

The Application of Business Judgment Rule Principles: The Protection for State-Owned Enterprises Directors to Business Risk Failure

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How to cite : Anita Kamilah and Trini Handayani. "The Application of Business Judgment Rule Principles: The Protection for State Owned Enterprises Directors to Business Risk Failure". *Unifikasi : Jurnal Ilmu Hukum*. 8(1). 2021.18-27. DOI : 10.25134/unifikasi.v8i1.3927
Submitted : 04-10-2020 Revised : 14-01-2021 Accepted : 23-02-2021

Abstract : State-owned enterprises have a strategic position in realizing the mandate of the 4th paragraph of the Preamble of the 1945 Constitution. However, the absence of synchronization of laws and regulations in interpreting the State-Owned Enterprises fund as separated state assets, creates legal uncertainty for the Board of Directors when losses arise due to business risks. This condition raises the issue of the board of directors' responsibilities in managing State-Owned Enterprise's finances. Thus, there is the need to apply the Principles of Business Judgment Rule in protecting the Directors from State-Owned Enterprises losses. The approach employed in this study was juridical normative research. Specifically, this study used descriptive analysis. The data were analyzed qualitatively. The findings revealed: (1) State-owned enterprises have played a role in realizing Indonesian Economic Democracy with their distinctive business characteristics, a profit-seeking company and social services provider to the community; (2) State-owned enterprise's losses are not related to state finances. This is because state equity participation has been transformed into state shares/funds to State-owned Enterprises whose management is based on the provisions of Limited Liability Companies; and (3) The principle of the Business Judgment Rule provides protection for the Board of Directors. It states that they can not be held accountable for the losses in state-owned Enterprises if the management of State Owned Enterprises is based on the following principles: (a) due of care; (b) due of skill; (c) good faith, and (d) for the best interest of the company. In conclusion, BUMN Persero that experiences losses due to business risks cannot be categorized as state financial losses. In addition, according to the principles of business judgment rule, Directors cannot be held accountable.

Keywords : Business Judgment Rule, Business Losses, State-Owned Enterprises

Penerapan Prinsip Business Judgment Rule sebagai Bentuk Perlindungan Direksi Badan Usaha Milik Negara Akibat Kegagalan Risiko Bisnis

Abstrak : Badan Usaha Milik Negara memiliki posisi strategis dalam mewujudkan amanat Pembukaan UUD 1945 alinea ke-4. Namun tidak adanya sinkronisasi peraturan perundang-undangan dalam menafsirkan modal Badan Usaha Milik Negara sebagai kekayaan negara yang dipisahkan, menimbulkan ketidakpastian hukum Direksi ketika timbul kerugian yang diakibatkan risiko bisnis. Kondisi tersebut menimbulkan persoalan tanggung jawab Direksi dalam pengelolaan keuangan Badan Usaha Milik Negara, dan perlunya penerapan Prinsip Business Judgment Rule dalam melindungi Direksi akibat kerugian Badan Usaha Milik Negara. Metode pendekatan yang digunakan dalam penelitian yuridis normatif, spesifikasi penelitian deskriptif analisis, dan analisis data dilakukan secara kualitatif. Hasil penelitian : (1) Badan Usaha Milik Negara telah berperan dalam mewujudkan Demokrasi Ekonomi Indonesia dengan karakteristik usahanya yang khas sebagai perusahaan yang mencari keuntungan juga penyediaan layanan sosial masyarakat; (2) Kerugian Badan Usaha Milik Negara bukan merupakan kerugian keuangan negara, karena penyertaan modal negara telah bertransformasi menjadi saham/modal negara pada Badan Usaha Milik Negara yang pengelolaannya didasarkan pada ketentuan tentang Perseroan Terbatas; dan (3) Prinsip Business Judgment Rule memberikan perlindungan bagi Direksi untuk tidak dapat dimintai pertanggungjawaban atas kerugian Badan Usaha Milik Negara apabila pengurusan Badan Usaha Milik Negara didasarkan pada prinsip: (a) due of care; (b) due of skill; (c) good faith, dan (d) for the best interest of the company. Kesimpulan, BUMN Persero yang mengalami kerugian akibat risiko bisnis, tidak dapat dikategorikan sebagai kerugian keuangan negara, dan sesuai prinsip business judgment rule Direksi tidak dapat dimintai pertanggungjawaban.

