State-Owned Enterprises with Persero status, in managing the company, especially in providing credit or financing, they will be very afraid of their actions which can be made suspects in criminal acts of corruption. The legal relationship between the state as a legal subject and a limited liability company with the status of a limited liability company is the ownership of a majority share or controlling share by the State in a limited liability company with a limited liability status. Such legal relations have been regulated in various applicable laws and regulations which have and are based on theoretical and philosophical foundations such as corporate legal doctrines such as the legal doctrine of the principle of the corporate veil, the legal doctrine of fiduciary duty and the Business Judment role. Therefore, legal problems arise, namely how is the relationship between State law and State Companies?; and whether in the provision of credit or non-performing bank financing can affect the value of state participation in state-owned banks in said state/regional-owned banks?. The legal research used in discussing the problem in question is using normative legal research, so that the results obtained in this legal research are what they should be.

Keywords: State Loss, State Companies, Corruption, Directors,

I. Introduction:

In Law Number 31 of 1999 as amended by Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, the formulation of the offense of corruption is regulated in Article 2 paragraph (1) which states that "Everyone (anyone) who unlawfully commits an act of enriching himself or herself or another person or a corporation that can harm the state's finances or the state's economy, shall be punished with imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah). Furthermore, Article 3 of the Law states that "Every person with the aim of benefiting himself or another party or a corporation, by abusing the authority, opportunity or facilities/facilities available to him (his) because of the position and/or position held by him. can be detrimental to state finances or the state economy, shall be sentenced to life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)". Article 4 of the Anti-Corruption Law states that the point is that returning the state's loss does not abolish the criminal act of corruption.

The word "can" in Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 as amended

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by Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, has a meaning that is considered not to provide certainty. Because the word "can" in the Anti-Corruption Law can be used as law enforcers to carry out investigations, even though there is not necessarily a state loss. Therefore, the phrase 'can' in Article 2 (1) and Article 3 of the Anti-Corruption Law is declared unconstitutional, and contrary to the 1945 Constitution in the decision of the Constitutional Court Number 003/PUU-III/2006 dated July 25, 2006,

The provisions of Law Number 31 of 1999 as amended by Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, is one of the things that is very feared by members of the Board of Directors and/or employees of a state-owned bank with the status of a Persero or Bank that is a subsidiary. state-owned bank company. Because they can be asked for information at any time, as witnesses or examined by the authorities, either the police or the Prosecutor's Office in cases of corruption based on the above provisions. The members of Direski are afraid, because the business opportunity which is the core business of a State-Owned Enterprise or a subsidiary of a State-Owned Enterprise is the main task that must be carried out by a State-Owned Enterprise or a subsidiary of a State-Owned Enterprise, as an agent of development. with a high profit target, it is very risky to become a suspect or defendant in a corruption case. Empirically, there have been many members of the directors of a State-Owned Enterprise or a subsidiary of a State-Owned Enterprise who have now been ruled by the Court as having committed a crime. corruption or is currently in the process of being investigated by either the Police or the Attorney General's Office.

One of the prominent cases relates to the distribution of credit/financing. The distribution of credit/financing which was originally in the initial process of disbursement was a legal act that was included in the field of civil law, namely the existence of an agreement between creditors and debtors, in the end experienced a shift into a criminal act of corruption, when credit/financing became jammed. This happened because the investigators and investigators considered that the breakdown in the provision of credit/financing indicated that there had been a state financial loss. Indeed, not all loans/financing that are experiencing congestion in their returns are shifted to the crime of corruption. Of course, investigators will look at other elements of corruption in the investigation and investigation process.

The debate on the element of state losses in the criminal act of corruption over the existence of credit/financing losses that experience congestion is a basic debate. Losses in lending/financing may occur due to business opportunities that do not work as expected. Failure to return credit/financing by the customer at risk has been included in interest costs or profit sharing. This means that credit interest or profit sharing in financing has included the risk of bad credit/financing and it has been calculated that there is a possibility that there is a certain percentage that will experience problems or become stuck.

Differences of opinion regarding losses for State-Owned Enterprises or subsidiaries of State-Owned Enterprises are only for granting credit/financing to certain debtors or losses in the reporting period. This is because State-Owned Enterprises or subsidiaries of State-Owned Enterprises suffer losses due to credit/financing problems or loss, but overall in the reporting period, they still earn profits and no losses occur. In addition, such losses may occur, simply because of certain unfavorable macro and micro economic conditions, so that credit/financing becomes problematic or is in default.

Investigators and Investigators in conducting investigations or investigations can only relate to one of the credit/financing loans that are bad which results in losses for the Bank. It does not at all relate to the provision of credit/other financing in the reporting period that provides very large benefits to the company. The loss in granting just one credit/financing is sufficient for investigators and investigators to conduct investigations or investigations.

