



# Juridical Review of the Losses of Bank with State Owned Enterprises Status for Violation of the Principles of Precaution by Bank Employees which Caused Losses Reviewed from Positive Law in Indonesia

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## Abstract

Banks with state-owned enterprise status carry out operational activities like banks in general, but their activities are not free from various risks. One of them is the risk of consequential losses *mismanagement*. The study based on the perspective of Limited Liability Companies and Corruption Crimes in this research is an important aspect, considering that often cases involving losses to banks with state-owned enterprise status due to mismanagement often end with different judge's considerations and decisions. This research is legal research (*legal research*) using normative juridical research. The approach method used is the statutory approach (*statute approach*) and conceptual approach (*conceptual approach*), which is done by reviewing all related laws and regulations as well as discussing and examining concepts, theories and doctrines that discuss the problem. The result of this research is the PT Law which adheres to the concept *Business Judgement Rule* states that members of the Board of Directors cannot be charged with legal responsibility, as long as they fulfill the elements of the provisions of Article 97 paragraph (5). Meanwhile, based on the State-Owned Enterprise Law, banks with State-Owned Enterprise status that experience losses can be charged with legal responsibility as a criminal act of corruption because in State-Owned Enterprise banks state finances are included as separate state assets, unless a subsidiary of the company carries out the detrimental act.

**Keywords:** Banks, Loss, State-Owned Enterprise

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## Introduction

National development is a sustainable development effort to create a just and prosperous Indonesian society based on Pancasila and the 1945 Constitution. However, to achieve these goals, we are faced with developing the national economy which is always moving quickly, competitively, and integrated with challenges. increasingly complex and increasingly advanced financial systems. For this reason, support and participation from various instruments is needed, one of which is the Bank as an economic driver.

Banks are business entities that collect funds from the public in the form of savings and distribute them to the public in the form of credit and/or other forms in order to improve the standard of living of many people. Based on the provisions of Article 21 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking, the legal form of a Commercial Bank can be a Limited Liability Company, Cooperative; or Regional Company. For Commercial Banks in the form of Limited Liability Companies, their management and accountability refers to Law Number 40 of 2007 concerning Limited

Liability Companies (hereinafter referred to as UUPT), so that if a loss occurs to the Bank, then the losses incurred are the responsibility of the legal entity concerned as long as This loss is a business risk loss.

As for the legal form of a Commercial Bank in the form of a Limited Liability Company, share ownership can come from separated state assets, or what is known as a State-Owned Enterprise (hereinafter referred to as State-Owned Enterprise). According to Article 1 of Law Number 19 of 2003, State-Owned Enterprise is a business entity whose capital is all or most of which is owned by the state through direct participation originating from separated state assets. According to the provisions of Article 4 of Law Number 19 of 2003 concerning State-Owned Enterprise:

1. State-owned enterprise capital is and comes from separated state assets.
2. State capital participation in the context of establishing or participating in State-Owned Enterprise comes from:
  - a. State budget;
  - b. Reserve capitalization;
  - c. Other sources.
3. "Every state capital participation in the context of establishing a State-Owned Enterprise or limited liability company whose funds come from the State Revenue and Expenditure Budget is determined by Government Regulation."

In practice, state-owned banks carry out operational activities like banks in general, namely collecting funds from the community and channeling them back to the community in the form of credit and other forms to improve people's living standards. Even in its development, banks can provide other services to make it easier for people to make transactions, or take advantage of the facilities provided by the bank, in addition to making a profit for the bank itself. However, banks in their activities are inseparable from various risks, including legal risks, reputation risks, operational risks and other risks. One of the risks that banks often accept is the risk of consequential losses mismanagement. Mismanagement as intended includes the management of Human Resources, the principle of prudence, Compliance with Legislation, Bank Confidentiality and also Bank Licensing.

