

# REVIEW OF THE LEGAL CERTAINTY OF MANAGEMENT OF THE COMPANY'S BUMN BY THE BOARD OF DIRECTORS IN STATE FINANCIAL MECHANISMS

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## ABSTRACT

*The management of BUMN in Indonesia has become a polemic in itself, especially regarding the state's financial mechanisms. The need for legal certainty for the Board of Directors as the highest leadership in the BUMN position structure is still a dilemma in the rules for managing the State's financial mechanisms. On the one hand, the Directors become a mouthpiece as a development agent, on the other hand, the Directors become a bureaucrat who must carry out their duties and functions in accordance with applicable regulations. What needs to be analyzed further in this research is how BUMN is managed over the controversy regarding BUMN wealth and finances, what is the responsibility of the Board of Directors for the management of BUMN which causes state losses. This research uses a normative approach from a formal legal perspective which examines statutory regulations or legal norms with various theories, concepts and legal principles to obtain juridical truth. The results of the research conclude that first, the controversy regarding the wealth and finances of BUMN not only provides legal certainty for the Directors but must also protect the Directors from various policy breakthroughs to advance and prosper the Indonesian people within the State through BUMN. Second, the PTPK Law often ensnares BUMN directors because it fulfills the elements in Article 2 and Article 3. This is different if the BUMN is in the form of a Persero which is also subject to the Limited Liability Company Law, in the provisions of Article 97 paragraph (5) which basically states that Directors cannot be held responsible for the company's losses if they can prove that the directors have carried out their duties in accordance with existing procedures and in making decisions, the directors have done so in good faith, prudence and there is no conflict of interest, then BUMN directors cannot be held responsible.*

**Keywords :** Legal Certainty, BUMN Management, Directors, State Financial Mechanisms

## INTRODUCTION

Indonesia is a country of law, Indonesia's commitment to realizing legal certainty is something that must be resolved based on the constitution, breakthroughs regarding the legal system have been slowly improved in the country. The aim of the State according to Aristotle is to achieve a better life (the best life possible), something that can be achieved with the supremacy of law (Usman, 2023). Law is a form of collective wisdom of citizens, so that citizens have a role in it.

Based on the above, the rule of law is not just a new concept in discussions about how the state is run and managed, but the state can exist as a goal to improve the welfare of the

people and participate in implementing justice for all Indonesian people. Financial issues are very crucial, especially in national and state activities. Therefore, the financial system is something that must be considered carefully so that the State can prosper its people and avoid forms of activity that are detrimental to the State's finances. Based on this, the State established a special institution to supervise State finances.

This institution is a response to demands for reform and to accommodate various developments that occur in the State institutional system and management of State finances of the Republic of Indonesia, as stated in Law Number 17 of 2003 concerning State Finances. In the national economic system, BUMN plays a role in producing goods and/or services needed in order to realize the greatest prosperity of society. The role of BUMN is felt to be increasingly important as pioneers and/or trailblazers in business sectors that are not yet of interest to private businesses. Apart from that, BUMN also has a strategic role as implementing public services, balancing the forces of large private sectors, and helping to develop small businesses/cooperatives.

BUMN in Indonesia was born as an implementation of economic politics mandated by Article 33 of the 1945 Constitution. Therefore, the goal of the state in establishing and controlling BUMN is in order to realize people's prosperity. This goal was then outlined in Law Number 19 of 2003 concerning BUMN. Thus, BUMN in Indonesia basically plays two main roles, namely: as a state company that seeks profits to increase foreign exchange for the country (agent of business) and as a means for the government to provide services to the community in the efforts of the State's task of realizing prosperity and welfare of the people. This dual role of BUMN is in line with the division of BUMN types into public companies and limited liability companies.

The establishment and implementation of BUMN activities has special characteristics, namely the existence of two dimensions of BUMN, namely the public dimension and the business entity dimension (Pier Angelo Toninelli, 2000). The existence of BUMN with its characteristics as a business entity should produce profits and have profit value for the state, besides that, BUMN also has a non-commercial function in carrying out the goals of community welfare which is the goal of the state (Panji Anoraga, 1995). Dibyو Sumantri stated that BUMN in Indonesia has unique characteristics in its position as an organization. On the one hand, as a development agent, we are required to carry out government policies and programs, while on the other hand, we must continue to function as a commercial business unit that operates based on sound business rules and principles.

The position of BUMN Persero as regulated in Law Number 19 of 2003 concerning State-Owned Enterprises is a BUMN with 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 Republic of Indonesia (Law Number 19 of 2003 concerning State-Owned Enterprises). The main goal is to pursue profit. It was further emphasized that in carrying out its business, all provisions and principles applicable to limited liability companies as regulated in the Law on Limited Liability Companies apply to BUMN Persero.

If the management of a BUMN follows the standards outlined by the UUPT mechanism, then apart from the organs of the Persero, any other party is prohibited from taking part or interfering in the management of the Persero. This is intended so that the Board of Directors can carry out their duties independently and without interference from outside parties, so no interference is permitted in the management of the Persero. This includes the definition of intervention in the form of actions or directions that directly influence the

actions of the management of the Company or the decision making of the Board of Directors (I. G Ray Wijaya, 2005).

Share ownership is the most fundamental thing in the management of BUMN, this will influence the government's dominance in carrying out its supervisory function in the sustainability of BUMN in Indonesia. The decision-making system in the GMS is a form of supervision that can be carried out by the government. The government's wishes in making company policies in the course of BUMN can be channeled through this GMS forum. The Minister is the shareholder's proxy who has a role in making GMS decisions. Not only that, other state instruments such as the DPR, BPK, BPKP, and other related institutions also influence policies in the management of BUMN (Christian Orchard Perangin-angin, 2017).

Muchayat stated that certain BUMNs are more busy playing bureaucratic roles that should be carried out by the government, thus forgetting their main business as operators in managing and developing businesses. With the additional role as regulator, BUMN is trapped in bureaucratization so that it is not competitive when it comes to competing with private companies that have effective and efficient performance. For example, Pertamina is the only company that has full rights to manage the oil industry in Indonesia (Muchayat, 2010).