However, cases of corruption in the provision of credit/financing that are experiencing congestion

are not considered to have occurred by the police or the prosecutor's office as investigators or non-corruption investigators. At least there is no data on the existence of criminal acts of corruption committed by non-State-owned Enterprise Banks with state-owned enterprises status or state-owned enterprises-owned banks with state-owned enterprises (subsidiaries of state-owned banks). This is because the investigators and investigators consider that the losses of the State-Owned Bank and the losses of the subsidiary Banks of the State-Owned Bank are the state's losses.

The basis of the investigators' thinking can be analyzed academically that losses to State-Owned Banks and losses to State-Owned Bank subsidiaries are state losses, because the state has a majority stake in State-owned Banks. Likewise, the definition of share ownership is extended to include subsidiary banks of State-Owned Banks. Thus, a legal problem arises, namely how is the legal relationship between the State and State Companies regulated? And whether the provision of credit or financing of a bad bank can affect the value of state participation in State property contained in the State/Regional Owned Bank?.

II. Research Methods

The research used in this article is normative legal research. Hadin Muhjadi and Nunuk Nuswardani[3], stated "normative legal research is research that examines legal issues from the point of view of legal science in depth against established legal norms". Piter Mahmud Marzuki[4] stated "legal research is a process to find legal rules, legal principles, and legal doctrines in order to answer legal issues or problems faced"

The legal problem faced in this research is how is the legal relationship between the State and State Companies regulated? And whether in the provision of credit or bank financing that is bad can affect the value of state participation in State property contained in State-Owned Banks and Bank subsidiaries of Owned by the State?.

In this paper, the problem approach used is more of a statutory approach, which is an approach that is carried out by reviewing the Law on State-Owned Enterprises, the Limited Liability Company Law, the State Treasury Act and several other laws and regulations. regulates business entities related to objects related to research.

All legal materials obtained from library research are then analyzed descriptively-qualitatively by building arguments based on the logic of deductive thinking. With descriptive-qualitative method, the author will present and describe and relate all materials relevant to this research in a systematic, comprehensive and accurate manner, in order to obtain answers to the problems posed.

The legal issues mentioned above are used as a central point for the process of searching for legal principles and legal doctrines in more detail in order to find legal norms that should be formed, so that this study provides answers to the legal issues above and provides future legal solutions, namely what should be.

III. Discussion

Corruption is an extraordinary crime in Law Number 31 of 1999 as amended by Law 20 of 2001 con-

3 Hadin Muhjadi dan Nunuk Nuswardani, Penelitian Hukum Indonesia Kontemporer, (Yogyakarta : Genta Publising, 2012), hal.,9.

4 Piter Mahmud Marzuki, Penelitian hukum, (Jakarta : Kencana, 2007), hlm., 35.

cerning the Eradication of Criminal Acts of Corruption, qualifying criminal acts of corruption in Chapter II which are divided into several types as regulated in Article 2 to Article 20, including those relating to additional penalties. In addition, there are other criminal acts related to criminal acts of corruption which are regulated in Chapter III articles 21 to 24. In the classification of the Corruption Crime Act, it also points to the entry into force of the articles regulated in the Criminal Code. , but the sanctions are emphasized in the corruption law.

To provide a clearer picture of the types or kinds of provisions regulated in the criminal act of corruption in outline as follows.

1. State Financial Losses:

State financial losses are regulated in Article 2 and/or Article 3 of the Law on criminal acts of corruption. Article 2 paragraph (1) of the Corruption Law essentially states that everyone can be categorized as a criminal act of corruption if that person unlawfully commits an act to enrich himself or another party or a corporation or company that is detrimental to state finances or the state economy. For this act, the punishment is life imprisonment or a minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)".

Then, Article 3 of the Corruption Law basically states that "everyone can be categorized as a criminal act of corruption with the aim of benefiting themselves or other parties or a corporation or company, abusing their authority, using opportunities or facilities/facilities available to them because of their position. or a position that can harm the state's finances or the state's economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)"

2. Gift giving

Every person who commits a criminal act as regulated in Article 209 of the Criminal Code, which in essence is giving a gift, is given a sanction in the form of imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of 250,000,000.00 (two hundred and fifty million rupiah).

3. Promise something to influence

Everyone who commits a crime as regulated in Article 210 of the Criminal Code, which essentially promises something to influence, is given a sanction in the form of imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and/or a fine of at least Rp. 150,000,000.00 (one hundred and fifty million rupiah) and a maximum of Rp. 750,000,000.00 (seven hundred and fifty million rupiah)

4. Cheating

Every person who commits a criminal act as regulated in Article 387 (cheat) or Article 388 of the Criminal Code, shall be given a sanction in the form of imprisonment for a maximum of 2 (two) years and a maximum of 7 (seven) years and a fine of at least Rp. 100,000. .000,00 (one hundred million rupiah) and a maximum of 350,000,000.00 (three hundred and fifty million rupiah).