The study based on the perspective of Limited Liability Companies and Corruption Crimes in this research is an important aspect, considering that cases involving losses to state-owned banks due to mismanagement usually end with different judges' considerations and decisions. On the one hand, the judge's decision at the Court thought that the loss to the state-owned bank was a consequence of mismanagement is a business risk-based loss, and the management of a Bank with State-Owned Enterprise status is managed based on the laws and regulations governing Limited Liability Companies. However, in another decision, the judge thought that the losses of a Bank with State-Owned Enterprise status could be categorized as state losses, considering that there were separate state assets, which were embedded in the form of shares,

Based on this, the legal issues or problems that will be discussed in this research are related to the qualification of losses for banks with state-owned enterprise status due to mismanagement from the perspective of limited liability companies and criminal acts of corruption. The problem identified in this research is whether a bank with the status of a State-Owned Enterprise that experiences losses can be considered an act of corruption.

### **Theoretical Framework**

#### **1) Legal Positivism Theory**

According to Hans Kelsen, law is separated from morals, but according to him, law is a pure norm that creates an idea about how someone should behave in a certain way. Legal positivism aims to create legal certainty and create the view that only legal norms can be tested using other legal norms. The theory of Legal Positivism views that law is law. Legal Positivism according to Hans Kelsen views that law is a

compelling order for human behavior (law is a coercive order of human behavior), law is the primary rule that determines sanctions [1].

## 2) Corporate Liability Theory

a. Strict Liability Theory: Corporate entities are considered to have responsibility for actions carried out by their shareholders, management, agents, representatives or employees. In the realm of criminal law, the concept of "*strict liability*" indicates that it is not necessary to prove malicious intent or "*men's rea*" related to certain elements that reflect the nature of unlawfulness or "*Actus reus*". However, in this context, intent, recklessness, or knowledge may be required for the elements of other criminal acts [2].

b. Corporate Criminal Theory: Corporations can cause harm to other parties in society, such as humans so that by imposing responsibility for criminal acts committed by corporations is in line with the principle that everyone is equal before the law.[3] Punishing the management is not enough to carry out repression of offenses by or with a corporation, therefore it is also necessary to be able to punish the corporation, and the management, or just the management. The possibility also needs to be expanded to prosecute corporations not only for economic offenses but also for offenses involving (aimed at protecting) the welfare of society (citizens). This is done so that the criminalization of corporations must be in accordance with an integrative stance regarding the purpose of criminalization, namely in its function as a means of prevention (general and specific), community protection, and maintaining community solidarity and retribution.[4] Corporate crime is organizational crime which is one form *white collar crime* with a special form in which grouping against *white collar crime* is:

- a) *White collar crime* individual, small scale with a simple modus operandi;
- b) *White collar crime* individual, large scale with complex operational modes;
- c) *White collar crime* involving corporations; And
- d) *White-collar crime* in the public sector.[5]

c. Vicarious Liability Theory: in general it can be concluded that superiors should be responsible for the actions carried out by their subordinates. As the meaning of the legal concept "*vicarious liability*" is defined as a person's responsibility for actions committed by another person, especially if both are involved in some form of joint activity or joint activity. This doctrine originates from the legal system "*common law*" and is known as "*let the superior answer*," where superiors have secondary responsibility for the actions carried out by their subordinates.[6]

d. Identification Theory: Direct criminal responsibility or "*direct liability*" (which is also known as *non-vicarious*) states that senior executives within a corporation, or individuals who receive delegations of authority from them, are considered to have certain goals and are, in a special way, considered extensions of the corporation itself. Thus, their actions and inner intentions are considered directly as causes of those actions, or as the inner intentions of the corporation. The scope of criminal acts that can be committed by corporations based on this principle is wider than if it is based on the doctrine of "*vicarious*." This theory states that acts or mistakes committed by "senior officials" are identified as acts or mistakes of the corporation. This concept is also known as the "alter ego" doctrine or "organ theory".[7]

It is aggregation: According to this theory, if a criminal act is only committed by one person then it cannot be said to be a criminal act, so there needs to be a combination of acts and mistakes committed by two or more individuals carried out intentionally or negligently at the relevant fault within the corporation. If this reflects an intention to have an evil inner attitude from the act, then liability can be imposed.[8]

## Research methods

This research is legal (legal research) using normative juridical research. The reason researchers use normative research is to produce new arguments, theories or concepts in determining legal certainty, legal systems and legal development.[9] The approach method used is the statutory approach (statute approach) and conceptual approach (conceptual approach), which is done by reviewing all related laws and

regulations as well as discussing and examining concepts, theories and doctrines that discuss the problem. About this approach, the research was carried out in two stages, namely literature study and field research which was only supporting.[10] The data analysis used is qualitative juridical analysis, namely the data obtained, both in the form of secondary data and primary data, is analyzed without using statistical formulas. However, this is done through a process of interpretation hermeneutics.[11]