Kata Kunci : Badan Usaha Milik Negara, Kerugian Bisnis, Business Judgment Rule.

INTRODUCTION

State-Owned Enterprises (BUMN) is one of the business actors apart from the private sector and cooperatives who have a big responsibility mandated in the Preamble of the 1945 State Constitution, to realize Indonesia as an independent, developed, righteous, and prosperous country, with its distinctive business characteristics apart from being a profit-seeking company and social services provider to the community.¹ Based on data from the statistical center in 2018, the number of BUMNs company reached to 115. They operate in almost all sectors of the economy including banking, energy, food, infrastructure, and sea, land, and air transportation with total assets reaching 8,201.97 trillion rupiahs. It increases by 12.26 percent from the previous year. The total equity also improved from the previous year, amounting to 2,819.16 trillion rupiahs which increased by 14.41 percent.² The large contribution of BUMNs to the State Budget (APBN) revenue reached an IDR of 257.1 trillion. It consists of dividend payments of IDR 45.1 trillion and BUMN taxes of IDR 212 trillion.³ There are several parameters that can be used to determine the success of a BUMN in carrying out its duties and roles properly. First, market domination, the success as the market leader in the midst of intense competition in the industry that becomes its core business. Second, brand awareness and brand image, the success of maintaining the company's image and reputation in the midst of intense business competition. Third, customer service quality, the success in providing good service to customers offline and online. Fourth, social economy contribution, providing a big contribution of socio-economic to society.⁴

Based on the above assessment parameters, and assessment of revenue, profit, assets, and market capitalization, Forbes, the United States business and financial magazine in 2019, placed four state-owned enterprises (BUMN) as the 2,000 best companies in the world. Banks Mandiri is ranked 11th in the world. It beats top global companies such as VW, IBM, Mastercard, Netflix, Nestle, Coca-Cola, Ferrari, and Facebook in the World's Best Employers Version ranking. Accordingly, the company tries to continually improve employee development from the aspect of happiness, capabilities, and productivity. Meanwhile, Telkom is ranked 112, BNI placed in 157, and finally BRI is in 186 in the world.⁵

In carrying out their duties and responsibilities as the front guard of the national economy, they have to follow the Law No. 19 of 2003 on State-Owned Enterprises, Law No. 40 of 2007 on Limited Liability Companies, Law No. 17 of 2003 on State Finance, Law no. 1 of 2004 on State Treasury, Law no. 15 of 2006 on the Supreme Audit Agency, Law no. 15 of 2004 on Audit of Management and Accountability of State Finances, and Law No. 31 of 1999 on Eradication of Corruption Crime.⁶ The large number of statutory provisions that are related to BUMN becomes one of the external challenges faced by the Ministry of BUMN. This is because there is a harmonization between one provision with another. For example, the interpretation of BUMN assets as state assets. Thus, if the

¹ Statistik Badan Usaha Milik Negara/Badan Usaha Milik Daerah Bab III Ulasan Ringkas, "Subdirektorat Statistik Keuangan", Jakarta: Penerbit BPS RI, 2018, p. 25.

² Ibid., 34.

³ Puput Ady Sukarno, *Kemenkeu : Kontribusi BUMN kepada APBN Terus Meningkat* [https:// ekonomi.bisnis.com/read/ 20190625/10/ 937757/ kemenkeu kontribusi-bumn-kepada-apbn-terus-meningkat](https://ekonomi.bisnis.com/read/20190625/10/937757/kemenkeu-kontribusi-bumn-kepada-apbn-terus-meningkat). Accessed on August 13th, 2020.

⁴ Ali Rahman, September, 27th 2019, *Peran Vital BUMN untuk Pembangunan Ekonomi Indonesia*, [https:// indopos.co.id/read/2019/09/27/197010/ini-peran-vital-bumn-untuk-pembangunan-ekonomi-indonesia/](https://indopos.co.id/read/2019/09/27/197010/ini-peran-vital-bumn-untuk-pembangunan-ekonomi-indonesia/). Accessed on August 13th, 2020.

