# UNJUST RESTRUCTURING PROCESS OF STATE-OWNED INSURANCE COMPANY; CASE STUDY PT ASURANSI JIWASRAYA (PERSERO)

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## ABSTRACT

*The issues on PT Asuransi Jiwasraya (Persero), an insurance corporation established and fully owned by the Government of the Republic of Indonesia had not been over yet. After the corruption court decision over several persons that we're held responsible for the loss of the Company, many issues were raised further. One of the issues is about the right of the insurance policyholders. This research aims to explore that there is an unjust restructuring toward policyholders. This is normative legal research with a case approach that aims for a solution. Data used in the research are secondary data, which consists of primary legal sources, secondary legal sources, and tertiary legal sources. Analysis was conducted using a qualitative approach. Findings and discussions proved that in conducting the restructuring of the Company, the Government of the Republic of Indonesia as the only shareholder of the Company does not consider the interest of the policyholders, and in some ways has breached the regulations to protect the policyholders, that were issued by the Government itself.*

**Keywords**: Insurance Restructuring, Policyholder's Right, Unjust Process

## INTRODUCTION

From the web site of *Asosiasi Asuransi Jiwa Indonesia* (Indonesian Life Insurance Association (2021), that PT Asuransi Jiwasraya (Persero) (the Company) was established in 1859 under the name of *Nederlandsch Indiesche Levensverzekering en Liffrente Maatschappij van 1859*, of 31 December 1859 (NILLM). The Company was established based on the Notarial deed of William Hendry Herklots Notary No.185 (Wikipedia, 2021). After the independence of the Republic of Indonesia, the Company was nationalized in 1960. After several changes in the name, the Company has PT Asuransi Jiwasraya (Persero) as its name today.

CNN Indonesia in its news (2020) stated that the Company has been in shortage of liquidity. The Equity of the Company was found to be negative Rp23.92 trillion in September 2019. The Company needed Rp32, 89 trillion to be solvable. The issues in the negative equity of the Company have been known since 2006 when the Ministry of State-Owned Enterprises (Ministry of SOE) and the Financial Service Authority (OJK) stated that the Company has reached negative Rp3.29 trillion in equity. In 2008, the Audit Board of the Republic of Indonesia (BPK) provided a disclaimer opinion for the 2006-2007 financial report of the Company. The equity deficit widens to Rp5.7 trillion in 2008 and Rp6.3 trillion in 2009. In 2012, Capital Market and Financial Institution Supervisory Board (Bapepam-LK) approved the Bancassurance product. The product, which offers high interest, contributes to increasing the loss of the Company. From 2013-2017 the Company introduced and sold JS Saving Plan products. In 2018, there was a reshuffle in the management of the Company. The new management found several discrepancies in the financial report of the Company, through some correction after being audited by a public accountant. In 2018 the Company experienced failure to pay the due and payable JS Saving Plan amounting to Rp802 billion. Among others, the equity of the Company was reduced to Rp27.24 trillion, with the problem in un-paid JS Saving Plan liability Rp15.75 trillion.

From CNN Indonesia news (2020), further in 2019, the Minister of SOE reported a fraud indication in the Company to the Attorney General of the Republic of Indonesia (Kejagung).



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There was also an annunciator that the investment conducted by the Company was put in "junk" and "manipulated" stocks. Accordingly, there was a breach of prudential principle in investment activity by the Company. This was one among many reasons that made the Company fail to pay the insurance claims. Besides the Attorney General, the office of high prosecutors (Kejati) was also aiming for corruption. In January 2020, BPK announced an official statement that the financial statement of the Company since 2006 was found to be untrue, because of window dressing. The statement was used by Kejagung to proceed with their prosecutions.

According to CNBC Indonesia (2021), in 2021, the Ministry of SOE declared that to resolve default payment on insurance policies issued by the Company, the Ministry of SOE will establish an insurance holding company owned by the state. The Ministry of SOE also claimed that it has restructured 94% of the retail policy, 96% of Bancassurance products, and 98% of corporate policy.

The research aims to discuss whether the restructuring process of the policy has been conducted accordingly, as regulated.