5. Embezzlement of money and/or securities

Anyone who commits a criminal act as stipulated in Article 415 of the Criminal Code, may be sentenced to a minimum of 3 (three) years in prison and a maximum of 15 (fifteen) years and/a fine of at least Rp.

150,000,000.00 (one hundred and fifty million rupiah) and a maximum of 750,000,000.00 (seven hundred and fifty million rupiah).

6. Counterfeit

Anyone who commits a criminal act as regulated in the provisions of Article 416 of the Criminal Code (forgery) shall be sentenced to a minimum of 1 (one) year and a maximum of 5 (five) years in prison and a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of 250,000,000.00 (two hundred and fifty million rupiah).

7. Criminal decency

Whoever commits a crime as regulated in the provisions of Article 417 (adultery) of the Criminal Code, may be sentenced to imprisonment for a minimum of 2 (two) years and a maximum of 7 (seven) years and a fine of at least Rp. 100,000,000.00 (one hundred million rupiah) and a maximum of 350,000,000.00 (three hundred and fifty million rupiah).

Whoever commits a criminal act in the provisions of Article 418 (adultery) of the Criminal Code, shall be sentenced to imprisonment for at least 1 (one) year and a maximum of 5 (five) years and a fine of at least Rp. 50,000,000.00 (fifty million rupiah). and a maximum of 250,000,000.00 (two hundred and fifty million rupiah).

Anyone who commits a crime in the provisions of Article 419 (living together outside of marriage), Article 420 (Article 423, Article 425, or Article 435 of the Criminal Code, may be given a life sentence imprisonment or imprisonment for at least 4 (four) years). four) years and a maximum of 20 (twenty) years and a fine of at least Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of 1,000,000,000.00 (one billion rupiah).

8. Utilization of Power

Anyone who gives gifts or promises to civil servants (State Civil Apparatus) by utilizing his power or authority attached to his position or position, or by the giver of gifts or promises deemed attached to his position or position, shall be punished with imprisonment for a maximum of 3 (three) years. three) years and/or a maximum fine of 150,000,000.00 (one hundred and fifty million rupiah).

9. Violation of the provisions of Corruption, trial and assistance

Whoever violates the regulations or provisions of the Law which expressly declares the violation of the provisions of the Law as a criminal act of corruption, the provisions stipulated in this Law shall apply.

Whoever conducts an experiment, assists, or conspires to commit a criminal act of corruption, shall be punished with the same punishment as referred to in Article 2, Article 3, Article 5 to Article 14 of the Corruption Law.

Whoever outside the territory of the Republic of Indonesia provides assistance, opportunities, facilities, or information for the occurrence of a criminal act of corruption, shall be punished with the same punishment as the perpetrator of a criminal act of corruption in accordance with the provisions in Article 2, Article 3, Article 5 to Article 14 of the Law. Corruption Act.

As for additional punishment for a criminal act, a criminal offense may be imposed in accordance with the provisions in Article 2, Article 3, Article 5 to Article 14 of the Anti-Corruption Law, the accused may be subject to additional penalties as referred to in Article 18 of the Anti-Corruption Law. Additional penalties include: a. confiscation of movable or immovable property b. payment of replacement money in a maximum amount equal to the assets obtained from the criminal act of corruption; c. closure of all

or part of the company for a maximum period of 1 (one) year; d. revocation of all or part of certain rights or the abolition of all or part of certain benefits, which have been or may be granted by the Government to the convict. If the convict does not pay the replacement money no later than 1 (one) time after a final court decision, then his property can be confiscated by the prosecutor and auctioned to cover the replacement money. In the event that the convict has insufficient property, he shall be sentenced to imprisonment for a length of time that does not exceed the maximum threat of the principal sentence in accordance with the provisions of this Law and the length of the sentence has been determined in a court decision.

Corporations or legal entities are also objects of criminal acts of corruption, so if a criminal act of corruption is committed by or on behalf of the corporation, criminal charges and penalties can be made against the corporation and or its management. If a criminal charge is made against a corporation, the corporation is represented by the management. The principal punishment that can be imposed on corporations is only a fine, with the maximum sentence being added by 1/3 (one third).