⁵ Bangga 4 BUMN Jadi Perusahaan Terbaik Dunia untuk Bekerja [https:// www.cnbcindonesia.com/news/20181024185412-4-38893/ bangga-4-bumn-jadi perusahaan-terbaik-dunia-untuk-bekerja](https://www.cnbcindonesia.com/news/20181024185412-4-38893/bangga-4-bumn-jadi-perusahaan-terbaik-dunia-untuk-bekerja). Accessed on August 13th, 2020.

⁶ Rukly Mokoginta, "Analisis Hukum Bisnis Tentang Kerugian Keuangan Pada Badan Usaha Milik Negara (BUMN)", *Lex Crimen*, Vol. IV, No. 6, 2015, p. 51.

loss appears in BUMN, some parties will define it as state loss and qualifies it as a criminal act of corruption.⁷

This condition raises concerns about legal uncertainty against the Board of Directors. This is because they can be prosecuted in court for committing actions that harm the state finances in managing the BUMN they lead.⁸ As in the case of the Directors of PT. Adhi Karya TBMN, who was convicted of committing a criminal act of corruption in 2014. This is because he was involved in irregularities and tender engineering when the BUMN engaged in the infrastructure sector became the executor of the Hambalang project. In the same year, the former President Director of PT Merpati Nusantara Airlines was found guilty. He was performing a criminal act of corruption related to aircraft leasing using a security deposit.⁹ Finally, the case of R.J. Lino. Richard Joost Lino (R.J. Lino), the managing director of PT Pelindo II (Persero), who was officially dismissed from his position by shareholders on December 23, 2015, after the KPK named Lino as a suspect of alleged corruption in the procurement of Quay Container Crane (QCC) in 2010.¹⁰ Responding to this problem, it is interesting to conduct a study on "law as it is written in the books", focusing on the following research questions: (1) What is the function and role of BUMN in realizing Indonesian economic democracy; (2) What is the Board of Directors responsibilities for losses to BUMN; and (3) Could the application of principle of the Business Judgment Rule protect the directors from losses to BUMN.

RESEARCH METHODS

The study employed a juridical normative approach by studying and examining legal principles, especially the provisions related to the principle application of business judgment rule as a form of protection for BUMN directors due to business risk failure. This study used descriptive research analysis to provide a complete and comprehensive picture of the principle application of business judgment rule using secondary data covering primary legal materials. It was in the form of statutory provisions related to the object under study. The secondary legal materials cover concepts and opinions related to the principle application of business judgment rule and are supported by tertiary legal materials that serve as materials supporting primary legal materials and secondary law materials.¹¹ Finally, the data analysis was carried out qualitatively, the research methodology without involving formulas and numbers.

RESULTS AND DISCUSSION

1. Function and Roles of BUMN in Realizing Indonesian Economic Democracy

Article 1 paragraph (3) The third amendment of the 1945 Constitution which was ratified on November 9, 2001, through State Gazette Number 13 of 2006, has had a major influence on the change in the concept of a rule of law in Indonesia from *rechtsstaat* or rule of law to a "rule of law based on Pancasila".¹² As stated in the Preamble to the 1945 Constitution, Pancasila is derived from the Indonesian socio-cultural values, which is the "Staatsfundamentalnorm" of the Unitary State of the Republic of Indonesia which, according to Jimly Asshiddiqie, has the following characteristics:

⁷ Ibid., 47.

⁸ Dwidja Priyatno, "Business Judgement Rule Dalam Pengelolaan Anak Perusahaan BUMN", *Makalah, Diskusi Panel, Ruang Udaya Gedung Graha Elnusa, Jakarta, November, 19th, 2019.*

⁹ Ibid.

¹⁰ Henny Juliani, "Pertanggungjawaban Direksi BUMN Terhadap Perbuatan yang Mengakibatkan Kerugian Keuangan Negara", *Masalah-Masalah Hukum*, Jilid 45, No. 4, Fakultas Hukum Universitas Diponegoro year, 2016, p. 300.

