

REVIEW OF STATE FINANCIAL DAMAGES IN LAWS TO THE NAME OF THE NABABAN HOTASI

NADYA DEFANI RIESTIRA SCHOUTEN

Master of Law, Postgraduate Program, Tarumanagara University, Jakarta, Indonesia
defaninadya@yahoo.co.id

Received 21 February 2020 - Revised 8 April 2020 - Accepted 11 Mei 2020

Abstract

This study analyzes Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN), Law Number 17 of 2003 concerning State Finance and Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning Eradication of Corruption in relation to the definition of regarding state finances. The problem that then arises is when there is a difference in the definition of state finances regulated in the law, so that when the Directors of SOEs (BUMN) issue policies that result in losses, then law enforcement officials are charged with Article 2 and Article 3 of Law Number 20 of 2001 Concerning Eradication of Corruption.

Keywords : *state finances, corruption, financial damages*

INTRODUCTION

According to Moeljatno, strafbaarfeit or called a criminal act or offense is an act that is prohibited by criminal law and threatened with criminal to anyone who violates the prohibition¹. Moeljatno said that criminal acts can be equated with the English term criminal act. Based on two reasons, such as first because a criminal act also means behavior and effect or in other words: the result of a behavior that is prohibited by law, the second reason, a criminal act is also separated from criminal liability, in order to be convicted by someone other than for committing a criminal act that person must also be Guilty², therefore, any act that is prohibited by law must be avoided and anyone who breaks it will be subject to criminal sanctions, so certain restrictions and obligations that must be obeyed by every citizen must be included in the law and government regulations, both at the central and regional levels³.

In relation to the definition of the term strafbaar feit, there are two views that have developed within criminal law experts, such as a monistic view and a dualistic view⁴.

Laws in Indonesia which is also develop is unwritten laws, that is customary law which allows such unlawful nature to exist and exist in society⁵. The teaching of the nature of violating material law is also related to the 2 (two) functions it holds, such as the negative function and the positive function. One unwritten law that applies in Indonesia is about the principle of business judgment rule. The principle of business judgment rule is implicitly accommodated in Article 92 and Article 97 of Law Number 40 of 2007 concerning Limited Liability Companies described in Article 92 paragraph (1) that in carrying out the management of a company by the Directors that aim for the compulsory interests of the company in accordance with the wishes, intentions, goals of the company. One form of business entity that can use the principle of business judgment rule is a State-Owned Enterprise (BUMN).

State-Owned Enterprises (BUMN) in the form of Limited Liability Companies when experiencing losses in very large numbers due to the decision of the Board of Directors, then the decision of the Board of Directors can be seen as a policy for the progress of a State-Owned Enterprise. However, due to the inclusion of capital in (state finances) in the Limited Liability Company, as a result the law enforcers assume that it can be said as a criminal act of corruption which is detrimental to the country's finances.

That is because there are differences in the definition of state finances regulated in Act Number 19 of 2003 concerning State Owned Enterprises (BUMN) is different from the definition of state finances contained in Act Number 17 of 2003 concerning State Finances and Act Number 20 of 2001 in conjunction with Law Number 31 of 1999 Concerning Eradication of Corruption. Article 1 paragraph

¹ Moeljatno, *Asas-Asas Hukum Pidana*, Edisi Revisi (Jakarta: Rineka Cipta, 2008), hlm. 2.

² *Ibid.*, hlm. 61-62.

³ P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, (Bandung: PT. Citra Aditya Bakti, 1996), hlm. 7.

⁴ Andi Hamzah, *Asas-Asas Hukum Pidana di Indonesia & Perkembangannya*, (Jakarta: PT. Sofmedia, 2012), hlm 121.

⁵ Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana*, (Yogyakarta: Cahaya Atma Pustaka, 2014), hlm 91.

(2) of Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN) declares that a Limited Liability Company is a state-owned company in the form of a limited liability company whose capital is divided into shares that are all or at least 51% (fifty one percent) of its shares owned by the State Republic of Indonesia whose main purpose is to pursue profit. In this case Arifin P. Soena Atmadja stated that there has been a legal transformation from public finance to private finance⁶. The characteristic of a legal entity is the separation of legal assets from the owners and management.

The asynchronous formulation of various regulations results in a misunderstanding of the legal concepts between company law, State financial law and specific criminal law regarding corruption. The next consequence is the absence of legal certainty for directors of the policies they have made. This happened in the case of the former President Director of PT. Merpati Airlines Nusantara, Hotasi P. Nababan which was decided by a Supreme Court judge was found guilty of committing a criminal act of corruption together and charged with Article 2 of Law Number 31 of 1999 concerning Corruption Crimes and in the decision of the Supreme Court Judges considering that the judge confirmed all the charges of the Public Prosecutor where the defendant was proven guilty of committing a criminal act of corruption in violation of the provisions contained in Article 2 of Law Number 31 of 1999 concerning Eradication of Corruption.