Apart from that, BUMN has the independence of Persero as an important business entity which must be maintained, so that Persero can be managed professionally and can develop well in accordance with its business objectives. In terms of management, BUMN also does not justify the existence of cross-bureaucratic financial relationships, even though they are basically state administration bodies. Because the financial needs of each government agency have been regulated and determined separately, government agencies are not justified in burdening the Persero with all forms of expenditure, and conversely the Persero is not justified in financing the expenditure needs of government agencies in its bookkeeping (Muchayat, 2010).

Based on the above, it can be underlined that SOEs in Indonesia have special problems in implementing their policies which disrupt the performance of SOEs. In practice, the state is still diligent in carrying out various interventions against BUMN through its policies, up to the level of two-sided government actions (*materiale daad*). In fact, the government in material and legal terms is subject to the rules of civil law, but is being distorted by unhealthy policy interventions, especially for the development and growth of BUMN (Inda Rahadian, 2013).

As is known, the Ministry of BUMN is part of the government, so along the way there are various obstacles to carrying out coaching duties within the BUMN environment professionally. BUMN must have a corporate mindset, while on the other hand the government must not abandon itself as a civil servant who still operates with a bureaucratic system and is subject to regulations related to the state civil apparatus. This is in stark contrast to the work at hand. This very dilemmatic situation must be overcome in order to create a bridge, otherwise it will be difficult to carry out the coaching duties carried out by the Ministry of BUMN.

BUMN Persero with a business form that has special characteristics in its management is faced between private law and public law. Facing public law and private law issues is essentially facing two problems that are confused, but must be separated. Firstly, can a dividing line be drawn between the provisions of public law and the provisions of private law which are contained in the provisions themselves, as is the case with coercive law and complementary law, a generally accepted separation which is not limited to time and room. Second, if a particular legal system, for example the current Indonesian legal system, makes

such a distinction as it determines in practice that a concrete relationship is subject to certain provisions of public law or private law, a question that can only be resolved with the help of data, generally used for legal discovery so the answer will definitely change according to time and space because it is tied to the provisions of positive law, jurisprudence and so on (John Z. Loudoe, 1985).

This form of legal uncertainty is a dilemma in BUMN regulations, which from the start did not recognize bureaucracy in their regulations. The government as a shareholder in BUMN Persero is the owner of the company which can appoint and even form professional institutions which are intended for the implementation of state business. In fact, the conflict between private and public law has created ambiguity in the implementation and management of state companies. Based on the study above, the first problem can be found, namely how is BUMN managed over the controversy regarding BUMN's wealth and finances? What is the responsibility of the Board of Directors for the management of BUMN which causes losses to the State?

## RESEARCH METHODS

This research uses a normative legal research method using library research, namely legal research that places law as a norm system building. This research is also supported by information and information from experts, academics, practitioners, state officials obtained through scientific journals, mass media, seminars, opinions, press releases, as research support (Mukti Fajar N.D and Yulianto Achmad, 2013). The approach used is the statutory regulation approach, namely the approach used to review and analyze all statutory regulations or regulations relating to the legal issue being handled. This approach method can also be called a qualitative approach which produces descriptive data, namely data expressed in writing or orally as well as real behavior, which is researched and studied as a whole. Therefore, normative research makes more use of primary legal materials, secondary legal materials and tertiary legal materials (Amiruddin dan H. Zainal Asikin, 2003).<sup>1</sup> This data analysis method originates from the findings in the research which will be discussed later, if after secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials are collected, then categorized, classified, tabulated and interpreted, then the data is analyzed using conducting analysis of legal materials (for normative research) (Nanang Martono, 2010). So this research will describe the data obtained in the form of a good explanation of the regulations.

## RESULTS AND DISCUSSION

### BUMN Management over Controversy regarding BUMN Wealth and Finance

The division of State duties in a modern legal state (*rechtsstaat*), according to Presthus, includes 2 (two) things, namely: (Meidy Yanto Sandi, et.al., 2023) (a) Policy Making, determining the direction of the State and (b) Task Executing, the accomplishment of duties according to the direction set by the State, Lemaire gives the State's tasks into 5 (five) types, namely: (a) legislation, (b) implementation, in this case making legal rules by the authorities themselves, (c) government, (d) police, and (e) court.

This concept tends to be in the form of legal certainty given to every individual and group, both in government and non-government, so that they have a clear legal umbrella in

carrying out their rights and obligations. Giving authority to the State administration to act on its own initiative is commonly known as *freies ermessen* or discretionary power, which is a term that contains broad obligations and powers. Obligations are actions that must be carried out, while broad powers imply freedom of choice, to do or not to do actions. According to E. Utrecht, State administrative power in the field of legalization includes the authority to make regulations on its own initiative and to make regulations on the basis of delegation, *droit function*, namely the power to interpret various regulations itself (Utrecht, 1990).

Regulations regarding State and BUMN finances. If you pay attention to Law Number 17 of 2003 concerning State Finances, State Finances include: First, the State's right to collect taxes, issue and circulate money and make loans; Second, the State's obligation to carry out public service duties of the State government and pay third party bills; Third, State revenues and expenditures; Fourth, regional revenues and expenditures; Fifth, State Assets/regional assets managed by themselves 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 companies/regional companies; Sixth, Wealth of other parties controlled by the government in the context of carrying out government duties and/or public interests; Seventh, Wealth of other parties obtained by using facilities provided by the government and/or public interests; and Eighth, the wealth of other parties obtained using facilities provided by the government (Arifm P. Soeria Atmadja, 2007).

Globalization adherents tend to reject the existence of balance between the state and the market by stating globalization as something that does not have a concept of equality between the two because there are separate states and markets. This means that globalization is only referred to as a commercial and not a political phenomenon, driven more by currency traders and businessmen than by politicians and bureaucrats. Thus, it can be interpreted that globalization has once again strengthened Adam Smith's version of the concept of economic liberalization which states that if the government regulates and interferes too much in economic transactions, everyone's welfare will decrease. In other words, the state must be separated from economic activity as a form of globalization (Dian Puji Nugraha Simatupang, 2011).