## **Discussion**

### **A. Disadvantages of Banks with State-Owned Enterprise Status from a Limited Liability Company Perspective**

According to Article 1 point 1 of Law Number 19 of 2003 concerning State-Owned Enterprise, State-Owned Enterprises, hereinafter referred to as State-Owned Enterprise, are business entities whose capital is wholly or largely owned by the state through direct participation originating from separated state assets. Furthermore, State-Owned Enterprise whose main objective is to pursue profits is called a Limited Liability Company (hereinafter referred to as Persero), where the Persero as referred to is in the form of a Limited Liability Company. Furthermore, based on the Law on State-Owned Enterprise, there are Public Liability Companies (hereinafter referred to as Public Perseros), namely Perseros whose capital and number of shareholders meet certain criteria or Perseros that conduct public offerings in accordance with statutory regulations in the capital market sector. In general, banks with State-Owned Enterprise status are in the form of Public Limited Companies (Tbk).

Banks are business entities that collect funds from the public in the form of savings and distribute them to the public in the form of credit and/or other forms in order to improve the standard of living of many people and contribute as income, circulation, indicators and stabilizers of the country's own economy. In the case of banks with State-Owned Enterprise status, they have a dominant role in contributing to state development so the government controls State-Owned Enterprise banks because they involve the possibility of major risks during a crisis, this causes limitations in the scope of movement of State-Owned Enterprise banks [12].

Regarding the phrase "the wealth of the separated State" contained in Article 1 number 1 of the State-Owned Enterprise Law, where the explanation of Article 4 paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprise has defined separated wealth as follows: "What is meant by separated is the separation of State assets from the State Revenue and Expenditure Budget to be used as capital participation in State-Owned Enterprise so that its guidance and management will no longer be based on the State Revenue and Expenditure Budget system, but its guidance and management will be based on the principles of healthy companies." With the definition of the phrase "the wealth of a divided country" Therefore, the State-Owned Enterprise Law differentiates between the position of the State as a public legal entity and the position of the State as a private legal entity in State-Owned Enterprise.

In line with this, Article 2 junction Article 11 of the Law on State-Owned Enterprise, states that the Law on State-Owned Enterprise applies to State-Owned Enterprise, the Articles of Association, and other statutory provisions, and to Persero applies all the provisions and principles that apply to Limited Liability Companies as regulated in the Law. Law Number 1 of 1995 concerning Limited Liability Companies (has been amended by Law Number 40 of 2007 concerning Limited Liability Companies). Based on this, considering that State-Owned Enterprise is in the form of a company, the management of State-Owned Enterprise is also subject to and complies with the applicable provisions according to Law Number 40 of 2007 concerning Limited Liability Companies.

According to the provisions of Article 3 of Law Number 40 of 2007, it is stated that Company Shareholders are not personally responsible for agreements made on behalf of the Company and are not responsible for the Company's losses in excess of the shares they own. However, the provisions referred to do not apply if:

- a. the Company's requirements as a legal entity have not been or are not fulfilled;

- b. The Shareholder concerned, whether directly or indirectly, in bad faith, uses the Company for personal interests;
- c. The relevant Shareholder is involved in an unlawful act committed by the Company; or
- d. The Shareholders concerned either directly or indirectly unlawfully use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

The exceptions above in the Company concept are referred to as Piercing the Corporate Veil. Based on this, apart from the exceptions above, any loss that arises becomes the Company's loss and is considered a business risk.