¹¹ Kornelius Benuf dan Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer", *Jurnal Gema Keadilan*, Vol. 7, No. 1, 2020, p. 26.

¹² Sulaiman, "Epistemologi Negara Hukum Indonesia (Rekonseptualisasi Hukum Indonesia)", *Seminar Nasional Hukum Fakultas Hukum Universitas Negeri Semarang*, Vol. 2, No. 1, 2016, p. 547.

(a) Supremacy of Law; (b) Equality Before the Law; (c) the Principle of Legality (Due Process of Law); (d) Serves as a means to achieve the goal of the state (*Welfare Rechtsstaat*).¹³

The Indonesian welfare state as stated in the preamble of the 1945 Republic of Indonesia cannot be separated from Jeremy Bentham's opinion (1748-1832) through utilitarianism which views that law must guarantee the greatest happiness for the greatest number whose ideology also received support from John Stuart Mill (1806-1873) and Rudolf Von Jhering (1818-1889).¹⁴ Asshiddiqie, as quoted by W. Riawan Tjandra, explained that in the concept of a welfare state, the state is required to expand its responsibilities to the socio-economic problems faced by a number of people.¹⁵

In realizing the goals of Welfare State, the national economic system should be based on the notion of economic democracy as stipulated in Chapter XIV of Article 33 of the 1945 Constitution Amendment 2002 entitled Indonesian Economy and Social Welfare, which places the welfare of society and the position of the people in a "central-substantial" position. Therefore, paragraph (2) of Article 33 of the 1945 Constitution is formed, that: "... Production branches which are important for the state and which control the lives of the people in general, are controlled by the state ...",¹⁶ whose duties and responsibilities are in accordance with the Law. No. 19 of 2003 given to State-Owned Enterprises (BUMN). According to W. Friedmann in the theory of "mixed economic system", the placement of BUMN in production branches which are important for the State and control the lives of many people is an implementation of the role of the state as a regulator, entrepreneur, provider, and umpire".¹⁷ The role of the state as a regulator has been implemented juridically with the passing of Law No. 19 of 2003 which justifies BUMN as Majority Shareholders who have a dominant position and strong authority in directing any BUMN policies, as well as providing clarity on the separation aspects of responsibilities between State-Owned Enterprises and the State itself. Then, BUMN has represented the government's function as an entrepreneur, through its role as a business agent to generate profits and a development agent as an implementer of public policies from the government in facing the development of the national economy and the global economy. As a provider, BUMN is a government tool in running a business to provide goods and/or services of high quality and adequate for the lives fulfillment of many people. Lastly, the role of the government as umpire is by placing BUMN as the "holding company" for all economic and business activities in Indonesia. Additionally, it is also actively participating in providing guidance and assistance to low economic entrepreneurs, cooperatives, and the community.¹⁸ Through the four roles above, BUMN has succeeded in realizing Indonesian economic democracy as mandated in the Indonesian national constitution.

2. The Board of Directors' responsibilities in BUMN Financial Management.

The Board Directors is an organ of BUMN that has a central role in the progress and retreat of BUMN. Thus, it is given full authority and responsibility for the management of BUMN as well as

¹³ Jimly Assiddiqie, "Cita Negara Hukum Kontemporer", *Makalah*, Disampaikan Pada Orasi Ilmiah pada Wisuda Sarjana Fakultas Hukum Universitas Sriwijaya, Palembang, 2004, dan Notonogoro, *Pancasila Dasar Falsafah Negara, Kumpulan Tiga Uraian Pokok-pokok Persoalan Tentang Pancasila*, Jakarta: Bina Akasara, 1983, p. 53.

¹⁴ Tanya, BL. Dkk, *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, 2010, p. 90-93, dan Cahyadi A dan Manullang, EF, *Pengantar ke Filsafat Hukum*, Jakarta: Kencana Prenada Group, 2008, p. 59-60, dan Santoso, HMA, *Hukum, Moral, dan Keadilan, Sebuah Kajian Filsafat Hukum*, Jakarta: Kencana Prenada Media Group, 2014, p. 58-60.