## THEORETICAL CONCEPT OF RESTRUCTURING

Article 1 point 11 of Law No.19 Year 2003 regarding State-Owned Enterprises (SOE Law) stated that:

> "Restructuring is an effort made in the context of making State-Owned Enterprises financially healthier which is one of the strategic steps to improve the company's internal financial conditions in order to improve its performance and to increase the company value."

From the definition given above, it is very clear that the purpose of the restructuring process is to improve the State-Owned Enterprise (SOE) internal financial conditions. The improvement will increase the value of the SOE so that the SOE can return to its previous performance to be able to fulfill all of its obligations to all its creditors. It is therefore the result of the restructuring shall not harm the SOE or the stakeholders of the SOE, which included the policyholders. Any acts or conducts made against the SOE that did not improve the performance of the SOE or moreover further reduced the capacity and capability of the SOE shall not fall into the definition of restructuring and cannot be accepted as the way or means of restructuring. Further, Article 72 and Article 73 of SOE Law, stated:

Article 72

(1) Restructuring is carried out to make SOE financially healthy so that it can operate efficiently, transparently, and professionally.
(2) The objectives of the restructuring are to:
    a) Improve the company's performance and value;
    b) Provide benefits in the form of dividends and taxes to the state;
    c) Produce products and services at a competitive process to consumers; and
    d) Facilitate the implementation of privatization.
(3) The implementation of the restructuring as referred to in paragraph (1) shall consider the principle of cost and benefit.

Part Two: Scope of Restructuring

Article 73

Restructuring includes

a) Sectorial restructuring, whose implementation is adjusted to the sector policies and/or provision of laws and regulations;
b) Company/corporate restructuring, which includes:
c) Increasing the intensity of business competition, especially in sectors where there are monopolies, both regulated and natural monopolies;



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d) Structuring of the functional relationship between the government as regulator and SOE as business entities, including the application of good corporate governance principles and setting directions in the context of implementing public service obligations;
e) Internal restructuring, including finance, organization/ management, operations, systems, and procedures."

Restructuring of insurance as a non-bank financial institution is regulated in the Regulation of Financial Service Authority (Peraturan OJK) No.71/POJK.05/2016 regarding the Financial Health of Insurance Company and Reinsurance Company (POJK71/2016). In POJK71/2016, restructuring is mentioned in article 51 paragraph (3). Article 51 paragraph (3) of POJK71/2016 stated that asset and/or liability restructuring is one of several steps that can be taken to make the financial conditions of an insurance company healthier. There is no further explanation on how the process will be taken. In article 51 paragraph (3) of POJK71/2016, six other steps can be taken to financially healthy an insurance company. They are increasing the paid-up capital, providing a subordinated loan, increasing premium tariff, assignment of part or all insurance portfolios, mergers, and others.

From the above explanation, it can be said that restructuring under SOE Law can be conducted at two levels:

1) At the macro-level, the restructuring shall involve more than one SOE; the restructuring process will be made at a sectoral level, where the Government through the Ministry of SOE restructure part or total structure of government ownership and management of the SOEs within one sector;
2) At the micro-level, the restructuring will happen to a specific SOE which facing financial problems referred to in POJK71/2016. The restructuring may involve other issues besides the financial matters, such as re-organizing.

## RESEARCH METHOD

This research is normative legal research. It used secondary data, which are data available to the public and can be accessed by everyone. It mainly consists of laws and legislation, especially laws and regulations that related to state-owned enterprises, insurance, corporation, consumer protection, civil contractual relation, and capital markets, including regulations issued by the Financial Services Authority.

Analysis was conducted using qualitative methods. It will analyze the legal conduct of the Government of the Republic Indonesia through the Ministry of State-Owned Enterprises (Ministry of SOE) in restructuring policyholders' rights, as the result of the failure of PT Asuransi Jiwasraya (Persero) to pay the due and payable policy. The analysis will be conducted based on the content analysis, through the understanding of the laws and regulations in comparison with the step-by-step method taken by the Ministry of SOE. The analysis will prove that whether the Ministry of SOE has conducted the restructuring of policy in line with the issued and enforceable laws and regulations.