Likewise with other Company Organs, such as the Board of Directors whose responsibility is limited to Duties, Principals, and Functions whose implementation is in accordance with statutory regulations and the Articles of Association/Bylaws (AD/ART), even the actions of the Directors in the Company must be based on Business Judgment Rule Doctrine. Judgment Rule Doctrine is often used as defense material so that the Board of Directors can be protected and free from legal action. The business Judgment Rule is a concept, where the Company's Directors cannot be held legally responsible for the decisions they make, even if these decisions cause losses to the company, as long as the decisions are made in good faith, with the right goals and methods, on a rational basis and with prudence. [13]

Business Judgment Rule Doctrine comes from a country that adheres to the system of Common Law which is born and rooted in the doctrine of fiduciary duty or the responsibility of the Company's Directors. Business Judgment Rule arises as a result of having implemented its fiduciary duty by a Director, viz duty of skill and care, then all errors that arise after implementing this principle, have the consequence that the Board of Directors is exempt from personal responsibility if an error occurs in their decision.[14]

In Indonesia, concept of Business Judgement Rule towards directors was adopted in Article 97 paragraph 5) of Law Number 40 of 2007 concerning Limited Liability Companies, which reads

"Members of the Board of Directors cannot be held responsible for losses as intended in paragraph (3) if they prove:

- a. The loss was not due to his fault or negligence;
- b. Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company;
- c. Have no conflict of interest, either directly or indirectly, regarding management actions that result in losses; And
- d. Have taken action to prevent the occurrence or continuation of such losses. "

The four conditions mentioned above are cumulative, that is, they must be fulfilled in their entirety so that the Board of Directors can be free from personal responsibility. The conditions above are essentially the basis for the application of the doctrine Business Judgment Rule in defense of the Board of Directors. Directors cannot take refuge under principles Business Judgment Rule when the decision he made turns out to contain elements fraud, conflict of interest, legality, and gross negligence.[15]

Based on the description above, in banking practices, especially in the management of Banks with State-Owned Enterprise status, if Shareholders and Directors carry out management professionally, adhere to the principle of prudence, prioritize risk management aspects, guide Business Judgement Rule and Piercing the Corporate Veil, then any loss that arises becomes the company's risk [16], even though the majority of capital invested in a bank with State-Owned Enterprise status is sourced from the State.

## **B. Disadvantages of Banks with State-Owned Enterprise Status in the Perspective of Corruption Crimes**

Whereas according to the provisions of Article 4 of Law Number 19 of 2003 concerning State-Owned Enterprises, State-Owned Enterprise capital is and comes from separated state assets, and state capital participation in the context of establishing or investing in State-Owned Enterprise comes from the State Revenue and Expenditure Budget, reserve capitalization and other sources. Capital participation, namely an attempt to own a new or existing company, by making a capital deposit into the company. Meanwhile, government capital participation is the transfer of ownership of assets which were originally unseparated assets into assets which are separated to be calculated as capital/shares. Government capital participation is part of investment in the form of providing capital, both initial capital participation and additional capital for efforts to increase the ability of organizations/companies to carry out their operational activities.

Government-owned banks are state finances limited to the number of shares in the bank, meaning that state financial participation in State-Owned Enterprise/BUMD banks is state assets that have been separated and become company capital. When state assets have been separated, these assets no longer fall into the realm of public law but private law so that if a "loss" occurs, the resolution is based on applicable regulations outside the provisions of public law, so it cannot be categorized as a criminal act of corruption.

However, to find out whether the capital participation mentioned above is included in State Finance, it is necessary to know the scope of State Finance. The scope of State Finance is regulated in Article 2 of Law 17 of 2003 concerning State Finance, the scope of State Finance includes, among other things, assets separated from state companies/regional companies and assets of other parties obtained using facilities provided by the Government.

Regarding the definition of a state company as referred to in Article 2 letter g of the State Finance Law above, Article 1 point 5 of the State Finance Law states that "a State Company is a business entity whose capital is wholly or partly owned by the Central Government". Based on these provisions, the norms contained in Article 2 letter g of the State finance law apply to state-owned enterprise in the form of perum and State-Owned Enterprise in the form of Persero. Whether the wealth owned by State-Owned Enterprise in the form of Perum (whose capital is completely owned by the state) or State-Owned Enterprise in the form of Persero (whose capital can be partially owned by the private sector) is State Finance.