The separateness of the state in the economy was rejected by Mohammad Hatta, who often conveyed his ideas by stating that the government actually has a role in the economy, namely by carrying out businesses that are classified as public utilities and important branches of production such as basic industry, mining and others. On the next occasion, Hatta stated that the task of national economic development could be handed over to private businesses under government ownership (Sri Edi Swasono, et al., 2002).

Juridically, the State as a public legal entity and power organization certainly cannot play an active and direct role in business activities that would reduce its function of administering government and public services. Thus, the state as a public entity establishes a civil legal entity that carries out economic functions directly, with the aim of achieving ongoing business activities without depending on the APBN, and will also be flexible. Therefore, the state has legal freedom to form business entities which are autonomous legal entities which are often called BUMN.

BUMN is the personification of the state in its form as a civil legal entity, but aims to support the realization of economic activities for shared prosperity. In this concept, BUMN must be prepared to face the possibility of experiencing losses because pursuing profits is not the most important orientation (Pandji Anoraga, 1994). In this role, BUMN obtains privileges from the state to carry out certain business activities, thus raising the question of whether

BUMN is carrying out business of a civil nature or carrying out public services which are the duty of the state (John D. Donahue, 1989).

The reality in Indonesia still shows that the burden of BUMN is very heavy in carrying out its public role, so that BUMN often shows support for government program activities rather than showing its ability to handle the company's accountability and probabilities process. The inability of BUMN to realize probabilities has an unfavorable impact on the state as the owner of its shares because it is likely that the state will bear losses. This is because BUMN often becomes the authority on behalf of the state to implement certain policies that do not generate profits, and impose subsidies that must be borne by the state budget. In understanding this situation, there needs to be accountability in the delegation of state public duties to BUMN which requires a comprehensive BUMN accountability system that is closely linked to conducive state economic policy (Dian Puji Nugraha Simatupang, 2011).

The state and BUMN have different characteristics of authority, namely the state has public and civil authority in accordance with its position as a civil legal entity. Therefore, the state's right to control the economy based on article 33 paragraphs (2) and (3) of the 1945 Constitution is handed over to the state as a public legal entity. This is because the state as a public legal entity has the authority to make binding regulations for the public. However, in exercising this right of control, the state can regulate and hand over its implementation to BUMN in an attributive or delegated manner based on statutory regulations and state administrative decisions. However, the right to control is exercised by BUMN whose shares, either in whole or in part, are owned by the state as a civil legal entity, and not in its position as a public legal entity (Dian Puji Nugraha Simatupang, 2011).

Provisions of Article 1 number (1) of Law no. 19 of 2003 concerning State-Owned Enterprises states that BUMN is a business entity whose capital is wholly or largely owned by the state through direct participation originating from separated state assets. Furthermore, state assets that are separated are state assets originating from the State Revenue and Expenditure Budget (APBN) to be used as state capital participation in Persero and/or Perum and other limited liability companies. This provision clearly states that capital participation in state companies comes from state assets which are separated and sourced from the APBN.

The APBN is the central government's income and expenditure budget. State assets separated to establish state-owned companies are not consumptive expenditure but rather productive expenditure which is sought to become a new source of income for the APBN, but within a certain time and gradually it is hoped that it can be combined again. The APBN is held based on the power of the law which divides the territory of our unitary state into autonomous regions (Wirjono Prodjodikoro, 1977). Muchsan believes that the state budget is the core of state finances, because the state budget is a driving tool for implementing the use of state finances. However, in practice, a general understanding has also developed that state finances involve all rights and obligations related to the state that are economically valuable in money.

Separated state assets are part of state finances, this is expressly regulated in Article 2 of Law no. 17 of 2003 concerning State Finance. This provision states that State Finance includes state assets/regional assets that are managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets that are separated from state companies/regional companies.

The juridical history of state financial regulation began in 1864 when the *Indoneische Comptabiliteit Wet (ICW)* was established, which took effect for the first time on January 1,

1887. The history of ICW is related to the change in the Dutch Groundwet paradigm in 1848, which gave stronger authority to parliament to carry out its functions. Control over State finances. In 1917 in the Dutch East Indies, the Governor General had the authority to determine the temporary budget. Then, after the Volksraad was formed, pioneering activities began to be carried out towards the control function of parliament, although up to 1925 the authority in terms of financial regulations was still in the hands of the Governor General of the Dutch East Indies (Ahmad Fikri Hadin, 2013).

After Indonesia's Independence, ICW was still implemented in Indonesia based on Article II of the 1945 Constitution transitional regulations, until it was finally changed with the enactment of Law no. 6 of 1968 concerning the Indonesian Treasury. The rolling of reforms in Indonesia in 1998 required changes to regulations governing State finances. The third amendment to the 1945 Constitution changed the rules relating to State finances. Arifin P. Soeria Atmadja stated that this has had very serious legal impacts for the government and state-owned, regional and private enterprises (Arifin, 2009). The implications of the change in basic norms related to state finances have given birth to three packages of laws that regulate state finances, namely Law no. 17 of 2003 concerning State Finance, Law no. 1 of 2004 concerning State Treasury, and Law no. 15 of 2004 concerning Examination of State Financial Management and Responsibility.

Serious impacts in the legal field occurred due to changes to the 1945 Constitution in Chapter VII and Chapter VIIA, as well as the three packages of laws that regulate the definition of the scope of State finances. Discussions and debates regarding the meaning of State Finances have always been a hot topic for discussion, starting from different interpretations of the sounding of Article 23 of the 1945 Constitution before the amendment, which provided an unclear understanding of State Finances. Regarding the interpretation of state finances, Dian Puji Simatupang classifies them into three types, namely (Dian Puji N. Simatupang, 2005) (Ikhwan Fahrojih et.al, 2008):

1. State finances are interpreted narrowly, as stated by Harun Al-Rasyid, he is of the opinion that what is meant by state finances in Article 23 paragraph (5) of the 1945 Constitution before the amendment is state finances in the narrow sense.
2. State Finances broadly, as stated by former BPK member Hasan Akman, that in relation to State financial accountability as intended by Article 23 paragraph (5) of the 1945 Constitution, what is meant by State Finances is State Finances in a broad sense. So the responsibility for State Finance that must be carried out by the government is not only regarding the APBN, but covers the APBD, the finances of State business units and essentially all State assets.
3. Carried out through a systematic and teleological or sociological approach to State Finances which can provide a relatively more accurate interpretation according to its objectives. This approach means that State Finance is based on the objectives or functions of the relevant regulatory provisions in the context of today's society. This interpretation seems most essential and dynamic in responding to various developments in society.