¹⁵ W. Riawan Tjandra, *Hukum Administrasi Negara*, Yogyakarta: Penerbit Universitas Atma Jaya, 2008, p. 9.

¹⁶ Elli Ruslina, "Makna Pasal 33 Undang-Undang Dasar 1945 Dalam Pembangunan Hukum Ekonomi Indonesia", *Jurnal Konstitusi*, Vol. 9, No. 1, 2012, p. 51.

¹⁷ Jefri Porkonanta Tarigan, "Unconstitutionality of Unbundling System in the Business of Providing Electricity", *Jurnal Konstitusi*, Vol. 15, No.1, 2018, p. 192.

¹⁸ Ibid.

representing them both inside and outside the court based on the provisions of the article of association.¹⁹ Therefore, in carrying out its duties and authorities, the Board Directors must follow the two basic principles. The first is a trust given by the company to him (fiduciary duty) and the second refers to the ability and prudence of the Board Directors' actions (duty of skill and care).²⁰

BUMN as the forefront of national development makes a major contribution to state revenue (APBN) in the form of dividends and taxes, contribution to the balance sheet/state assets. This can be in the form of BUMN retained earnings and an increase in market value as well as contributing to economic growth and improving the welfare of public companies and private sector whose revenues are visible to the public. However, the empirical fact is that there are many BUMN that are categorized as unhealthy and even experience losses which have implications for detrimental to state finances. Based on the 2018 Central Government Financial Report, 12 out of 115 State-Owned Enterprises (BUMN) suffered losses, and in 2018 PT Asuransi Jiwasraya (Persero) led BUMN losses with a value of IDR 15.83 trillion, due to the decline in asset value and swelling in Jiwasraya Insurance obligations. In December 2018, the company's assets amounted to an IDR of 36.82 trillion, while liabilities reached an IDR of 47.06 trillion. Thus, the equity value was minus to IDR of 10.25 trillion and recorded a loss IDR of 13.08 trillion, and the case of PT Asuransi Jiwasraya (Persero) 's loss is being investigated by the Attorney General's Office of the Republic of Indonesia for alleged corruption through investments that violate the principles of corporate governance.

The inconsistency of statutory regulations related to BUMN institutions has resulted in the obscurity of the law at the normative level. This discrepancy covers in Law Number 19 of 2003 concerning BUMN, Law Number 17 of 2003 concerning State Finances, and Law Number 40 of 2007 concerning Limited Liability Companies (UUPT), which have an impact on differences regarding the responsible parties involved for the losses of BUMN businesses. The first opinion argues that the Board of Directors can be held accountable for the BUMN losses. This is based on the idea that BUMN is a business entity that is wholly or most of its capital is owned by the state through direct participation. This is originating from separated state assets, namely state assets originating from the Revenue Budget and State Expenditures (APBN) to be used as state capital participation in Persero (limited liability company) and/or housing estate and other limited liability companies.

Talking about BUMN capital as separated state assets originating from the State Budget, it is related to Law No. 17 of 2003 on State Finances, all the state rights and obligations that can be valued in money and all forms of money or goods that can be used as state property in connection with the implementation of these rights and obligations, whether managed by themselves or by other parties in the form of money, securities, accounts receivable, goods, and other rights that can be valued in money, including assets separated from state /regional companies. Therefore, BUMN losses are considered losses to state finances. This is corroborated by the terminology of state finances in Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption. It is generally stated that what is meant by state finances is all state assets in any form, which separated or not separated, including all parts of state assets and all rights and obligations arising from: (1) Being in control, management, and accountability of state agency officials at the central and regional levels; and (2) Being in control, management and accountability of State-Owned Enterprises / Regional-Owned Enterprises, foundations, legal entities, and companies

¹⁹ Henny Juliani, "Pertanggungjawaban Direksi BUMN Terhadap Perbuatan yang Mengakibatkan Kerugian Keuangan Negara", *Masalah-Masalah Hukum*, Jilid 45, No. 4, Fakultas Hukum Universitas Diponegoro Tahun, 2016, p. 300.