To pursue property originating from criminal acts of corruption, investigators and/or reporters usually relate it to the Law of the Republic of Indonesia Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering. This is to pursue where the proceeds of the crime are hidden and/or used to be returned to the state and/or confiscated and returned to the State-Owned Enterprises/Local Government-Owned Enterprises or subsidiaries of State-Owned Enterprises/Local Government-Owned Enterprises. The pursuit of assets from the criminal act of corruption is carried out against any person who places, transfers, transfers, spends, pays, grants, entrusts, takes abroad, changes form, exchanges for currency or securities or other actions on Assets that he knows or reasonably suspected to be the proceeds of a criminal act) with the aim of concealing or disguising the origin of the Assets shall be punished for the crime of Money Laundering including concealing or disguising the origin, source, location, designation, transfer of rights, or the actual ownership of the Assets which are known to him. or reasonably suspected to be the proceeds of a criminal act and also the person receiving or controlling the placement, transfer, payment, grant, donation, safekeeping, exchange, or use of Assets which he or she knows or reasonably suspect is the result of a criminal act.

This research is limited to criminal acts of corruption that harm state finances as regulated in Article 2 paragraph 1 and Article 3 of Law Number 31 of 1999 as amended by Law 20 of 2001 concerning the Eradication of Criminal Acts of Corruption. The word “can” in Article 2 paragraph (1) and Article 3 of the Law on the Eradication of Criminal Acts of Corruption, has the meaning of bias which is contrary to the 1945 Constitution. This is as contained in the decision of the Constitutional Court (MK) Number 003/ PUU-III/2006 dated July 25, 2006, removed the phrase “can” in Article 2 paragraph (1) and Article 3 which must mean that corruption offenses which have been formal offenses have turned into material offenses that require consequences, namely elements of state financial losses. must be calculated in real / definite. Thus, the element of offense relating to “harming the state’s finances” must be understood to have actually occurred or is real in the Corruption Law, so it is not an estimate.

State losses are closely related to state finances. Law Number 17 of 2003 concerning State Finance Article 1 number 1 states that in essence, State Finance is all/everything rights and obligations of the state that can be valued in money, and all/everything in the form of money or goods that can be used as property state in connection with the implementation of these rights and obligations. The general explanation of the state finance law, among others, states that the object of State Finance includes all rights and obligations of the state that can be valued in money, including policies and activities in the fiscal, monetary and management of separated state assets, as well as everything in the form of money, or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. Furthermore, the details of state finances are mentioned in Article 2, among others in letter g. states that essentially “state assets/regional assets are managed independently by the state/regional or

by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets separated from state/regional companies. . Thus, it can be concluded that the state finances include, among others, state assets including assets separated from state/regional companies".

The separation of state assets in state companies/regional companies is securities, receivables, goods, and other rights that can be valued in money that have been separated by the state into state ownership shares in local companies/regional companies. State-owned shares in state/regional companies separated by the state originate from the issued and fully paid-up capital by the state to the company. The expenditure of state money that places capital in state companies/regional companies and has fully paid up comes from state money sourced from the separated APBN/APBD.

The separation of state money to deposit capital in state companies/regional companies is carried out by the President as the Head of Government holding the power of managing state finances which is authorized to the Minister of Finance as the Chief Financial Officer (CFO) and Fiscal managers and Government Representatives in the ownership of separated state assets, and to the Minister/Head of Institution. The explanation of the State Finance Law, among others, states that in the relationship between the government and state companies, regional companies, private companies, and public fund management bodies, it is stipulated that the government can provide loans/grants/capital participation to and receive loans/grants from state companies/ regions after obtaining approval from the DPR/DPRD.

This is confirmed in law no. 1 of 2004 concerning State Treasury Article 41 paragraph (1) states which essentially states that "the (Central) Government can make long-term investments in order to obtain or obtain economic, social and/or other benefits. Furthermore, the said investment can be made in the form of shares, debt securities, and direct or other investments. Investments made by the central government in state/regional/private companies are stipulated by government regulations. Equity participation made by local governments in state/regional/private companies or the like is stipulated by regional regulations (Perda). Thus, it can be concluded that the government in depositing capital in state/regional companies must first obtain approval from the DPR/DPRD.

State-Owned Enterprises are regulated in Law Number 19 of 2003 concerning State-Owned Enterprises. Article 1 point 1 provides limitations regarding State-Owned Enterprises, which are business entities whose entire or most of the capital is owned by the state through direct participation originating from separated state assets. Furthermore, Article 9 of the Law on State-Owned Enterprises states that SOEs consist of from Persero and Perum. Article 1 number 2 states that a State-Owned Enterprise (BUMN) whose status is a Persero is a State-Owned Enterprise (BUMN) in the form of a limited liability company whose capital is divided into shares of which all or at least 51% (fifty one percent) of the shares are owned by the State RI whose main goal is to pursue profit. This is confirmed by Government Regulation Number 12 of 1998 concerning Limited Liability Companies (PERSERO) which has been amended by Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision, and Dissolution of State-Owned Enterprises.