The logical consequence of government capital participation in a limited liability company is that the government shares the risk and is responsible for losses in the business it finances. In bearing the risks and being responsible for losses in this business, the government cannot be positioned as a public legal entity. This is because the government's task as a public legal entity is *bestuurszorg*, namely a task that covers all areas of society and a modern legal state that pays attention to the interests of all the people. The consequence is that if a public legal entity must also bear the risk and be responsible for the losses of a

business, the public function will not be carried out optimally and optimally by the government.

Capital that is included in a company legally is no longer the wealth of the person who included the capital, but becomes the wealth of the company itself, because there has been a separation of wealth between the wealth of shareholders and the company. With these characteristics, shareholders' responsibility for losses or debts of the company is also limited (Ridwan Khairandy, 2007).

Money or losses that occur are simply paid sufficiently from the assets available in the company. With this concept, when the state includes its capital in the form of shares into a Persero from separate state assets, by law those assets become Persero assets, no longer state assets. As a consequence, all wealth obtained either through state participation or obtained from the company's business activities, by law becomes the property of the Company itself (Ridwan Khairandy, 2007).

Erman Rajagukguk believes that the characteristic of a legal entity is the separation of the legal entity's assets from the assets of its owners and managers. Thus, a legal entity in the form of a limited liability company has assets that are separate from the assets of directors (as administrators), commissioners (as supervisors) and shareholders (as owners). Likewise, the assets of a foundation as a Legal Entity are separate from the assets of the foundation's management and foundation members, as well as the foundation's founders. Furthermore, the assets of the cooperative as a legal entity are separate from the assets of the management and members of the cooperative (Erman Rajagukguk, 2006).

In relation to the guidance and management of BUMN capital originating from separated state assets, what is meant by separated is the separation of state assets from the APBN to be used as state capital participation in BUMN for further guidance and management which is no longer based on the APBN system, but the guidance and Its management is based on healthy company principles. This can be interpreted as meaning that the management and development of BUMN whose capital comes from separated state assets must be in accordance with the provisions of the form of business as the basis of reference, be it Perum or Persero.

Debates and discussions related to the State Finance Law are often carried out to seek clarity on the elements of state assets in the State Finance Law. The Constitutional Court has heard the application for judicial review of the State Finance Law. The application for judicial review to the Constitutional Court was submitted by several components of society as follows:

1. The Center for Strategic Studies University of Indonesia (CSSUI) or the Center for the Study of Strategic Issues at the University of Indonesia regarding the Management of State Assets is registered at the Constitutional Court Number 48/PUU-XI/2013. The articles requested for material review are Article 2 letters g and letter i of Law Number 17 of 2003 concerning State Finances.
2. The State-Owned Enterprise Legal Forum is registered at the Constitutional Court Number 62/PUU-XI/2013. The articles requested for material review are Article 2 letters g and letter i of Law Number 17 of 2003 concerning State Finances as well as Article 6 paragraph (1), Article 9 paragraph (1) letter b, Article 10 paragraph (1) and paragraph (3) letter b, and Article 11 letter a of Law Number 15 of 2006 concerning the Financial Audit Agency.

The request for material review essentially states that BUMN assets do not fall within the scope of state finances and the BPK cannot carry out audits of BUMN. In its decision the Constitutional Court rejected the parties' petition in its entirety, the Judge stated that the



definition of State Finances does not conflict with the Constitution, because this definition cannot be understood only based on Article 23 of the 1945 Constitution, but must also be understood comprehensively using the Articles others such as Article 23C which regulates the need for a Law to regulate other matters regarding State Finances (which are necessary), as well as an understanding of the concept of a welfare state which is explicitly adopted in the 1945 Constitution, namely in the Preamble to the 1945 Constitution, and Article -articles contained in it.

In his legal considerations (Copy of Constitutional Court Decision Numbers 48 and 62/PUU-XI/2013), the Constitutional Court Judge said that apart from the constitutionality issues as considered above, it turns out that there are still other issues that must be considered, namely regarding the paradigm of the function of BUMN or BUMD as an arm of the state, which is implemented based on the business paradigm (business judgment rules) that is truly different from government administration which is carried out based on a government paradigm (government judgment rules). Furthermore, the Constitutional Court outlined other considerations as follows:

That is true, the country's wealth has been transformed into BUMN or BUMD capital as business capital whose management is subject to the business paradigm (Business Judgment Rules), but the separation of state wealth does not result in a transition to making BUMN or BUMD wealth independent of state wealth, because from this perspective The transaction that occurred was clearly only a separation which could not be a transfer of ownership, therefore it remained state property and thus the state's authority in the field of supervision remained valid. However, the paradigm of state supervision must change, namely that it is no longer based on the paradigm of managing state assets in government administration (government judgment rules), but rather based on the business paradigm (business judgment rules). Therefore, according to the Court, it is within the realm of law-making policy that supervision is regulated appropriately in accordance with the nature and specificity of paradigms that differ from one another, so that the implementation of the supervisory function can run well and each organizer government and business functions can run without doubt. In this way, the implementation of state duties, both by the examiner and the institution being examined, will be effective and efficient, which in turn will create good corporate governance in an effort to improve the welfare of the people ”

One of the Constitutional Court judges, Harjono, expressed a dissenting opinion regarding the a quo case. Judge Harjono was of the opinion that the state's relationship with BUMN (Persero) is a relationship of ownership as shareholders of a Limited Liability Company whose rights and obligations are subject to the Limited Liability Company Law. The state no longer has free authority over some of the state's assets which were separated to become company capital because they have been converted into shareholder rights as regulated in the Limited Liability Company Law.

Judge Harjono further said that by being converted into shareholder ownership in a percentage which is reflected as voting rights at the GMS and the right to receive dividends, the state's relationship with the wealth it originally owned has been severed. If the state, when establishing a Persero, separates its wealth in the form of goods or objects with a certain monetary value as capital of the Persero which is then converted into shares, then the state's ownership relationship with the goods or objects has been severed, meaning that the goods or objects no longer belong to the state but are part of the assets. Persero's assets, because if state ownership is still attached, then the state will have two titles of rights to the same item or object. Shareholder rights replace the ownership rights previously held by the state.