## ANALYSIS OF STATE-OWNED RESTRUCTURINGS BASED ON PREVAILING LAWS AND REGULATIONS

Based on Law No.40 Year 2014 regarding Insurance (Insurance Law), there are three forms of insurance companies. They are a corporation, co-operation, and mutual fund that was existed before the issuance of the Insurance Law. Therefore State-Owned Enterprises (SOE) that were involved in insurance activities can only be made in the form of a corporation. It means that the conduct of SOE's corporation cannot be separated from Law No.40 Year 2007 regarding Corporation (the Corporate Law).



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In general, the term restructuring cannot be found in Law No.40 Year 2007 regarding Corporation (the Corporate Law). In reference to POJK71/2016, restructuring can be seen as the process of making financially sick corporations healthy. In general, it can be conducted through the action of the corporation itself or with the assistance of third parties that were then related to the corporation. The first way, that can be conducted by the corporation itself, can take forms by way of injecting fresh monies to the corporation. The increase of the capital can be made through the General Meeting of the Shareholders of the corporation. It can take the form of a capital increase or shareholder's loan.

The Second can take the forms of:

a) Third party's funding, either in for of equity participation or through third party loan (equity or liability restructuring);
b) The utilization of the corporate's assets, through asset management, which can be made in the forms of asset securitization, factoring, forfeiting, selling, incumbrance, and other means of corporate actions;
c) Corporate merger or acquisition.

Those actions can be followed by a reorganization of the company through management restructuring. In general, the actions can only be conducted through the approval of the General Meeting of the Shareholders of the corporation.

Concerning the SOE as a corporation, there is Law No.19 Year 2003 regarding State-Owned Enterprises (SOE Law). The term "restructuring", as mentioned above can be found the Article 72 and Article 73 of SOE Law. Given single company restructuring, the process cannot be separated from the Corporate Law. As the implementation of Article 72 and Article 73 of the SOE Law, the State Ministry of SOE has issued the Regulation of State, Minister of SOE No.Per-01/MBU/2009 regarding the Guidance for Restructuring and Revitalization of SOE by Perusahaan Perseroan (Persero) PT Perusahaan Pengelola Aset (PerMenNeg BUMN No.Per-01/MBU/2009). The PerMenNeg BUMN No.Per-01/MBU/2009 is made especially for macro and micro levels of bank restructuring. Under the article 2 paragraph (2) PerMenNeg BUMN No.Per-01/MBU/2009 it is stated that: "(2) Restructuring and Revitalization shall be conducted based on principles of good corporate governance, *i.e.,* transparency, accountability, responsibility, independence, fairness, and sustainability."

In the PerMenNeg BUMN No.Per-01/MBU/2009, the restructuring process of SOE at the company level (micro-level) shall be conducted in accordance with the good governance principles, and may not harm any third party interest, which is related to the company. The process must be conducted by appointing an "independent" third party to do the feasibility study of the restructuring. The PerMenNeg BUMN No.Per-01/MBU/2009 also requires the involvement of inter-ministerial relations, *i.e.,* The Ministry of SOE, the Ministry of Finance, and the technical ministry that supervises the activities of the company that needed to be restructured. In this case, the inter-ministerial coordination shall be conducted under the general principles of good government.

Other than PerMenNeg BUMN No.Per-01/MBU/2009, there are no general regulations that were ever issued to explain the process of restructuring of SOE. However, concerning the restructuring, there is Government Regulation No.33 Year 2005 regarding the Procedures of Privatization of SOE in form of Corporation (Persero) (GR33/2005) as may be amended by Government Regulation No.59 Year 2009 regarding the Amendment of Government Regulation No.33 Year 2005 regarding the Procedures of Privatization of SOE in form of Corporation (Persero).