According to the Attorney General's Office, Hotasi allegedly cost the state US \$ 1 million for leasing Boeing 737-400 aircraft, so that the state suffered US \$ 1 million for leasing Boeing 737-400 and 737-500 aircraft by the USA TALG company. and make mistakes (negligence), so that the Merpati directors must be legally responsible⁷.

The attitude of the Merpati directors who kept Security Deposite even before the leasing contract was signed, indicates that the tenant (State-Owned Enterprises / BUMN) has made a mistake by acting at least carelessly and negligently. Aside from that, because the funds turned out to be lost, the directors of the company and possibly together with their subordinates, have committed wrongdoing which must be accounted for legally, both civil law and criminal law.

RESEARCH METHODS

From the background, this research need a method . The research method is very important in conducting research to arrange legal writing so that the author can find out the importance of research, assess the results of research, and can give birth to attitudes and mindset that are skeptical, analytic, critical, and creative. Therefore the author will use one research method, namely normative juridical research methods. This normative juridical research method is carried out by starting legal research that uses secondary data, that is, data which are generally already in a ready made condition.

Normative juridical research is conducted by examining library materials or secondary data, secondary data in the field of law is divided into:

1. Primary law materials, is a law materials that have binding legal force, such as applicable laws and related laws, such as:
 - a. Criminal Law Book.
 - b. Code of Civil law.
 - c. Law Number 19 of 2003 concerning State-Owned Enterprises.
 - d. Law Number 17 of 2003 concerning State Finance.
 - e. Law Number 20 of 2001 in conjunction with Law Number 31 Year 1999 concerning Eradication of Corruption Crimes.
 - f. Law Number 40 of 2007 concerning Limited Liability Companies
 - g. Decision of the Supreme Court Number 41 / PK / Pid.Sus / 2015.
2. Secondary law materials, is a materials that provide an explanation of primary law materials, for example research results, library materials (literature), and other law publications relating to the issues discussed in this study.
3. Tertiary law materials, is a materials that provide instructions and explanations for premier and secondary law materials such as dictionaries, encyclopedias and the internet.

DISCUSSION

The corruption term comes from the Latin: Corruption or Corruptus, which means bad, deviating from holiness, insulting words, or slandering. Opinions of several experts regarding the definition of criminal acts of corruption differ, among them arguing that corruption is a deviation from formal duties

⁶ Nindyo Pramono, *Sertifikasi Saham PT Go Public dan Hukum Pasar Modal di Indonesia*, (Bandung: Citra Aditya Bakti, 2001), hlm. 15.

⁷ Kesimpulan Penulis dari Putusan Mahkamah Agung Peninjauan Kembali terhadap Perkara terdakwa Hotasi D. P Nababan Nomor 41/PK/Pid.Sus/2015.

in the official position of government, not only executive positions but also legislative, political parties, audits, BUMN / BUMD to the private sector officials.

The definition of corruption in the Indonesian General Dictionary (W.J.S. Poerwadarminta), is interpreted as cheating, can be bribed and immoral. According to the Big Indonesian Dictionary, corruption is a misappropriation or embezzlement of state or company money and so on for personal or other people's interests.

In Law Number 31 of 1999 amended by Law Number 20 of 2001 which is referred to acts that are included in the Corruption Act in general, there are 7 types of acts that can be classified as corrupt acts, such as State Financial Losses, Bribery, Occupation, Extortion, Fraud, Conflict of Interest in Court, and Gratuity.

In this theoretical study, the author will only discuss the types of Corruption Crimes in the first category, that is Corruption Crimes related to detriment of state finances. In Indonesia there are statutory regulations which unite the understanding of State-Owned Enterprises (BUMN) wealth with state property, including Law No. 17 of 2003 concerning State Finances, in Article 1 point 1, Law No. 31 of 1999 as amended by Law No. 20 of 2001 concerning Eradication of Corruption, and Law No. 15 of 2004 concerning the Examination of Management and Responsibility for State Finance Article (3) paragraph (1).

The core of several definitions or definitions of State Finances which are seen from several Laws and Regulations on State Finances are separated state assets (equity participation in BUMN / BUMD) are state assets. So that if there is a loss to State-Owned Enterprises (BUMN), it will harm the country's finances.

Then there are several regulations in Indonesia that separate State-Owned Enterprises (BUMN) assets from state assets, namely Law Number 19 of 2003 concerning State-owned Enterprises in Article 1 paragraph 1, Law No. 1 of 2004 concerning State Treasury in general provisions of Article 1 paragraph 22, Government Regulation Number 8 of 2005 concerning Reporting and Performance of Government Agencies in article 1 paragraph 20, Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies which are contained in Article (1) paragraph 7, Article (2) paragraph 1 and 2, Article (2a) paragraph 1-5.⁸

With so many regulations regarding state finances, the definitions of state finances are dissimilar, even the definition is not the same between one regulation and another, where there are regulations that equate the definition of state finance / wealth with State-owned Enterprises (BUMN) assets and there are also rules that separate definitions. State finances / assets are different or separated from BUMN assets. From the various definition given about state finances, there needs to be an affirmation of what and how the scope of state finances is, so that they do not experience obstacles in their application.