Based on this, State-Owned Enterprise capital originating from state/government capital participation is State Finance (see Article 2 of Law 17 of 2003 concerning State Finance juncto Article 4 of Law Number 19 of 2003 concerning State-Owned Enterprises) because it is capital originating from state/government facilities. The following is an example of a criminal act of corruption that is associated with State-Owned Enterprise losses, which is related to the granting of credit by Bank SPK) uses the names of the three CVs. The SPK was to be submitted for Light Infrastructure Credit (KRING) at Bank five billion eight hundred seventy-six million five hundred thousand rupiah) in reality never existed.

This case falls into the realm of criminal acts of corruption even though the basis of the case is that the granting of credit was due to state losses from the actions of the perpetrators. The criminal act of corruption is a formal offense, where the criminal act of corruption is said to have occurred if the elements of the act formulated have been fulfilled, it does not need to cause consequences. A formal offense focuses on an act that is prohibited, in essence the law does not include any consequences of the act, so that in a formal offense, an act is considered complete if the perpetrator has completed the series of acts formulated in the offense formula.[17] "...can be detrimental to State Finances or the State Economy...", in this sentence it can be interpreted that both real losses (actual loss) or which is only potential, so this element does not need to be proven or must be proven.[18]

Following is also the Supreme Court's jurisprudence regarding losses to State-Owned Enterprise which are categorized as criminal acts of corruption, namely Decision Number 121/Pid.Sus/2020. The case in this decision is a criminal act of corruption related to PT Pertamina as a State-Owned Enterprise with the defendant Ir. Galaila Karen Kardinah aka Karen Galaila Agustianwan aka Karen Agustianwan. The consideration of the Panel of Cassation Judges regarding State Finances is based on the Constitutional Court Decision Number 01/PHPUPres/XVII/2019 dated 27 June 2019. As is known, in the cassation decision, the

Panel of Cassation Judges, the actions committed by the Defendant were not categorized as Criminal Offences.

Apart from that, there is Constitutional Court Decision Number 48/PUU-XI/2013, Constitutional Court Decision Number 62/PUU-XI/2013, Constitutional Court Decision Number 59/PUU-VI/2018 and finally reaffirmed in Decision Number 26/PUU- No. Thus it can be concluded that capital participation from the State/APBD to BUMD/Regional Companies is separated and **included in the State's assets/finances**.

With the Constitutional Court's decision, it can also be seen that the Constitutional Court has differentiated State-Owned Enterprise as a business entity from other business entities as private legal entities. The main differentiating element is that the separation of State assets does not mean that State-Owned Enterprise assets are separated from State assets because from the perspective of the transactions that occur, it is clear that this separation cannot be constructed as a transfer of ownership. Therefore, State-Owned Enterprise assets remain State assets and the State's authority in the field of supervision remains valid. This means that in managing State finances, State-Owned Enterprise also applies constitutional supervision, which is the function of the DPR and the Supreme Audit Agency, using different audit principles. The confirmation regarding the assets of State-Owned Enterprise Persero, which is part of the state's assets, also ensures that losses to banks with State-Owned Enterprise Persero status are state losses. Therefore, losses to banks with State-Owned Enterprise status can be directly subject to the Corruption Eradication Law. However, this matter cannot be applied if the act is carried out by a subsidiary of a State-Owned Enterprise. This is as stated in the Constitutional Court Decision Number 01/PHPUPres/XVII/2019 dated 27 June 2019, and was used as a Legal Consideration by the Panel of Cassation Judges in Decision Number 121K/Pid.Sus/2020.

### **Conclusion**

Based on the PT Law which adheres to the concept Business Judgement Rule as can be seen from Article 97 paragraph (5) which essentially states that members of the Board of Directors cannot be charged with legal responsibility, as long as they fulfill the elements of the provisions of Article 97 paragraph (5). Meanwhile, based on the State-Owned Enterprise Law, banks with State-Owned Enterprise status that experience losses can be charged with legal responsibility as a criminal act of corruption. This is because in state-owned banks, state finances are included as separate state assets, unless a subsidiary of the company carries out the detrimental act.

### **Suggestion**

Banks and banking are characterized as the most heavily regulated based on their regulatory aspects. Therefore, in relation to the bank's activities as a State-Owned Enterprise, legal risks resulting from the actions of members of the Board of Directors should be specifically regulated. This is based on the idea that funds in state-owned banks do not only come from separated state assets, but also public funds which are entrusted to the management of the bank.

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