²⁰ Chatamarrasjid Ais. *Penerobosan Cadar Perseroan dan Soal-soal Aktual Hukum Perusahaan*. Bandung: Citra Aditya Bakti, 2004, p. 71.

that include state capital or companies that include third-party capital based on agreements with the state.²¹

Based on the aforementioned description, there is a similar formula between Law No. 17 of 2003 on State Finances, with Law Number 20 of 2001 on the Eradication of Corruption in which state finances covers separated state assets that are under the control, management, and accountability of BUMN. This was also strengthened by the results of the Constitutional Court Decisions Number 48 / PUU-XI / 2013 and Number 62 / PUUXI / 2013 which rejected the constitutional review. In particular, Article 2 letter g and i of Law Number 17 of 2003 concerning State Finances against Article 23 of the NRI of the 1945 Constitution and other articles petitioned by the applicant. Through this decision, the Constitutional Court maintains the view that capital included in BUMN is part of state finances.²² The view is right; the country's assets have been transformed into BUMN capital as business capital whose management is subject to the business judgment rules. However, the separation of state assets does not make it turn into BUMN independent assets. As a result, there is no legal transformation of state / public finance to private finance to manage state assets separated by BUMN. The Constitutional Court's decision has a broad impact on all cases that occur in the future. This is because the decision of the Constitutional Court is erga omnes, where unlawful acts of BUMN Directors that result in state financial losses can be subject to administrative sanctions and/or criminal sanctions. This is because Directors as BUMN organs are matched with state officials who carry out strategic functions in realizing the goals of the state and public services.

The second view argues BUMN Persero that experiences losses cannot be categorized as state financial losses. This is based on the provisions of Article 2A paragraph (1-5) Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. It is stated that capital participation originating from state assets separated from BUMN or Limited Liability Companies, transformed into shares/state capital in BUMN or Limited Liability Companies. Thus, they become assets of BUMN or Limited Liability Companies and are recorded as long-term investments in accordance with the percentage of Government ownership in BUMN or Limited Liability Companies, whose management is no longer based on government regulations, but based on the provisions on Limited Liability Companies. This is in line with the provisions of Article 1 paragraph (2) and Article 11 of Law Number 19 of 2003 concerning State-Owned Enterprises which states that a Limited Liability Company, hereinafter referred to as a Persero, is a BUMN in the form of a limited liability company. Thus, all provisions and principles apply to Limited Liability Companies, according to Law No. 40 of 2007 and the view of the Common Law system, a major characteristic of the corporation lies in this distinction between the business and its owners.²³

Several legal experts such as Erman Rajagukguk, Arifin P. Soeria Atmadja, and Hikmahanto Juwana reinforce the above opinion that BUMN finance is not state finance but BUMN finance itself as a legal entity. Thus, if there is a loss to BUMN as a result of business risk, the loss is not mentioned as state losses but BUMN losses. This is because if the Persero experiences bankruptcy, it

²¹ Desca Putra Yana dan Dian Puji M. Simatupang, *Pertanggungjawaban Direksi Pertamina Dalam Dugaan Persekongkolan Tender Yang Dilakukan BUMN (Analisis Hukum Keuangan Publik Terhadap Divestasi Dua Unit Kapal Tanker VLCC PT. Pertamina)*, 12.

²² Isis Ikhwanasyah, An-an Chandrawulan dan Prita Amalia, "Optimalisasi Peran Badan Usaha Milik Negara (BUMN) pada Era Masyarakat Ekonomi Asean (MEA)", *Jurnal Media Hukum*, Vol. 25, No. 2, 2018, p. 151.

²³ Don Hofstrand dan Inda Rahadiyan, "Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN", *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 4, No. 20, 2013, p. 628.

is not mentioned as state bankruptcy, but the Persero's bankruptcy. The state only suffers as a shareholder and does not interrupt the APBN/APBD finances.²⁴