1. Elements of State Financial Losses in Corruption in Article 2 and Article 3 of Act 31 of 1999 concerning Corruption

State financial losses can occur in two stages, that is when the funds will go to the state treasury and at the stage the funds will come out of the state treasury⁸.

The regulation of State Financial Losses in Corruption Crimes is contained in the formulation of Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999. Law Number 20 of 2001 concerning Eradication of Corruption and one of the elements that must be fulfilled in uncovering the occurrence of a criminal act of corruption is that it can be detrimental to State Financial Losses or the State Economy.

Explanation of Article 2 paragraph (1) The reason for the phrase "Can" before the sentence is detrimental to the country's finances was also stated by the Constitutional Court in MK Decree Number 003 / PUU-IV / 2006 dated July 24, 2006. The Court considered that the losses incurred in criminal acts of corruption especially large scale ones, it is very difficult to prove it precisely and accurately.

⁸ Peraturan Pemerintah No 72 tahun 2016. Penjelasan pasal-pasal terkait :

"Pasal (1) ayat 7 : Penyertaan Modal Negara adalah pemisahan kekayaan Negara dari Anggaran Belanja dan Pendapatan Negara atau penetapan cadangan perusahaan atau sumber lain untuk dijadikan sebagai modal BUMN dan/atau Perseroan Terbatas lainnya, dan dikelola secara korporasi"
"Pasal (2) ayat 1 dan 2 : (1) Penyertaan modal Negara ke dalam BUMN dan Perseroan Terbatas bersumber dari APBN, kapitalisasi cadangan dan/atau sumber lainnya. (2) Sumber penyertaan modal Negara yang berasal dari APBN, sebagaimana dimaksud pada ayat (1) huruf a meliputi kekayaan negara yang berupa salah satunya adalah saham milik Negara pada BUMN atau Perseroan Terbatas.

⁸ Jawade Hafidz Arsyad, *Korupsi dalam Perspektif HAN*, Jakarta: Sinar Grafika, 2013), hlm. 17.

“Pasal (2a) ayat 3 : Kekayaan Negara yang sebagaimana dimaksud pada Pasal (2) ayat 2 yang dijadikan penyertaan modal negara pada BUMN atau Perseroan Terbatas bertransformasi menjadi saham/modal negara pada BUMN atau Perseroan Terbatas tersebut.

“Pasal (2a) ayat 4 : Kekayaan Negara yang bertransformasi sebagaimana dimaksud pada ayat 3, menjadi kekayaan BUMN atau Perseroan terbatas tersebut.

“Pasal (2a) ayat 5 : Kepemilikan atas saham atau modal negara pada BUMN atau Perseroan Terbatas dicatat sebagai investasi jangka panjang esuai dengan kepemilikan Pemerintah pada BUMN atau Perseroan Terbatas”.

What is meant by state financial losses from the formulation of elements in Article 2 is that corruption is a formal offense, where the consequences do not need to have occurred if the act has harmed state finances / the country's economy then the act has been completed⁹.

Whereas what is meant by the State Economy is economic life compiled as a joint venture based on the principle of kinship or community business independently based on Government policies, both at the central and regional levels in accordance with the provisions of applicable legislation aimed at providing benefits, prosperity, and welfare to all people's lives (Explanation of Law Number 31 of 1999)¹⁰.

In Article 3 it is stipulated that the intended perpetrators of corruption must assume an office or position. Therefore, those who can hold an office or position are only individuals, then the criminal act of corruption contained in Article 3 can only be carried out by individuals, while the corporation cannot commit the crime of corruption¹¹.

Provisions in Article 2 paragraph (1) of Law Number 31 of 1999. Law Number 20 of 2001 regarding Eradication of Corruption is determined as an enrichment element, so in Article 3 the beneficial element is determined. What is meant by profit is the same as getting a profit, that is the income earned is greater than expenses, regardless of the further use of the income earned.

Abuse of authority occurs when a person who has authority based on general provisions or customs that is inherent in a position / position that they hold are used erroneously / contrary to the purpose and objective of the authority given from that position or position¹².

Position in the formulation of Article 3 of Law Number 31 of 1999 . Law Number 20 of 2001 concerning Eradication of Corruption can be used for the perpetrators of corruption as follows:

1. Civil Servants as perpetrators of corruption who do not hold certain positions, both structural and functional positions.
2. Corruption perpetrators who are not Civil Servants or Private Individuals who have functions in a corporation.