The establishment of a Persero is proposed by the Minister to the President accompanied by basic considerations and relevant matters after being studied together with the Technical Minister and the Minister of Finance. The Persero applies all the provisions and principles that apply to limited liability companies as regulated in Law Number 40 of 2007 concerning Limited Liability Companies. Thus, the above description has clearly provided an answer to the question of how the legal relationship between the State and State Enterprises, namely the relationship between the state and state/regional companies is a share ownership relationship. As a share ownership relationship, it will be subject to the laws and regulations governing the company. In the case of a limited liability company, it is subject to the laws and

regulations applicable to the limited liability company.

Limited Liability Company, hereinafter referred to as Company, is a legal entity which is a capital partnership, the establishment of which is based on an agreement, to conduct business activities with authorized capital which is entirely divided into shares and fulfills the requirements stipulated in the Act. The Company's organs are the General Meeting of Shareholders, the Board of Directors and the Board of Commissioners. The word "limited" in a Limited Liability Company, has given a description of one of the characteristics of a Limited Liability Company, namely that the shareholders have limited liability for the "shares" they are given. Meanwhile, the responsibilities of the Board of Directors must be carried out based on 3 (three) principles that are interwoven in one system, namely the principle of fiduciary duty, the principle of duty of care and skill and the principle of standard of care. The principle of duty of care and skill and the principle of standard of care are essentially further implementations of the fiduciary duty principle.

The Board of Directors is appointed and dismissed based on the General Meeting of Shareholders. The actions of the Board of Directors in managing the company are not only based on the provisions of the Limited Liability Company Law and or the Articles of Association of the company concerned. Legal relations and communication between the Board of Directors and shareholders are carried out through the General Meeting of Shareholders. Likewise, the responsibility for the management of the board of directors is stated in the General Meeting of Shareholders, either in the annual General Meeting of Shareholders or the Extraordinary General Meeting of Shareholders.

Henry Campbell Black who stated "Fiduciary duty. A duty to act for someone else's benefit, while subordinating one's personal interest to that of the other person. It is the highest standard of duty implied by law.[5] Another opinion states "PT is the cause for the existence (raison d'etre) of the Board of Directors. Therefore, it is not wrong to say that between the PT and the Board of Directors there is a fiduciary relationship that creates "fiduciary duties" for the Board of Directors[6]. Chatamarrasjid, stated, the Board of Directors must start from the foundation that the duties and positions obtained are based on two basic principles, namely the first trust given to him by the company (fiduciary duty) and second (duty of skill and care).[7]

The duty of the Board of Directors is to manage the company. The task is the task of management and the task of representation (representing the company). I.G.Ray Widjaya divided the duties of the Board of Directors into 3 (three) tasks, namely: fiduciary duties, trust and confidence; based on skill, prudence and diligence (duties of skill, care and diligence) and based on statutory duties (statutory duties).[8]

The Fiduciary duty principle concerns all the duties of the Board of Directors. This means, the Board of Directors must have the duty of care and skill, faith, honesty and loyalty to the company. The duty of care requires the Board of Directors to be careful. This means that the Board of Directors must follow the applicable procedures and with rational considerations.

Business Judgment Rules. Munir Fuady[9] limits this Doctrine, namely "A Director, commissioner or other employee of the company or the main shareholder, is not allowed to take the opportunity to seek personal gain when the action he takes is actually an act that should be carried out by the company in

5 Henry Campbell Black, *Black's Law Dictionary,* (West Kellgg Boulevard, ST. Paul, Minn: West Publishing Co, Sixth Edition,1990, hlm. 675

6 Fred B.G. Tumbuan, 2000 ---------, *Tugas dan Tanggung Jawab Direksi Perseroan Terbatas*, Materi Pendidikan Singkat Hukum Bisnis, Jakarta, Unika AtmaJaya, 2000., hlm. 3.

7 Chatamarrasjid, *Menyingkap Tabir Perseroan*: Bandung: PT Citra Aditya Bakti, 2000., hlm. 39

8 Rai.I.G Widjaya, *Hukum Perusahaan,* Jakarta: Megapoin, 2000. hlm. 220

9 Munir Fuady*, Doktrin-doktrin Modern Dalam Corporate Law Eksistensinya Dalam Hukum Indonesia*, Bandung: PT Citra Aditya Bakti, 2002., hlm. 224.

carrying out its business". This doctrine places the directors on the actual proportions of humans, where their efforts may fail. Failures accepted under this doctrine are human failures. So it is appropriate if a director is not generalized to be responsible for errors in making decisions (mere errors of judgment), without considering the human element.