Therefore, the provisions of Article 2 Letter g of Law No. 17 of 2003 concerning State Finance which states State Finance includes state assets/regional assets that are managed independently or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets separated from state/regional companies, as well as the application of the principle of corruption as regulated in Law No. 31 of 1999 against the Board of Directors due to the loss of BUMN greatly hampers the Board of Directors in carrying out their duties and responsibilities. This is because it confuses BUMN losses with state losses. Consequently, there is a demand for presenting a criminal act of corruption.²⁵ This condition is not in accordance with the legal principle of the position of a limited liability company as a separate legal entity,²⁶ which according to the Common Law system, a major characteristic of the corporation is this distinction between the business and its owners. The fatwa of the Supreme Court of the Republic of Indonesia which shows the separation of BUMN assets from state assets, is shown in the handling of several non-performing loans (NPL) at PT.BRI (Persero) tbk., PT. Bank BNI (Persero) tbk., And PT. Bank Mandiri (Persero), tbk., Where receivables or bills by state-owned banks are not state claims. This is because state-owned banks are subject to the provisions of the Limited Liability Company Law.²⁷

Studying the two differences of opinion regarding the responsibility of the Board of Directors due to BUMN losses, the authors view that BUMN losses cannot be accumulated as state losses. This is because in running a Persero, the BUMN Law has stipulated provisions and principles for PT which have a separation of wealth between founders and also the administrators. Shareholders, commissioners, and directors can only be held accountable for the losses of BUMN Persero if in carrying out their duties and responsibilities, it is contrary to the articles of association or deviates from the PT Law. The loss becomes personal responsibility, not criminal responsibility. Losses of BUMN Persero can become a criminal act if there is an act against the law such as giving and receiving bribes and manipulating books. Thus, it fulfills the elements of a criminal act /is in the realm of corruption.²⁸

3. The application of Business Judgment Rule Principle as a Form of Protection for BUMN Directors.

The United States with the Common Law legal system has a major role in developing the doctrine of business judgment rule, as a derivative of Corporate Law which limits the space and freedom of courts in the United States to adjudicate the business decisions of the Board of Directors. This is for the reason that judges do not have sufficient competence in the business field. Accordingly, they do not deserve to examine the Board of Directors' decisions as applied in the cases of Delaware Supreme Court and *Grobow v. Perot*.²⁹ Black's Law Dictionary defines business judgment rule as the presumption that in makin business decision not involving direct self interest or

²⁴ Hikmahanto Juwana, "Beda Pengelolaan", *Majalah Konstitusi*, No. 79, September, 2013, p. 20.

²⁵ Erman Rajagukguk, "Bukan Keuangan Negara", *Majalah Konstitusi* 79, September, 2013, p. 20, dan Arifin P. Soeria Atmadja. *Keuangan Publik Dalam Perspektif Hukum. Teori, Kritik, dan Praktik*. Jakarta: RajaGrafindo Persada, 2009, p. 104.

²⁶ Inda Rahadiyan, "Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN", *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 4, No. 20, 2013, p. 633.

²⁷ Inda Rahadiyan, "Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN", *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 4, No. 20, 2013, p. 631.

²⁸ Ahmad Mahyani, "Tanggung Jawab Pidana Direksi BUMN Yang Merugi", *Jurnal Hukum Bisnis Bonum Commune*, Vol. 2, No. 1, 2019, p. 5-6.

²⁹ Hendra Setiawan Boen. *Bianglala Business Judgment Rule*. Jakarta: Tatanusa, 2008, p. 100.

self dealing, corporate directors act in the honest belief that their actions are in the corporation best interest.³⁰

Malaysia, with its common law system, also implements the business judgment rule doctrine in its corporate law, as stipulated in Article 73 and Article 132 (1) of the Malaysian Limited Liability Company Law which requires that: "a director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company".³¹ Indonesian company law also adheres to the application of business judgment rule as stipulated in Article 97 paragraph (5) of Law No. 40 of 2007 concerning Limited Perseron, members of the Board of Directors cannot be held accountable for losses as included in Article 97 paragraph (3) if they can prove: (a) Losses arise not because of their mistakes or negligence; (b) Has carried out the management in good faith and prudence for the interest of and in accordance with the aims and objectives of the Limited Liability Company; (c) Has no conflict of interest, either directly or indirectly, over management actions that result in losses; and (d) have taken steps to prevent the loss from arising or continuing.