Abusing opportunities means abusing the time available to them in their position. While abusing means means to abuse the tools or equipment available to them because of their position¹³.

1. Business Judgment Rule in State-Owned Enterprises

In an explanation of the legislators (Memorie van Teoligting, MvT) stated as follows: "The company is the entire act carried out, uninterruptedly, overtly, in certain positions for profit¹⁴.

A State-owned Company is a company whose capital is entirely separated from the Republic of Indonesia's assets, unless otherwise stipulated by or under the law (Article 1, Law No. 19 of 1960). This state-owned company was established by government regulation, which has become a legal entity since the entry into force of the PP concerned (Article 3 of Law No. 19 of 1960)¹⁵.

On December 28, 1967 the Government of the Republic of Indonesia issued Presidential Instruction No. 17 of 1967 concerning Directing and Simplifying State Enterprises into three forms of State Enterprises. The basic considerations are:

- a. There are differences in the form, law status, organizational structure, staffing system, administration and others in existing state enterprises.

⁹ Darwan Prinst, *Pemberantasan Tindak Pidana Korupsi* (Bandung: Citra Aditya Bakti, 2002) hlm.32.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Shinta Agustina, *Penjelasan Hukum Unsur Melawan Hukum Penafsiran Unsur Melawan Hukum Dalam Pasal 2 Undang-Undang Pemberantasan Tindak Pidana Korupsi*, (Jakarta: LeIP, 2016), hlm. 61.

¹³ Darwan Prinst, *Pemberantasan Tindak Pidana Korupsi* (Bandung: Citra Aditya Bakti, 2002) hlm. 34.

¹⁴ Sentosa Sembiring, *Hukum Dagang*, (Bandung: PT Citra Aditya Bakti, 2008), hlm. 14

¹⁵ Abdulkadir Muhammad, *Hukum Perusahaan Indonesia*, (Bandung: Citra Aditya Bakti, 2006), hlm. 8.

b. More use State Enterprises in the context of Economic Development and national prosperity¹⁶.

The point is that the State Enterprise was formed by this State to help develop the State Economic Development in which the capital owned by the State Enterprise is wealth that has been separated by the state as an investment in the capital of the State Enterprise, and the State Enterprise is formed to realize the prosperity of the nation.

According to Law Number 40 of 2007 concerning Limited Liability Companies in Article 1 paragraph (2) the organ of the company consists of the General Meeting of Shareholders, Directors and Board of Commissioners.

The Board of Directors is the Company's Organ which has the authority and is fully responsible for the management of the Company for the interests of the company, in accordance with the aims 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. In principle, the Board of Directors is responsible for the company (overall shareholders), not to individual shareholders. The duties of the board of directors are not limited to routine activities, but are also authorized and must take the initiative to make plans and estimates regarding the company's development for the future in order to realize the goals and objectives of the company¹⁷.

The Directors represent the Company both inside and outside the court. In the event that a member of the Board of Directors consists of more than 1 (one) person, the person authorized to represent the company is each member of the Board of Directors (each Director), unless otherwise stipulated in the articles of association. The authority of the Directors to represent the Company is unlimited and unconditional, unless specified otherwise in the Limited Liability Company Law, articles of association, or RUPS resolutions. The GMS decision must not conflict with the provisions of the Limited Liability Company Law and / or the company's articles of association.

In the event that after the financial year ends, the Company suffers a loss, and the interim dividends distributed that should be returned by the shareholders to the Company cannot be returned, the Board of Directors and the Board of Commissioners are jointly and severally liable for the Company's losses¹⁸.

According to E. Utrecht, a legal entity (*rechtspersoon*), a body which according to law has the authority to be a supporter of rights, is further explained that a law entity is any advocate of rights that are not soulless or more precisely not humans¹⁹. According to R. Subekti, a law entity is principally a body or association that can have rights and perform actions like a human being, and has his own wealth, can be sued or sued before a judge. It can be concluded that a law entity is a law subject whose appearance does not seem like a normal human being, but has rights and obligations and can carry out law actions like a natural person.

According to the Decree of the Finance Minister of the Republic of Indonesia Number 740 / KMK 00/1989 what is meant by BUMN is:

Business Entities whose entire capital is owned by the state (Article 1 paragraph 2a). Or a business entity that is not wholly owned by the state but whose status is equated with a BUMN such as (Article 1 paragraph 2b): (1) BUMN which is a joint venture between the government and the regional government; (2) BUMN which is a joint venture between the government and other BUMNs; (3) BUMNs which are joint ventures with national or foreign private entities in which the state has a minimum majority share of 51%.

Based on these provisions, State-owned Enterprises are included in the category of associations (*vereniging*) which are formed intentionally and voluntarily by people who intend to strengthen their economic position, preserve culture, take care of social matters and so on. State-Owned Enterprise (BUMN) is a business unit in which part or all of its capital comes from state assets that are separated with the aim of prospering the people.