The obligations to conduct good corporate governance principles in SOE can be found in the Regulation of State Minister of State-Owned Enterprises No.Per-01/MBU/2011 regarding the Implementation of Good Corporate Governance in State-Owned Enterprises. The regulation is amended by the Regulation of State Minister of State-Owned Enterprises No.Per-09/MBU/2012 regarding Amendment of Regulation of State Minister of State-Owned



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Enterprises No.Per-01/MBU/2011 regarding the Implementation of Good Corporate Governance in State-Owned Enterprises.

In the provision of Article 3 of PerMenNeg BUMN No.Per-01/MBU/2011, it was stated that:

"The GCG principles mentioned in this Regulation shall include:

1) Transparency, that is the openness in making decisions and openness in disclosing material and relevant information regarding the company;
2) Accountability, that is the clarity of function, implementation, and responsibility of the company Organs so that the management of the company can be conducted effectively;
3) Responsibility, that is the suitability in the management of the company against the legislations and sound corporate principles;
4) Independency, that is the conditions that the company managed professionally without conflict of interest and free from influence/ pressure from any party which I not in compliance with the legislation and sound corporate principles;
5) Fairness means the equity and equality in fulfilling the rights of the stakeholders, arising from agreements and legislations."

The company organs shall mean the General Meeting of the Shareholders (GMS), the Board of Commissioners, and the Board of Directors.

From the above analysis, it can be said that the process of restructuring an SOE that is involved in the insurance industry must be conducted according to the principles of Good Corporate Governance. It means that the restructuring process shall not harm the policyholders.

In view of corporate restructuring that involved the increase of capital of the SEO, there is Government Regulation No.44 Year 2005 regarding the Procedure for State Capital Participation and Administration in State-Owned Enterprises and Corporations (GR44/2005). Under article 7 of GR44/2005 it is stated that "Increase in government capital in Sate-Owned Enterprises and Corporations as meant in article 5 point c is carried out in order to:

a) Improve the capital structure of the SOE and Corporation; and/or
b) Increase the business capacity of the SOE and Corporation.

Meanwhile, if the corporate restructuring involved a merger or acquisition, there is a Government Regulation No.43 Year 2005 regarding Merger, Consolidation, Acquisition, and Changes in the Form of the State-Owned Enterprises (GR43/2005). Based on GR43/2005 and GR44/2005, the process will involve a (feasibility) study that involved the Ministry of SOE, Ministry of Finance, and the technical related ministry.

Besides those mentioned above, the obligations to conduct GCG principles can also be found in Article 11 paragraph (1) Insurance Law that stated: "Insurance Company shall apply good corporate governance." It is then followed by the issuance of the Financial Authority Regulation No.73/POJK.05/2016 regarding Good Corporate Governance for Insurance Company. Concerning merger and acquisition, Article 41 paragraph (1) of Insurance Law required approval from the Financial Services Authority. According to Article 43 paragraph (3) point a. Insurance Law, that the merger and acquisition referred to in Article 41 paragraph (1) Insurance Law shall not reduce the right of the policyholders.

## Policyholders as Consumer that must be Protected

Law No. 8 Year 1999 regarding Consumer Protection (Consumer Protection Law) defines a consumer as every person that used goods and/or services available in the society, either for his/ her interest, the family, other people, or other living thing and not for sale. It also defines business actor (*pelaku usaha*) means any person or business entity, either in the form of a legal entity or not, established and domiciled or doing business in the territory of the Republic of Indonesia, either severally or jointly through contracts conducting activities in the economic



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sector. Meanwhile, service is defined as every service in the form of work or performance available in society to be used by the consumer.

Based on the above definitions, it is clear that the policyholders are the consumer. The insurance company, including the SOE that engaged in the insurance business, is the business actor. The insurance service is the service as mentioned in the Consumer Protection Law.

Article 18 paragraph (1) point a. Consumer Protection Law stated that business actors that offer goods and/or services for trade shall not make or state standard clause in every document and/or contract that divert the responsibility of the business actor to consumers. The terms specifically said that in whatsoever conditions, the business actor shall not divert its obligations and responsibilities to the consumer, which may result in the loss or reduce the right of the policyholders. In conjunction with the process of restructuring conducted by an SOE that engaged in insurances activities, the restructuring shall not in any way make a contract that diverts or reduce the right of the policyholders. Any agreement from the policyholders to the restructuring agreement that diverts or reduce the right of the policyholders shall be deemed as not written and cannot be enforceable before the court of law, as referred to Article 18 paragraph (3) Consumer Protection Law.