BUMN finances cannot be treated like state finances. In Hikmahanto Juwana's view, naturally managing state finances is different from managing BUMN finances. In BUMN financial management there is a profit and loss balance sheet, this does not exist in the state. In the context of a state budgeting for state activities, the most important thing is how to absorb what has been budgeted. However, in the context of BUMN, management (board) will manage the money like a business entity, including private business entities, state-owned companies will not always make a profit. BUMN financial profits and losses are seen from the end of the year, the fiscal year, the annual book, so that at certain times there can be losses, and then it is considered that there has been a state loss Risalah Sidang Perkara MK Nomor 48 dan 62/PUU-XI/2013.

The debate regarding separated state capital has had legal force since the Constitutional Court decided that BUMN capital was still categorized as state assets, thus its management still referred to regulations related to state finances and the state treasury. The debate that occurs from various circles does not mean stopping BUMN businesses, but it should be noted that BUMN managers must be able to contribute as much as possible to the country's economy as mandated by the constitution.

It is worth underlining that one of the judge's considerations in deciding this case is that the management paradigm must change, no longer based on the principle of governance judgment rule but based on the principle of business judgment rule so that there is no doubt in its management. This is in line with the provisions of the BUMN Law which emphasizes that the basis for regulating the existence of Persero BUMN is the substance of the Limited Liability Company Law, so that its management must comply with this law. All forms of loss or profit arising from the company's legal actions are seen as the rights and obligations of the legal entity. This situation is a legal consequence of the separation of state assets in BUMN Persero. The legal facts clearly state that the capital paid by the state to establish BUMN Persero has turned into company wealth, no longer state wealth.

A national consensus is urgently needed from various parties in viewing the management of BUMN based on the Constitutional Court Decision as described above. In this way, the bearers of the mandate, including Directors, Commissioners, GMS, BUMN employees, as well as the Indonesian people as the main stakeholders, receive clarity and legal certainty regarding the BUMN management mechanism. This is very important so that BUMN can further increase its role and contribution to the nation and state.

### **Responsibility of Directors for BUMN Management that Causes State Losses BUMN Directors Are Not State Officials**

State corporations are often seen as a relatively new phenomenon. A study of industrial history shows that state enterprises are not merely creations of the state, but rather are extensions of themselves in their efforts to enable extra-territorial expansion. In fact, these state companies were the predecessors of today's multinational companies. The differences lie only superficially, the most important difference being that the old state enterprises were created primarily for economic reasons, and were mostly involved in trading activities. However, to facilitate its commercial efforts, the company was gradually given government and political functions.

The uniqueness of BUMN is in its position as a corporate organization as a development agent that is required to carry out government policies and programs, but on the other hand it must continue to function as a commercial business unit that operates based on

sound business rules and principles. Thus, the establishment and implementation of BUMN activities have special characteristics, namely the existence of two dimensions that BUMN has, namely the public dimension and the business entity dimension.

BUMN Persero with a business form that has special characteristics in its management is faced between private law and public law. Facing public law and private law issues is essentially facing two problems that are confused, but must be separated. Firstly, can a dividing line be drawn between the provisions of public law and the provisions of private law which are contained in the provisions themselves, as is the case with coercive law and complementary law, a generally accepted separation which is not limited to time and room. Second, if a particular legal system, for example the current Indonesian legal system, makes such a distinction as it determines in practice that a concrete relationship is subject to certain provisions of public law or private law, a question that can only be resolved with the help of data, generally used for legal discovery so the answer will definitely change according to time and space because it is tied to the provisions of positive law, jurisprudence and so on (John Z. Loudoe, 1985).

The Ministry of BUMN is the implementing element of the government in the context of sharpening, coordinating and synchronizing government programs in the field of developing State-Owned Enterprises. The BUMN Ministry is led by a Minister who is under and responsible to the President. As an extension of the government in providing guidance to BUMN, the existence of the Ministry of BUMN should be very strategic in achieving the objectives of establishing BUMN.

The BUMN Ministry is part of the government. In its journey there are various obstacles to carrying out development duties within the BUMN environment professionally. In dealing with BUMN, you must have a corporate mindset, while on the other hand, the government must not abandon itself as a civil servant who still operates with a bureaucratic system and is subject to regulations related to the state civil apparatus. This is in stark contrast to the job at hand, namely coordinating with business actors who do not have the status of civil servants. This very dilemmatic situation must be overcome in order to bridge bureaucratic thinking with corporate-based thinking, otherwise it will be difficult to carry out the coaching duties carried out by the Ministry of BUMN.

The formation of BUMN by the state is solely to become a company, but there are still many people who do not know exactly where the position of BUMN is. The term "state-owned" in the abbreviation BUMN-State-Owned Enterprises greatly influences the public's point of view, so that they consider BUMN to be a government institution. This opinion is not only in the cloud community but among banking circles, entrepreneurs, law enforcers such as police, prosecutors, judges and lawyers, even BUMN personnel themselves view that BUMN is not a private institution. Most of them reason that their capital comes from the state, apart from that there are also those who argue that BUMN is included. Institutions under the Ministry of State-Owned Enterprises. The influence of the views of the Regulations before the BUMN Law came into force is still firmly embedded in society's perspective, where at that time BUMN officials and employees were categorized as Civil Servants (Gatot Supramo, 2016).

The views of the community above have been erroneous, because the status of state-owned companies is not at all in the organizational structure of the government or state. BUMN is the same as other companies whose position is outside the government. The difference with companies that are not BUMN lies in the capital included in the state company, namely that most or all of the capital to form the BUMN is owned by the state. By

knowing that the location of BUMN is outside the government system and is connected to the status of ownership of assets within the BUMN, then these assets are not state assets (not managed based on state financial mechanisms), but are the BUMN's own assets (Gatot Supramo, 2016).