Regarding State-Owned Enterprises (BUMN) finance, this provision has been regulated in Article 4 of Law Number 19 of 2003 concerning BUMN which states that if BUMN Capital is and originates from separated state assets and Participation of state capital in the context of establishment or inclusion in State-Owned Enterprises (BUMN) can be sourced from the Revenue Budget and State expenditure, reserve capitalization and asset revaluation gains.

Article 11 of Law No. 19 of 2003 is also stated if State-Owned Enterprises (BUMN) in the form of Limited Liability Companies are also subject to the provisions of Law Number 1 of 1995 concerning

¹⁶ R. T. Sutantya Rahardja Hadhikusuma & Sumantoro. *Pengertian Pokok Hukum Perusahaan*. (Jakarta: PT. Raja Grafindo Persada 1996). Hlm. 187.

¹⁷ Chatamarrasjid Ais, *Menyingkap Tabir Perseroan*, (Bandung: Citra Aditya Bakti, 2000), hlm. 37.

¹⁸ Try Widiyono, *Direksi Perseroan Terbatas (Bank dan Persero)*, (Bogor: Ghalia Indonesia, 2005), hlm. 58.

¹⁹ Chaidir Ali, *Badan Hukum*, (Bandung: Alumni, 1999), hlm. 18-19.

Limited Liability Companies which have now been amended by Law Number 40 of 2007 concerning Limited Liability Companies, so that BUMN management in the form of a PT, is the same as another private company. Thus BUMN finances are private finances managed by state-owned companies in order to obtain profits as a source of state revenue²⁰.

The Law on State Finance is too broad in interpreting the criteria for state wealth to the finances which have been separated in BUMN and BUMD, so that errors often occur in terms of prosecution of corruption cases. Article 2 letter g of the State Finance Law explains the assets of the state or regional assets which are managed by themselves or other parties in the form of money, securities, receivables, goods and other rights that can be valued with money, which includes assets that are separated in state companies or regional company²¹.

The article causes law enforcers to interpret that all management of state assets in State-Owned Enterprises (BUMN) must follow the mechanism of management of state finances. In fact, all BUMN companies must comply with Law No. 19 of 2003 concerning State-Owned Enterprises (BUMN). The definition of state wealth in the Law on State Finance is too broad.

Related to State-Owned Enterprises (BUMN) financial management that is different from the management of state finances has also been explained in the Constitutional Court Decision No. 77 / PUU-IX / 2011. The Constitutional Court ruled that BUMN are business entities that have assets separate from state assets so that the authority to manage business assets, including the settlement of State-Owned Enterprises' debts, is subject to limited company law under Law No. 40 of 2007. So, since the issuance of the ruling, receivables BUMN that were previously categorized as state receivables are canceled and BUMN receivables are only private accounts generally in other private companies²².

Based on the explanation above, the form of accountability of the BUMN Directors to the stipulated policy applies the business judgment rule doctrine as stipulated in Act No. 19 of 2003 concerning BUMN and Act Number 40 of 2007 concerning Limited Liability Companies. This is in accordance with Article 11 of Law No. 19 of 2003 which states that if BUMN in the form of Limited Liability Companies, all provisions and principles that apply to limited liability companies apply as stipulated in Law Number 1 of 1995 concerning Limited Liability Companies which have now amended by Law Number 40 of 2007 concerning Limited Liability Companies, so that the management of BUMN in the form of Limited Liability Companies is the same as other private companies. However, in the research conducted by the author, this provision was not carried out by law enforcement officials who tended to use Law Number 31 of 1999 concerning Corruption as in the case of the former President Director of PT. Merpati Nusantara Airlines, Hotasi P. Nababan which was decided by a Supreme Court judge was found guilty of committing a criminal act of corruption together and charged with Article 2 of Law Number 31 of 1999 concerning Corruption Crimes.

2. Judgment of the Supreme Court Judges Regarding State Finances in State-owned Enterprises (BUMN) by referring to the Definition of State Finances regulated in the State Finance Law and the Corruption Eradication Act

Corporations especially in this case look at the Supreme Court Regulation (Perma) No. 13 of 2016 concerning Procedures for Handling Criminal Acts by Corporations. Where this "Perma" contains the provisions of Corporations can be held liable criminally by looking at the "Errors" committed by Corporations. In terms of error criteria there are a number of things that need attention. First, the corporation gets profits or benefits from certain criminal acts or the crime is committed for the benefit of the corporation. Second, corporations allow criminal acts to occur. Third, the corporation does not take steps to prevent or prevent greater impacts and ensure compliance with applicable legal provisions in order to avoid criminal acts.

This proof system of handling corporate criminal acts still refers to the Criminal Procedure Code and procedural law provisions that are specifically regulated in other laws. Like the defendant's statement, the corporation's statement is law evidence in the trial. While the imposition of corporate crime, that is the main criminal sanctions in the form of fines and additional crimes in accordance with applicable law, such as compensation, compensation and restitution²³.