## The Corporate and State's Responsibilities

From the Consumer Protection Law, it is clear that an SOE as an insurance company that is established in a form of a corporation shall not divert its obligations that are arising from the policy contract with the policyholders (beneficiary). If the SOE insurance company as a corporation had financial difficulties, the loss of the SOE shall not be transferred to the policyholders.

Under Corporate Law, the member of the Board of Directors and the member of the Board of Commissioner will not be personally held liable for the loss of the corporation for everything that has been reported and disclosed to the shareholders at the General Meeting of the Shareholders. Personal liability will be applicable for every untrue, misleading, and/or undisclosed information. It is, therefore, the member of the Board of Directors and/or the Board of Commissioners that were found guilty that cause loss to the corporation, *i.e.,* the SOE as a corporation, the members of the Board of Directors and/or the Board of Commissioners shall be held responsible with their assets.

The obligation and liability of the members of the Board of Directors and/or the Board of Commissioners of the Company as SOE can be found in the Government Regulation No.45 Year 2005 regarding the Establishment, Management, Supervision, and Dissolution of State-Owned Enterprises (GR45/2005). Based on Article 1 point 7 GR45/2005, "the Board of Directors is SOE organ that is responsible for the management of the SOE for the interest and purpose of the SOE and represents the SOE inside and outside the court of law." Under Article 27 paragraph (1) and (2) GR45/2205 it is stated:

1) "Every member of the Board of Directors shall in good faith and full responsibility perform his/her duty for the interest and business of the SOE.
2) Every member of the Board of Directors shall be fully and personally responsible if he/she is guilty or negligent in doing his/her duty according to the provisions of paragraph (1)."

Article 1 point 8 GR45/2005 defines the Board of Commissioners as "an SOE organ that has the duty to supervise and provide advice to the Board of Directors in running the management activities of the SOE." As part of the responsibility, provision of Article 59 paragraph (1) and (2) GR45/2005 stated that:

1) "Commissioner and Supervisory Board shall in good faith and full responsibility perform his/her duty for the interest and business of the SOE.



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2) The Commissioner and Supervisory Board shall be fully and personally responsible if he/she is guilty or negligent in doing his/her duty according to the provisions of paragraph (1)."

Based on the development of the cases of the Company, PT Asuransi Jiwasraya (Persero) that can be identified, there was no civil suit ever been taken to sue the members of the Board of Directors and/or the Board of Commissioners personally due to the loss incurred by the Company. The biggest case that was known concerning the liability of the members of the Board of Directors and/or the Board of Commissioners is the corruption case that has sentenced the Company's ex-President Director, ex-Finance Director, and ex-Division Head of Investment and Finance. Besides, three other people were sentenced to the corruption case (Kompas.com, 2020). Based on the court decision the assets of the sentenced person were seized and confiscated by the State. However, the court decision has not been final and binding. The seizure and confiscation of the assets have also included some which have not belonged to the sentenced person. Some legal efforts have been conducted to save the assets.

The criminal corruption cases do not even imply that the State as the owner has taken sufficient civil action to make sure that the member of the Board of Directors and/or the member of the Board of Commissioners that have caused loss to the Company be liable accordingly. The confiscation of the assets in the corruption court case cannot justify that the confiscated assets will and shall be used to pay the policyholders.

Further on the Corporate Law, Article 3 paragraph (2) point c stated that the shareholder's limited liability of a corporation shall cease to exist if the shareholders are involved in the tort conducted by the corporation. Even the provision is still debatable as to whether it can be used against the State to be responsible for not taking civil legal action against the member of the Board of Directors and/or the member of the Board of Commissioners that have caused loss to the Company. However, the confiscation of the assets through criminal corruption cases has incurred further difficulties for the Company to pay the due and payable obligation to policyholders.