In the establishment of a State Company, the state only deposits the shares placed in the State Owned Enterprise (BUMN) with the share price specified in the articles of association. Such deposit of shares is state money which is separated as regulated in the State Finance Law and the State Treasury Law as discussed above. Thus, in a formal juridical manner, as long as the share price that has been taken and fully paid up by the state does not decrease, the state does not suffer a loss.

State-owned banks and subsidiary banks of State-Owned Enterprises (BUMN) and local government-owned banks, even though these banks experience profits and the price of shares that have been taken and fully paid up has not decreased, but there are many directors and/or directors. or the employee of the bank concerned as a suspect in a corruption case. This is suspected to be due to the interpretation of losses to these banks based on the existence of 1 (one) or more credit-granting transactions experiencing congestion which should be suspected of violating the law. Thus, the element of violating the law regulated in the corruption law is more dominant and the concept of the notion of "state loss" is biased.

The state treasury law has also regulated the mechanism for returning state losses. The general explanation of the law emphasizes the universally applicable principle that whoever is authorized to receive, keep and pay or deliver money, securities or state property is personally responsible for all deficiencies that occur in its management. The obligation to compensate state financial losses by the state financial managers is an element of reliable internal control.

Article 35 of the State Treasury Law states in essence that "Every state official and civil servant (State Civil Apparatus) who is not a treasurer who violates the law or neglects his obligations, either directly or indirectly, which is detrimental to state finances, is required to compensate for the loss in question, namely: receiving, storing, paying, and/or delivering money or securities or state goods is the treasurer who is obliged to submit an accountability report to the State Audit Board". Furthermore, Article 67 Paragraph (1) of the State Treasury Law is quite clear. Paragraph (2) states that "State compensation for the management of Perum and company companies which are wholly or at least 51% (fifty one percent) of the shares owned by the Republic of Indonesia shall be determined by the State Audit Board (BPK), as long as it is not regulated in a special law. "

This is the legal basis and the basis for the State Finance Agency (BPK) to conduct an audit of state losses, including the amount of compensation. However, the limits and scope of authority of the State Finance Agency (BPK) are regulated in Article 3 of the State Treasury Law which states that the audit of state financial management and responsibility is carried out by the State Finance Agency (BPK) whose variable includes all elements of state finances as referred to in paragraph (1). in Article 2 of Law Number 17 of 2003 the definition of State Finance is point g which relates to state participation in state/regional companies (Persero) as described above.

Thus, the concept of state losses against state/regional companies that suffer losses in one or more of the ways in providing credit/financing is biased. On the other hand, there is an opinion that interprets the state loss only if the state's participation in the form of shares in state/regional companies has decreased. However, there are other parties who are of the opinion that the state loss is interpreted if the state company/regional company that suffers a loss in one or more transactions carried out is considered a state loss. So the latter looks at the state's losses to state/regional companies without considering the losses or gains in the reporting period, including the consolidated balance sheet. This means that even in the annual reporting period the state company experiences a very large profit, but if there are 1 (one) or more

transactions that experience losses, then the loss is considered a state loss (after fulfilling the formulation of other offenses). This does not affect the value of the shares regulated in the Company's Articles of Association, as state money that is set aside for the establishment of state-owned banks as regulated in the State Finance Act and the State Treasury Act. This is very different if the loss is in such a way that it affects the decline in the value of the shares regulated in the company's articles of association. This means that the notion of state losses has shifted to "possible income" if the credit/financing becomes smooth.

Even though the State does not suffer losses on state money set aside in the form of state shares in state companies, the legal logic has shifted that if there is a credit/financing transaction carried out by the directors which then experiences a bottleneck, this is considered to have harmed the state. If this is done to benefit oneself or others and there is an element of violating the law, then it is considered to have been qualified as a violation of a criminal act of corruption.

In the event that it is reasonably suspected and/or deemed to have harmed the state, the state as a shareholder should, as a shareholder, hold the board of directors accountable at the annual or extraordinary General Meeting of Shareholders. Thus, if it turns out that based on the results of the internal audit and the State Finance Agency (BPK) has made a detrimental transaction, the General Meeting of Shareholders (GMS) can reject the responsibility of the Board of Directors. If during the examination, it turns out that it is appropriate to suspect that a crime has been committed, the state through the State-Owned Enterprises Minister of State-Owned Enterprises (BUMN) with the status of a limited liability company can report it to the authorities, although the authorities may conduct an investigation based on the development of the case and/or on the basis of reporting. the other party.

Legal basis, line of thought and legal logic as described above related to state losses on the management of directors of state companies apply mutatis mutandis to Banks whose shares are directly owned by local governments

If the description above relates to a Persero company, it is actually very different from a company owned by a subsidiary of a Persero/Subsidiary of a State-Owned Enterprise (BUMN) or a subsidiary of a regionally owned company. The difference, especially when viewed from the state's financial losses as stipulated in the Corruption Act.