The issue of state financial mechanisms in the management of BUMN has become a debate regarding state losses and BUMN losses have a significant impact on the BUMN Directors who are the decision makers of the BUMN. BUMN directors have an important role in making BUMN decisions, which can direct BUMN to gain profits and can also direct BUMN to losses. Because BUMN is a company that carries out business activities to gain profit, losses are a consequence of business activities. Therefore, losses are a common thing in managing companies, as well as for BUMN.

In the management of BUMN in Indonesia, there are still several cases where the Directors of BUMN Persero are charged with criminal acts of corruption if a loss occurs to the BUMN. Indirectly, BUMN Directors are equated with Government Officials in terms of their responsibilities. As is understood, the responsibilities of the Directors of BUMN Persero and Government Officials are two different things.

Philipus M. Hadjon believes that the responsibility of officials regarding the implementation of their functions is divided into two, namely official responsibility and personal responsibility. Position responsibility is related to the validity of government legal actions carried out by officials for and on behalf of the position. While personal responsibility relates to maladministration in the use of authority or public service, officials who carry out the duties and authority of their position or make policies will be subject to personal responsibility if they commit acts of maladministration. The difference between official responsibility and personal responsibility lies in the consequences of actions related to criminal responsibility, civil liability and state administrative liability (TUN). Job responsibilities relate to civil liability and TUN liability, while personal responsibilities relate to criminal liability (Philipus M. Hadjon, 2011).

There are several causes that result in state losses, in the State Treasury Law it is stated that there are two things that cause state losses, namely Unlawful Acts/Actions and Negligence. An unlawful act here is interpreted as an act intentionally carried out by someone which results in state losses, while negligence means someone neglects their obligations which causes state losses. Every official whose actions are unlawful or due to negligence results in state financial losses, must compensate for these losses. Apart from that, the Corruption Eradication Law also regulates state financial losses where there are several acts/actions that cause state financial losses, namely benefiting oneself or others and abusing authority.

The accountability of the Directors of BUMN Persero is something that is always a matter of debate. The provisions of the PTPK Law often ensnare BUMN directors because they can fulfill the elements contained in Article 2 and Article 3. This is different if the BUMN is in the form of a Persero which is also subject to the Limited Liability Company Law, in the provisions of Article 97 paragraph (5) basically states that the Directors cannot be held responsible for the company's losses if it can be proven that the directors have carried out their duties in accordance with existing procedures and in making decisions, the directors have done so in good faith, prudence and there is no conflict of interest, then the BUMN directors cannot be held responsible.

The description above clearly shows the significant differences between the responsibilities of BUMN directors and government officials. The directors of BUMN

Persero have protection when a BUMN loss occurs based on the provisions of Article 97 paragraph 5. Meanwhile, if government officials cause state losses, they cannot avoid punishment, because BUMN losses can occur due to business risks, while state losses caused by government officials in the context of public law are caused by two possibilities, namely unlawful acts and negligence.

### **Not all BUMN losses can be equated with state financial losses**

Discussion of state losses cannot be separated from the understanding of state finances itself, while losses of state-owned enterprises in the form of Persero cannot be separated from discussions of losses of state-owned companies. Along the way, there have been differences of opinion regarding state losses versus BUMN losses. In general, there are two groups with different opinions regarding this matter, there are those who think that BUMN losses are also state losses, and there are also those who think that BUMN losses and state losses are two different things. If it is drawn out, the root of the problem lies in the understanding of state finances itself (Prasetio, 2014).

Differences of opinion between the two camps cause problems to arise, especially in terms of the management of the BUMN, especially in making decisions that can cause losses to the BUMN. Several parties have equated the loss of the BUMN to a state loss, which has resulted in the emergence of a new problem in the realm of public law which can be linked to criminal acts of corruption. The directors of BUMN Persero, who are the main decision makers in running the BUMN's business, are at risk of being responsible for state losses, which could result in the directors being charged under the Corruption Law.

The concept of separate state assets (state finances) and state losses is currently often associated with the practice of accusations of corruption and sanctions for criminal acts of corruption imposed on the actions of the directors of BUMN Persero in carrying out business transactions that lead to losses, so that it is postulated to be detrimental to state finances. . Erman Rajagukguk (Erman Rajagukguk , 2011)<sup>2</sup>stated that in fact there was nothing wrong with the formulation of state finances in the explanation of Law no. 31 of 1999 concerning Corruption Crimes which states:

“State finances in question are all state assets in whatever form, separated or not separated, including all parts of state assets and all rights and obligations arising from them:

- (a) is under the control, management and responsibility of State agency officials, both at the central and regional levels;
- (b) is under the control, management and responsibility of State-Owned Enterprises/Regional-Owned Enterprises, foundations, legal entities and companies that include state capital, or companies that include third party capital based on an agreement with the State.”

Legally, the financial status of BUMN/BUMD/other legal entities that obtain state facilities is not state finance which is not included in state finance. However, legally this does not mean that the state can just let go, because the state still has control over BUMN/BUMD/other legal entities that obtain state facilities according to the governance and regulations stipulated in their respective laws. Like state-owned limited liability companies, state finances that are separated within them do not include state finances, but the state as a shareholder has a way of controlling them according to limited liability company law. In certain cases, in the interests of state protection, shareholders can act in the public domain in BUMN, as state proxies in separated state assets, if there are legal reasons for the state to protect their legal rights interests. For example, in disputes over BUMN assets, shareholders

move to become state power in that state assets are separated in order to protect BUMN assets. This is what the state calls *sui generis* or uniqueness within the state (Dian Puji Nugraha Simatupang, 2020).

The assumption that BUMN/BUMD and other legal entities that obtain state facilities will cause violations of criminal elements not to be resolved by law and criminal sanctions can be said to be a miraculous mistake in understanding the legal system and legal theory. In this way, the application of clear laws for every violation will actually provide justice for all parties and make all parties have legal certainty in their position when a violation occurs (Dian Puji Nugraha Simatupang, 2020).

Criminal acts of corruption can occur in the state-owned or private sector, the object of the criminal act of corruption is not where the money comes from. Until now the problem is where the money comes from, not what they do. If BUMN finances are still considered state finances, BUMNs have to compete with private business entities that actually do not have the same level of planned plans. The private sector will not be haunted by the problem of harming state finances, but this is not the case with BUMN. With conditions like this, how can the state expect BUMN as state-owned companies to contribute dividend income to the state budget (Hikmahanto Juana, 2013).