Under Corporate Law, the members of the Board of Directors and the member of the Board of Commissioners will not be personally held liable for the loss of the corporation for everything that has been reported and disclosed to the shareholders at the General Meeting of the Shareholders. Personal liability will be applicable for every untrue, misleading, and/or undisclosed information. If Article 3 paragraph (2) point c Corporate Law can be applied, the State shall pay all the due and payable obligation of the Company to the policyholders.

Sayekti (2020) stated that the loss of the Company is caused by the mismanagement in the stock investment portfolio. Assuming that the stock investment portfolio shall have been presented in the Company's financial statement; the approval of the financial statement of the Company by the General Meeting of the Shareholders might have shifted the personal liability of the members of the Board of Directors and the member of the Board of Commissioners to limited liability. It may be the reason why there was no civil lawsuit taken against the Board of Directors and the member of the Board of Commissioners.

## The Existence and Legal Standing of the Restructuring Team Established by the Ministry of SOE

The restructuring of policy is a micro restructuring process that was supposed to be implemented at the Company level. However, Sayekti (2020) mentioned at least three options as an alternative to safeguard the Company. The first is by way of privatization, the second is bailed out by the State through a capital increase, and the third is by introducing insurance holding SOE. Kompas.com (2020) has mentioned PT Bahana Pembinaan Usaha Indonesia (Persero) as the SOE insurance holding company. From these three options that may be taken, it is clear that whichever option that will be taken, shall not harm the insurance policyholders.



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During the process of the insurance policy restructuring with the policyholders, the Ministry of SOE has established a Restructuring Team. The so-called Restructuring Team has made an offer to the policyholders an un-disputable and un-negotiable option, which certainly reduced the rights of the policyholders. One among several proposed options were: 15-year installment payment for each due and payable policy for JS Mantap Plus Plan A; 71% of total due and payable policy in the 5 years installment of JS Mantap Plus Plan B; and 59% of total due and payable policy in 6 years installment for JS Mantap Plus Plan C. If policyholders refused to follow the restructuring scheme, the policyholders will be paid from the proceed of the sale of the unclean and unclear assets of the Company. For those who follow the scheme, the insurance policy will be assigned to IFC Life, the holding insurance SOE.

From the extract of the flow and step that was mentioned above, several big questions may arise. i.e.,:

1) The insurance policy is a contract between the Company and the insurance policyholders, that only bind and can only be amended upon mutual consensus;
2) Restructuring of the insurance policy has significantly lowered the right of the policyholders;
3) No "fair" negotiation has ever been conducted by the Company and the representations of the insurance policyholders;
4) The Restructuring Team appointed by the Ministry of SOE as the State representative, cannot impose the one-sided offer to the policyholders;
5) The assignment of the policy cannot be made without a novation that involved the Company, the policyholders, and IFC;
6) The dissolution of the Company is not a process of restructuring.

The questions that arose above are sufficient enough to prove that the restructuring process for insurance policyholders is unjust.

## CONCLUSION

The State/Government through the Minister of State-Owned Enterprises has been aware of the loss of PT Asuransi Jiwasraya (Persero) before 2010 and there was never a serious action be taken. The state never took civil legal action against the members of the Board of Directors and/or the Board of Commissioners that caused losses to the Company. The State through the criminal corruption cases has seized and confiscated many assets that were supposed to be assets of the Company, in view that the loss of the State in the corruption case is the reflection of the loss in the Company as SOE. The confiscated assets by the States were not used to pay the due and payable insurance policy, instead will be paid using the un-clear and un-clean assets of the Company that will be dissolved. The insurance policyholders were required to follow the "un-just" scheme of policy restructuring that reduce the rights of the policyholders. The scheme was unjust because it was never conducted properly as civil relations between the Company and the policyholders. The process of restructuring was never conducted according to the prevailing laws and regulations. It does not comply with the civil contractual, legal relation, prohibited provision in consumer protection, corporate responsibilities (as well as directors, commissioners, and shareholders' responsibilities), insurance law that specifically stated that the insurance policyholders may not be harmed, and the GCG principles as State-Owned Enterprises law and capital market regulations.

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