SOEs in carrying out their business development can establish subsidiaries/joint ventures through equity participation. SOEs can also invest in existing subsidiaries/joint ventures. The BUMN capital participation can be done in the form of money or objects within the limits regulated by law. For BUMN whose business in the banking sector is subject to the single presence policy set by the Financial Services Authority and also may not have subsidiaries engaged in non-financial activities. In addition, there are provisions for the Decree of the Minister of SOEs Number SK-315/MBU/12/2019 of 2019 concerning Structuring Subsidiaries or Joint Ventures within State-Owned Enterprises.

The Ministerial Decree (Kepmen) is essentially the Ministry of SOEs reviewing the going concern of Subsidiaries and Joint Ventures whose performance is not good and making the best decisions based on the assessment, involving the SOE directors. The moratorium and review also applies to affiliated companies that are consolidated into SOEs, including their subsidiaries and their derivatives. However, the decision and moratorium are excluded for the establishment of subsidiaries/joint ventures in the context of participating in tenders and/or implementing projects for SOEs having construction services and/or toll road concessions.

Based on this description, it is clear that the establishment of a subsidiary of a BUMN refers to Article 7 of Law No. 40 of 2007 concerning Limited Liability Companies with all the restrictions regulated in the applicable regulations, with the process of establishing a subsidiary in a BUMN company the

same as the process of establishing a Limited Liability Company in general which essentially namely: a). The Company is established by 2 (two) or more legal subjects with a Notary Deed made in the Indonesian language; b). Each founder of the Company is required to subscribe to shares at the time the Company is established; c). The Company obtains legal entity status on the issuance date of the decision of the Ministry of Law and Human Rights regarding the legalization of the Company's legal entity; d). If after ratification as a legal entity, there are less than 2 (two) shareholders, then no later than 6 (six) months after the situation, the shareholders must transfer part of their shares to other people or the Company issues new shares to other people; e). If the time period has been exceeded, the shareholders remain less than 2 (two) people, the shareholders are personally responsible for all engagements and the Company's losses can be requested to be dissolved at the request of the interested party or the district court.

The definition of "person" according to the explanation of Law No. 40 of 2007 concerning Limited Liability Companies is an individual, either an Indonesian citizen or a foreigner or an Indonesian or foreign legal entity. This confirms that as a legal entity, the Company is established based on an agreement, 2 (two) or more persons, both between person and person between person and entity and entity and entity. In addition, a Limited Liability Company is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills the requirements stipulated in the law and its implementing regulations.

Proof of state losses in state subsidiary companies needs to prove that there is a state loss side by examining the flow of establishment of state subsidiaries associated with the provisions governing state finances, namely Law no. 17 of 2003 concerning State Finance and Law number 1 of 2004 concerning the State Treasury. As described above, the establishment of a subsidiary of a state company does not involve state intervention or state finances, except for a permit or approval for equity participation in a state subsidiary company that obtains permission from the shareholders of a state company which is regulated in the articles of association of the state company, in this case the state is represented by Ministry of SOEs as shareholders.

In Article 1 of Law No. 40 of 2007 concerning Limited Liability Companies, the main understanding related to the company is given, namely the Company's Organs are the General Meeting of Shareholders, Directors and Board of Commissioners. The General Meeting of Shareholders, hereinafter referred to as the General Meeting of Shareholders, is the Company's Organ which has the authority not granted to the Board of Directors or the Board of Commissioners within the limits specified in this law and/or the articles of association. The Board of Directors is an organ of the Company that is authorized and fully responsible for the management of the Company for the benefit of the Company, in accordance with the purposes and objectives of the Company and represents the Company, both inside and outside the court in accordance with the provisions of the articles of association. The Board of Commissioners is the Company's Organ in charge of conducting general and/or specific supervision in accordance with the articles of association and providing advice to the Board of Directors.

Furthermore, Article 3 regulates the responsibility of the shareholders, which essentially states that the shareholders are not personally responsible for the engagements made on behalf of the Company and are not responsible for the loss of the Company exceeding the shares owned. These provisions become invalid if: the requirements of the Company as a legal entity have not been met; b. Shareholders, either directly or indirectly, in bad faith take advantage of the Company for personal gain; c. Shareholders involved in unlawful acts committed by the Company; or d. Shareholders, either directly or indirectly, illegally take advantage of the Company's assets, resulting in the Company's assets being insufficient to pay off the Company's debts".