Losses can also be due to civil problems resulting from an agreement that is breached by another party, so that for a moment there may be state losses, even though if losses due to civil matters should be resolved civilly, this can be done by suing the party who has caused harm, not then bringing the management of the BUMN to court. Criminal realm. Likewise, losses due to administrative and other problems (Hikmahanto Juana, 2013).

Managers of BUMN and BUMD and other legal entities that obtain state facilities are in fact faced with uncomfortable conditions with the expansion of state finances and its legal consequences, so it is certain that some of the best professionals will not be able to lead BUMN/BUMD and other legal entities that obtain state facilities on a regular basis. Optimally to realize the success and success of the company, so that it can generate high taxes and dividends for the country. This is because BUMN/BUMD managers and other legal entities that obtain state facilities will focus more on routine company formalities to save themselves rather than focusing on the company's strategic technicalities to generate profits for the company, which in turn will increase taxes and dividends for the state, which ultimately The state will use it to achieve state goals for the greatest prosperity of the people (Dian Puji Nugraha Simatupang, 2020).

State financial losses can occur in BUMN when it can be proven that there have been unlawful acts committed by the directors. More specifically, in exercising its authority, the directors have abused the authority given to them and are not in accordance with the applicable laws and regulations and the established articles of association.

The contradictory climate and polemic about the status of state assets are separated into BUMN based on different assumptions when interpreting the status and financial position of BUMN. This confusion ultimately creates difficulties in providing definite, clear and firm limits on the occurrence of losses to BUMN in the public or private domain. But one thing is certain that not all losses that occur to BUMN are state financial losses which can ultimately ensnare directors with criminal acts of corruption. Losses to BUMN are also very likely to occur as a result of BUMN business risks in running the company. These business risks are the result of decisions that have been carried out by the board of directors in good faith, responsibility and with great care beforehand.

Regarding state assets that are separated in the management of BUMN, Tan Kamello is of the opinion that it is a wrong legal opinion if anyone states that BUMN is a corporation whose capital comes from the APBN and according to Law no. 17 of 2003 includes State Finance. Tan Kamello emphasized that BUMN finances are not State Finance, BUMN based on Law no. 19 of 2003 is a special company (*lex specialis*) of a Limited Liability Company based on Law no. 40 of 2007, so it must comply with the provisions of the Limited Liability Company Law (Tan kamello, 2013).

In accordance with legal theory, the enactment of the BUMN Law should also apply the legal principle of *lex posterior derogat leg priori*, which is interpreted as new regulations overriding old regulations. The principles of BUMN wealth are adhered to in the BUMN Law which has been implemented, while the principles of BUMN wealth which were regulated before the State Finance Law must be set aside (Gatot Supramo, 2016).

For positive economic sustainability, it is necessary to make changes to Law no. 17 of 2003 concerning State Finance, because this Law is contrary to the legal entity doctrine and Law no. 40 of 2007 concerning Limited Liability Companies which does not provide legal certainty to business actors, so that in carrying out their business business actors are hesitant in taking business actions (Erman Rajagukguk, 2011).

Political reform of state financial law is a very priority, it is necessary to start with updating the scope of state finances first, which will be able to realize the values of social justice, and abandon old-fashioned, static, dogmatic understandings that weaken the state's financial position in order to realize state goals. Placing the scope of state finances in accordance with legal theory, creating social justice, and respecting the principles of legal entity theory. Thus, the value of political renewal of state financial law will be in line with the mandate of article 23 paragraph (1) of the 1945 Constitution (Dian Puji Nugraha Simatupang, 2020).

### **Clear Separation of Qualifications for Actions Of Bumn Directors That Give Rise to Losses That Can Be Punished**

The recognition that BUMN as a Persero must be given a place to run business like a legal subject supporting rights and obligations, as well as having separate assets positions BUMN Persero as a business actor or economic actor must be able to run a business with a business orientation and of course the consequences of BUMN as a legal subject can sue and can be sued, can even be filed for bankruptcy. Law Number 40 of 2007 concerning Limited Liability Companies has regulated clear standards regarding the accountability of directors. This is important, because it is feared that the directors will not have the courage to make business decisions. This condition is contrary to the company's position as a risk taker so that it will indirectly stop the company's continuous improvement. Therefore, the inclusion of the principle of business judgment rule in the Limited Liability Company Law is a very positive thing to support the development of the business climate in Indonesia (Bismar Nasution, 2014).

The application of the business judgment rule principle is essentially an immunity for BUMN Directors who have implemented business policies based on what is regulated in Article 97 paragraph 5 of the Limited Liability Company Law. BUMN Persero is a business entity that manages the company's business, at certain times it is difficult to predict a policy (unpredictable), so it is very possible that company losses will occur due to a business climate

that is not in favor of the policies taken by the BUMN directors. The principle of business judgment rule internalized in the Limited Liability Company Law provides discretion on the policies of BUMN Directors who have implemented this principle properly and correctly.

In the past, the business judgment rule was only a doctrine, but now this has been regulated, however, in the field there are still many dynamics between one assembly and another regarding the implementation of the BJR when it is brought to court to make a decision. This condition actually really depends on the prosecutor's expertise in proving whether or not the elements of mens rea and actus reus are present, which is one of the concepts to eliminate the business judgment rule doctrine. There is often a misunderstanding regarding the criminal and civil domains, because in principle criminal law measures material truth, not formal truth.

Romli Atmasasmita is of the opinion that the Persero is actually subject to the civil law regime, especially the BUMN Law and is not under the criminal law regime, even though losses have occurred to the Company. In line with this, Laode Muhammad Syarif revealed that the losses experienced by BUMN resulting from new business decisions can be said to have harmed state finances and can be said to be a criminal act of corruption when there is kickback that flows to the Directors, their families and/or friends. When there is no flow of funds going to the Board of Directors, then the loss is only a business risk and is not a criminal act of corruption, so the settlement must be carried out in accordance with the Limited Liability Company Law and the BUMN Law.

Based on this logical thinking, the presence of Article 155 of the Limited Liability Company Law is only an early warning, not an article that requires all cases in the Company to be resolved through the criminal realm. This article reminds us that Directors may commit criminal acts, but their actions must first be ascertained that they are indeed criminal acts.