Then if a Corporation is proven to have committed a Corruption Act according to Article 18 paragraph (1) of letters b, c, and d of Law 31 of 1999 concerning PTPK, it states that: (b) payment of

²⁰ Riant Nugroho dan Ricky Siahaan, *BUMN Indonesia* (Jakarta: Elex Media Komputindo, 2006)

²¹ *Ibid.*

²² Agus Adhari, "Kedudukan Keuangan Badan Usaha Milik Negara terhadap Keuangan Negara", *Jurnal Fakultas Hukum Universitas Pembangunan Panca Budi*, 2013, hlm. 6.

²³ <http://www.hukumonline.com/berita/baca/lt50913e5b4d3a1/kekayaan-bumn-bukanbagian-keuangan-negara>., diakses pada tanggal 8 Oktober 2017.

the replacement money as much as the same as the assets obtained from criminal acts 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 can be given by the Government to the convicted person.

So basically the corporation can be held liable if it is proven that the corporation was formed to accommodate the results of Criminal Acts as the author has explained above through the corporation's criminal penalties from various laws and regulations.

Problems appears when the Directors of State-Owned Enterprises (BUM) make a business decision and from these decisions cause losses which ultimately make BUMN Directors become a suspect charged with Article 2 paragraph (1) of Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning Eradication of Acts Criminal Corruption. This happened in the case of Hotaban Nababan, Former President Director of PT Merpati Nusantara Airline.

According to the Author, the Supreme Court Judge's consideration of state finances within the BUMN was incorrect by referring to the definition of state finances in the State Finance Law and the Corruption Crime Act. That is because in determining the existence of state losses for decisions made by BUMN Directors is by referring to Law Number 19 of 2003 concerning State Owned Enterprises, and Act Number 1 of 2004 concerning State Treasury.

In Article 1 number 10 of Law Number 19 of 2003 concerning State-Owned Enterprises states that the separated state assets are state assets originating from the State Revenue and Expenditure Budget (APBN) to be used as state capital participation in Persero and / or Public Corporation and limited liability companies the other. Because state assets in State-Owned Enterprises (BUMN) are separate, if to determine whether or not there is a state loss, it must look at the provisions in Article 1 number 22 of Law Number 1 of 2004 concerning the State Treasury which states that State / Regional losses are short of money, letter valuable and tangible, tangible and certain goods as a result of intentional or negligent unlawful acts. Based on these provisions, then there are 3 (three) elements that must be met, such as:

1. There is a lack of good money, securities, and goods;
2. The exact and real amount;
3. As a result of unlawful acts intentionally or negligently.

The provisions in Article 1 number 22 of Law Number 1 of 2004 concerning the State Treasury are certainly contrary to the provisions of Law Number 17 of 2003 concerning State Finance and Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning Eradication of Acts Criminal Corruption.

The author agrees with the statement from the Professor of the Faculty of Law UI (FHUI) Erman Radjagukguk who said that the assets of BUMN Persero and the assets of BUMN Perum as a legal entity are not part of the country's wealth. Because, "separated state wealth" in State-Owned Enterprises (BUMN) is only in the form of shares. That is, the wealth of BUMN does not become state wealth. In Article 11 it is stated that all provisions and principles that apply to Limited Liability Companies apply to Limited Liability Companies as stipulated in Act Number 1 of 1995 concerning Limited Liability Companies which have now been amended to Act Number 40 of 2007 concerning Limited Liability Companies.²⁵

Based on this statement, it can be stated that when a BUMN loses due to a decision of the BUMN Directors, the loss is not necessarily a state loss. That is because in Article 56 of Law Number 1 of 1995 concerning Limited Liability Companies which are currently also regulated in Article 66 of Law Number 40 of 2007 concerning the most recent Limited Liability Companies which states that within five months after the company's fiscal year is closed, the Directors prepare an annual report to be submitted to the GMS, which contains at least, among others, an annual calculation consisting of the balance sheet at the end of the previous fiscal year and calculation of profit / loss from the relevant savings book and an explanation of the document.

Based on these provisions, the loss suffered in one transaction does not mean the loss of the limited liability company because there are other profitable transactions.

Based on this, according to the Author, there was a mistake of the Supreme Court Judge who determined the losses arising from the decision of the Directors of State-Owned Enterprises (BUMN) included in state losses determined in the concept of criminal law as determined in Act Number 20 of 2001 in conjunction with Act Number 31 of 1999 concerning Eradication of Corruption Crimes. Though not always the case. That is because there are losses arising from the decisions of the Directors of BUMN including part of private law provided the decisions are made in good faith and carried out carefully.

Eradication of Corruption. Though not always the case. That is because there are losses arising from the decisions of the Directors of State-Owned Enterprises (BUMN) including part of private law provided the decisions are made in good faith and carried out carefully.