The conception of the establishment of a limited liability company is an act of agreement between

the “founders” on the one hand and the “company” on the other, where the legal relationship occurs because of the “inclusion” of the founders into the company, then it brings legal consequences that the authority of the shareholders is granted by the company. The company is a right that is attached to the individual, namely attached to the owner of the company’s shares, so that the rights of the shareholder cannot be delegated to other parties, including the Board of Directors and the board of commissioners. At the same time, the actions of the board of directors in managing the company will still apply professionally, legal doctrine and provisions for the management of the board of directors.

The authority of shareholders whose funds are managed by the Board of Directors of the company has been regulated in Article 66 of the Limited Liability Company Law which confirms that the Board of Directors submits an annual report to the GMS after being reviewed by the Board of Commissioners within a period of no later than 6 (six) months after the Company’s financial year ends. must contain at least: the balance sheet at the end of the last financial year in comparison with the previous financial year, a statement of profit and loss for the financial year concerned, a statement of cash flows, and a statement of changes in equity, as well as notes to the financial statements; In the GMS forum, shareholders are entitled to obtain information relating to the Company from the Board of Directors and/or Board of Commissioners, as long as it relates to the agenda of the meeting and does not conflict with the interests of the Company.

Shareholders may also request to be investigated if there is a criminal act within the company as regulated in Article 138 of the Limited Liability Company Law which is carried out with the aim of obtaining data or information in the event that there is an allegation that: a. The Company commits an unlawful act that is detrimental to shareholders or third parties; or b. a member of the Board of Directors or the Board of Commissioners commits an unlawful act that is detrimental to the Company or its shareholders or third parties.

The examination referred to is carried out by submitting a written application along with the reasons to the district court whose jurisdiction covers the domicile of the Company. The application referred to may be submitted by: a. 1 (one) shareholder or more representing at least 1/10 (one tenth) of the total shares with voting rights; b. other parties who based on laws and regulations, the articles of association of the Company or an agreement with the Company are authorized to apply for examination; or c. public prosecutor’s office.

The application as intended is submitted after the applicant first requests data or information from the Company at the General Meeting of Shareholders (GMS) and the Company does not provide such data or information. Applications to obtain data or information about the Company or requests for examination to obtain such data or information must be based on reasonable reasons and in good faith.

Based on the description above, it can be concluded that in the establishment of a subsidiary of a state company there is no state intervention except for a permit or approval for capital participation in a subsidiary of a state company which is regulated in the articles of association of a state company. However, in the practice of litigation, the loss of a state subsidiary company will be highlighted by law enforcers for an investigation to obtain facts and evidence that the loss is a state loss. Thus, based on a formal judicial analysis, losses to subsidiaries of state companies (Persero) and subsidiaries of regionally owned companies, are not appropriate to be brought into the realm of corruption, because there is no state loss.

IV. Conclusions and Suggestions

1. Conclusion

Based on the research presented above, it is clear that the legal relationship between the state and state enterprises is state capital participation set aside in state companies/regional companies. Thus, as a corporation, the legal relationship is state share ownership in state/regional companies. The legal relationship of share ownership has been regulated in the limited liability company law. Thus, in a formal juridical manner, the provision of credit or financing of a Bank with the status of a Persero (a bank with the status of a state-owned company/regional company) in the event of providing credit/financing which then becomes non-performing does not affect the value of state participation in a Bank with a Persero status.

However, the legal logic has shifted that if there is a credit/financing transaction carried out by the board of directors which then experiences a bottleneck, this is considered to be detrimental to the state. If this is done to benefit oneself or others and there is an element of violating the law, then it is considered to have been qualified as a violation of a criminal act of corruption. Such legal logic has put enough pressure on the management of the board of directors in managing state companies to remain committed to prodential banking. Legal basis, line of thought and legal logic as described above related to state losses on the management of directors of state companies apply mutatis mutandis to Banks whose shares are directly owned by local governments

For a subsidiary of a State-Owned Enterprise or a subsidiary of a regional government, whose shares are partly owned by a State-Owned Enterprise or by a regional government, the treatment related to state financial losses should be different from the case of a State-Owned Enterprise or a company owned by a regional government, because the ownership indirectly by the state. So that the financial loss to a subsidiary of a State-Owned Enterprise or a subsidiary of a regional government is a financial loss for the company concerned or a State-Owned Enterprise or a company owned by a regional government, and not a state loss.

2. Suggestions

There is no limit on state losses, so the interpretation of the definition of state losses may differ. The provision of credit/financing that is in trouble and the Bank in question in the reporting period experiences a formal juridical profit does not affect the state money set aside in the form of shares in a state-owned bank, which means that there is no state loss, but in practice investigators are based on legal logic. consider it a state loss.

Therefore, it is necessary to have an agreement on the understanding of state losses that are included in the law, so that a sense of justice is obtained in the enforcement of criminal acts of corruption whose enforcement can be accounted for in the hereafter.

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