Based on this logical thinking, Asep Nana Mulyana is of the view that the provisions of Article 155 concerning criminal provisions in the Company Law are linked to the doctrine of piercing the corporate veil. And hope that the responsibility will be in accordance with the shares paid up. Incidents like this become a basis for these individuals to choose a limited liability company as the legal form for their business. This article conveys a message so that shareholders or irresponsible individuals do not use the company as their support and take the opportunity to carry out certain actions or evil intentions that cause losses to the BUMN.

The nature of the assignment given to BUMN is also the same, if it fulfills the requirements determined by the business judgment rule doctrine which is regulated in the PT UUPT then it is not categorized as a state loss. However, if the opposite is done and things are found that are a conflict of interest or no good will, then it cannot be categorized as a loss to the company and can be punished. In the Anti-Corruption Law and several other provisions, BUMN directors can be equated with state officials, similar to the fact that BUMN money is part of state finances. However, it must be tested first if a loss occurs, whether it is part of the state's financial loss or purely a business loss.

The losses that occurred to BUMN Persero need to be investigated whether it was true that the directors' personal actions were not in good faith and did not comply with the AD/ART, or whether there was state intervention dictating the direction of the BUMN's policies and business activities. The position of BUMN as a company is the doer of business, so profits or losses that occur are normal. However, if the state intervenes in the direction of policies and business activities and actually causes losses, then it must be classified as a state loss. The most basic thing about incidents like this is that BUMN is not subject to the Limited Liability Company Law, with state intervention in the direction of BUMN policy and



business activities through policies or materielle daad, besides that the state is not responsible if the BUMN is proven to suffer losses due to state intervention.

If the state and BUMN do not heed the principles that apply to Persero BUMN. So BUMN losses can be classified as state losses so that they fulfill the elements of being an object of criminal responsibility. An expanded phrase regarding BUMN losses in the regulation of state losses is the provision that if BUMN losses are proven to be caused by state intervention in dictating the direction of policies and activities of BUMN business activities, then they become state losses.

The culture in government strongly discourages risk-taking, as politicians, the media and auditors are quick to shoot down any innovation that fails. Politicians love to take shots at bureaucracy. Meanwhile, political parties are always attacking each other, and managers and trusted people (in state companies) who are caught up in it will become targets for shooting. The media likes 'war arenas' because they increase circulation (David Osborne & Peter Plastrik, 2001).

Every values decision made will be something that the Board of Directors is faced with, including when faced with choices that are for interests outside the interests of the company. The object of value is a person's behavior that is related to right behavior and a good life, where the person can be said to have good ethics (vice versa) and has good right conduct and a good life (Prasetio, 2017).

In principle, not all business risks that occur in BUMN can be categorized as state losses. In carrying out business activities, inappropriate decisions are something that cannot be avoided. BUMN directors are quite concerned about the confusion between state losses and business risks. If in making a decision it turns out that there was an error, then responsibility cannot be blamed on the Board of Directors, if the Board of Directors can prove that the decision has been made in accordance with applicable regulations, and is based on the principle of prudence and in accordance with the aims and objectives of the company, considering the company's business very dynamic and cannot be predicted whether it will result in significant profits or business losses. In essence, the Board of Directors cannot be blamed for business decisions as long as these decisions are carried out properly:

1. have good faith (*fraud*);
2. there is no conflict within (*conflict of interest*);
3. there are no unlawful acts (illegality); or
4. There is no concept of intentional error (gross negligence)

Loss in general is a condition that is most avoided, both personal human losses and collective losses in the form of legal entities. Likewise, the state as the owner of capital in managing BUMN. In general, state losses will result in the threat of criminal acts of corruption, with the existence of an unlawful act in the realm of criminal law. State losses can be said to be an act against the law, especially criminal law, if state losses contain juridical deficiencies, namely coercion (*dwang*) or bribery (*omkoperij*) and deception of a deceptive nature (*kuntsgrepen*) (Dian Puji Nugraha Simatupang, 2020).

Accuracy in qualifying an act is something that deserves attention, whether the act is a criminal act or a civil act. Thus, not all losses experienced by BUMN Persero can be said to be criminal acts and cannot immediately be processed criminally, but first it must be proven that an unlawful act occurred. If no criminal unlawful act has occurred, then the problem must be resolved administratively or civilly.

## CONCLUSION

The management of BUMN has become ambiguous in the implementation and management of state companies, this is due to the lack of legal certainty regarding the management of BUMN Persero by the Directors, giving rise to crucial concerns in handling finances, this specter has given rise to polemics for the Directors of BUMN Persero when state losses occur which can be punished by law enforcement officials. Meanwhile, the State through the Minister of BUMN ordered that BUMN can produce innovation in its management which provides good foreign exchange for the welfare of the people and the State as a supporter in the pillar of nationality, therefore breakthroughs are needed in policy making even though it can be detrimental to BUMN.

The position of BUMN Directors is to be a development agent in making a breakthrough both corporately and bureaucratically, the basic thing in making this policy is that the Directors become a dilemma in carrying out their functions. On the one hand, the Directors are the authority holders in running the BUMN they lead. On the other hand, the Directors are required to as a healthy bureaucrat so that fraud does not occur in managing BUMN finances as a State goal that can generate State foreign exchange and participate in implementing the State's goal of improving the welfare of its people. This form poses a particular threat to BUMN Directors in carrying out reforms in executing policies that participate in creating a healthy, tough and professional BUMN. Meanwhile, on the other hand, the Board of Directors is responsible if there are losses to the State in terms of its management, which is always the target of law enforcement officials, then the function of the Board of Directors as a development agent cannot be carried out in accordance with the wishes of the actions they achieve, such as good faith, no conflict of interest, there are no unlawful acts (illegality) or there is no concept of intentional error (gross negligence). This form of legal certainty must be immediately provided to BUMN Directors so that the implementation of their duties can run smoothly and without obstacles from all existing regulations.

## END NOTES

<sup>1</sup>Amiruddin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2003), 118

<sup>2</sup>Erman Rajagukguk, *Op.Cit*, 2-3

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