According to the author, directors can only be held criminally liable on the condition that the directors commit fraud or embezzlement and corruption regulated in Act Number 20 of 2001 in conjunction with Act Number 31 of 1999 concerning Eradication of Corruption, so the provisions in Article 2 paragraph (1) of Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning Eradication of Corruption Crimes which may be detrimental to the country's finances can be fulfilled.

3. Judgment of the Supreme Court Judge Who Claims to Provide Security Deposit Actually in Accordance with the Agreement but Causing State Losses is a Corruption Crime

According to the author, there was a mistake made both in the Nababan Hotasi case, the Public Prosecutor, as well as by the Panel of Judges for cassation and reconsideration. The mistake made by the Public Prosecutor and the Judges at the cassation and reconsideration level was not to consider the mens rea (evil intention) factor from Nababan Hotasi. In this case, the act of Nababan Hotasi was declared "resulting in enriching others", so that the element of corruption in Article 2 paragraph (1) was fulfilled.

In proving the element of enriching oneself, another person, or corporation, the judge should not only associate the relationship between the act of enriching oneself, another person or corporation with unlawful acts committed by Nababan Nababan, but it is also necessary to prove whether the act against the law has been done, indeed with awareness to enrich oneself, others, or corporations. There is awareness of the perpetrators in committing unlawful acts which results in enriching themselves, other people or corporations which shows the existence of mens rea (evil intentions) from the perpetrators, and this is not in the Prosecutor's indictment nor is it taken into consideration by the Supreme Court Judges.

Here the author further approves the decision and consideration of the Corruption Judge Panel at the Central Jakarta District Court in the explanation above, according to the Writer on the consideration of the TIPIKOR (Corruption) Panel of Judges at the Central Jakarta District Court, it looks more at the substance in the provisions in Company Law and looks at (mens rea) the criminal intentions of the perpetrators first and in the case the defendant based on the evidence that has been proven not guilty and has proven to have no ill intentions from the defendant.

According to the author, the consideration of the Panel of Judges of the Corruption Court in the PN who said in this case that the essence of the case experienced by Hotasi Nababan was purely a business risk and could not be qualified as a Corruption. And according to the author, the consideration of the Panel of Judges of Corruption in the Central Jakarta District Court is a verdict that is correct and has legal certainty and is fair for the accused Hotasi Nababan.

According to the author, the decision of the Supreme Court Judge at the level of Cassation and Review that sentenced Hotasi Nababan as the President Director of PT Merpati Nusantara Airline with a criminal sentence is an act contrary to the mandate in Article 97 paragraph (5) of Law Number 40 of 2007 concerning Limited Liability Companies and not seeing the existing law facts and based on the loss suffered by PT Merpati Nusantara Airline is not a state loss. That is because the company's assets are separated from the assets of its founders, so it can be stated the opinion of the judge who stated the company's loss was a state loss is also very incorrect.

According to the author, the Hotasi Nababan case as the President Director of PT Merpati Nusantara Airline actually appears because there is no understanding between one law and another, if law enforcement officials use the definition of state finance based on the Explanation of Law Number 31 of 1999 concerning Eradication of Corruption, if there is a loss to BUMN and Persero, law enforcers and state officials use the provisions of Article 2 letter g of the State Finance Act and general explanation of Law Number 31 of 1999 concerning Eradication of Corruption. In essence, the inclusion of a separated state is state property which by nature is in the realm of public law. Therefore, if there is a state loss, then the provisions of the Corruption Act can be applied to State-Owned Enterprises management. In the case of company losses, especially in BUMN, law enforcement officials must look to the principle of *lex specialis derogat legi generalis*, so that the applicable provisions relating to BUMN are Article 1 number 1 of Law Number 19 of 2003 concerning BUMN which states that state participation is separated state assets.

Because there is a mistake in the sense of state finance, it has an impact on the business world. Legal uncertainty arises so that State-Owned Enterprises directors do not dare to take strategic decisions. Even though BUMN directors dare to make strategic decisions, but when BUMN suffer

losses, law enforcement officials immediately act using Article 2 letter g of the State Finance Law and a general explanation of Law Number 31 of 1999 concerning Eradicating Corruption.

CONCLUSION

The consideration of the Supreme Court Judge regarding state losses in State-Owned Enterprises by referring to the definition of state finances regulated in the state finance law and the law on combating criminal acts of corruption is a mistake. That is because in determining the existence of state losses on decisions made by BUMN Directors, they should refer to Act Number 19 of 2003 concerning State Owned Enterprises, and Act Number 1 of 2004 concerning State Treasury. BUMN Directors can only be held criminally liable on the condition that the director commits fraud or embezzlement and corruption that is detrimental to the country's finances, as stipulated in Act Number 20 of 2001 in conjunction with Act Number 31 of 1999 concerning Eradication of Criminal Acts Corruption, so that the provisions in Article 2 paragraph (1) of Law Number 20 of 2001 in conjunction with Law Number 31 of 1999 concerning Eradication of Corruption Crimes which contain can harm state finances can be fulfilled.

The consideration of the Supreme Court Judge who states that providing a security deposit that is actually in accordance with the agreement, but which causes state losses to be a criminal act of corruption is a mistake. That is because the Supreme Court Judges did not consider the mens rea (evil intention) factor from Hotaban Nababan. In this case, the act of Nababan Hotasi was declared "resulting in enriching others", so that the element of corruption in Article 2 paragraph (1) was fulfilled. In proving the element of enriching oneself, another person, or corporation, the judge should not only associate the relationship between the act of enriching oneself, another person or corporation with unlawful acts committed by Hotaban Nababan, but it is also necessary to prove whether the act against the law has been done, indeed with awareness to enrich oneself, others, or corporations. The awareness of the perpetrators in carrying out acts against the law that results in enriching themselves, other people or corporations is what indicates the existence of mens rea (evil intentions) of the perpetrators, and this is not taken into consideration by the Supreme Court Judges.

SUGGESTION

To the Government, it is necessary to revise Law Number 20 of 2001 concerning Eradication of Corruption and Law Number 17 of 2003 concerning State Finance to harmonize the definition of state finance with Law Number 19 of 2003 concerning State-Owned Enterprises, and Law Number 1 of 2004 concerning the State Treasury. This needs to be done so that in the future there will be no more debate about the definition of state finances in the case of a decision of the Directors of State-Owned Enterprises suspected to be detrimental to state finances.

To the Attorney General's Office and the Supreme Court, it is necessary to hold training or training that is conducted routinely for prosecutors and judges, especially with regard to company law doctrines. This needs to be done so that the Public Prosecutor and Judge of the Supreme Court can work professionally and not in conflict with the law in handling law cases related to the policies of the Directors of State-Owned Enterprises suspected of causing state losses.

REFERENCES

- Abdulkadir Muhammad, *Hukum Perusahaan Indonesia*, Bandung: Citra Aditya Bakti, 2006.
- Agus Adhari, "Kedudukan Keuangan Badan Usaha Milik Negara Terhadap Keuangan Negara", *Jurnal Fakultas Hukum Universitas Pembangunan Panca Budi*, 2013.
- Andi Hamzah, *Asas-Asas Hukum Pidana di Indonesia & Perkembangannya*, Jakarta: PT. Sofmedia, 2012.
- Chaidir Ali, *Badan Hukum*, Bandung: P.T. Alumni, 2011.
- Chatamarrasjid Ais, *Menyingkap Tabir Perseroan*, Bandung: Citra Aditya Bakti, 2000.
- Darwan Prints, *Pemberantasan Tindak Pidana Korupsi*, Bandung: Citra Aditya Bakti, 2002.
- Eddy O.S Hiariej, *Prinsip-Prinsip Hukum Pidana*, Yogyakarta: Cahaya Atma Pustaka, 2014.
- Jawade Hafidz Arsyad, *Korupsi dalam Perspektif HAN*, Jakarta: Sinar Grafika, 2013.
- Moeljatno, *Azas-Azas Hukum Pidana*, Edisi Revisi Jakarta: Rineka Cipta, 2008.
- Nindyo Pramono, *Sertifikasi Saham PT Go Public dan Hukum Pasar Modal di Indonesia*, Bandung: Citra Aditya Bakti, 2001.
- PAF Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Bandung: Citra Aditya Bakti, 2013.
- Riant Nugroho dan Ricky Siahaan, *BUMN Indonesia* Jakarta: Elex Media Komputindo, 2006.
- R.T. Sutantya Rahardja Hadhikusuma & Sumantoro. *Pengertian Pokok Hukum Perusahaan*. Jakarta : PT. Raja Grafindo Persada 1996.
- Sentosa Sembiring, *Hukum Dagang*, Bandung: PT Citra Aditya Bakti, 2008.

Shinta Agustina, *Penjelasan Hukum Unsur Melawan Hukum Penafsiran Unsur Melawan Hukum Dalam Pasal 2 Undang-Undang Pemberantasan Tindak Pidana Korupsi*, Jakarta: LelIP, 2016.
Try Widiyono, *Direksi Perseroan Terbatas Bank dan Persero*, Bogor: Ghalia Indonesia, 2005.
Peraturan Pemerintah Nomor 72 tahun 2016 tentang Perubahan Atas Peraturan Pemerintah nomor 44 tahun 2005 tentang Tata Cara Penyertaan dan Penatausahaan Modal Negara pada Badan Usaha Milik Negara dan Perseroan Terbatas.
Putusan Mahkamah Agung Nomor 41/PK/Pid.Sus/2015