Referring to Article 3 and Article 11 of Law Number 19 the Year 2003 concerning State-Owned Enterprises which explicitly confirms that all regulations that apply to limited liability companies also apply to BUMN which is in the form of Persero. There is a similar application of business judgment rule concept in company law in the United States, Malaysia, including Indonesian BUMN that in managing the company, the Board of Directors must follow the four principles: (1) due of care; (2) due of skill; (3) good faith, and (4) for the best interest of the company.³² If these principles have been implemented by the Board of Directors, but then in running the company the BUMN experiences a loss as a result of business risk, then based on the concept of business judgment rule implemented in Article 97 paragraph (5) of Law No. 40 of 2007 on Limited Liability Companies, members of the Board of Directors cannot be held responsible for such losses.

CONCLUSION

Referring to the aforementioned description, it can be concluded that BUMN through their roles as regulators, entrepreneurs, providers, and umpire have succeeded in realizing Indonesian economic democracy as mandated in the Indonesian national constitution. BUMN Persero that experience losses as a result of business risks cannot be categorized as losses to state finances, but losses to BUMN. This is because state capital participation is transformed into shares/state capital in BUMN whose management is no longer based on government regulations but is based on provisions concerning Limited Liability Companies. The application of business judgment rule in company law including in BUMN provides protection for BUMN Directors who cannot be held accountable for BUMN losses only if the management of the company has carried out its prudential principles, and is based on good faith for the interests and objectives of the Company.

SUGGESTION

To further optimize the role of BUMN in improving the national economy, it is necessary to make clear arrangements of BUMN. Thus, they can avoid legal disharmony which results in the uncertainty for the Board of Directors in carrying out their duties and responsibilities. In addition, in carrying out its duties and powers, the Board of Directors must continue to comply with the

³⁰ Bryan A. Garner. *Black's Law Dictionary*. America: Thomson Group, 2010, p. 212.

³¹ Aiman Nariman. *Commercial Applications of Company Law in Malaysia*. Malaysia: CCH Wolters Kluwer Business, 2008, p. 265.

³² Aiman Nariman. *Commercial Applications of Company Law in Malaysia*. Malaysia: CCH Wolters Kluwer Business, 2008, p. 265, dan Chatamarrasjid Ais. *Penerobosan Cadar Perseroan dan Soal-Soal Aktual Hukum Perusahaan*. Bandung : Citra Aditya Bakti, 2004, p. 71.

provisions of fiduciary duty, statutory good faith as adopted in the principle of corporate law. Thus, the Board of Directors can legally apply the principles of the business judgment rule.

REFERENCES

Books.

- Arifin P. Soeria Atmadja. *Keuangan Publik Dalam Perspektif Hukum. Teori, Kritik, dan Praktik*. Jakarta: RajaGrafindo Persada, 2009.
- Ahmad Mahyani, “Tanggung Jawab Pidana Direksi BUMN Yang Merugi”, *Jurnal Hukum Bisnis Bonum Commune*, Vol. 2, No. 1, 2019.
- Aiman Nariman. *Commercial Applications of Company Law in Malaysia*. Malaysia: CCH Wolters Kluwer Business, 2008.
- Bryan A. Garner. *Black’s Law Dictionary*. America: Thomson Group, 2010.
- Cahyadi A dan Manullang, EF, *Pengantar ke Filsafat Hukum*, Jakarta: Kencana Prenada Group, 2008.
- Chatamarrasjid Ais. *Penerobosan Cadar Perseroan dan Soal-soal Aktual Hukum Perusahaan*. Bandung: Citra Aditya Bakti, 2004.
- Hendra Setiawan Boen. *Biaglala Business Judgment Rule*. Jakarta: Tatanusa, 2008.
- Notonogoro, *Pancasila Dasar Falsafah Negara, Kumpulan Tiga Uraian Pokok-pokok Persoalan Tentang Pancasila*, Jakarta: Bina Akasara, 1983.
- Statistik Badan Usaha Milik Negara/Badan Usaha Milik Daerah Bab III Ulasan Ringkas, “Subdirektorat Statistik Keuangan”, Jakarta: Penerbit BPS RI, 2018.
- Santoso, HMA, *Hukum, Moral, dan Keadilan, Sebuah Kajian Filsafat Hukum*, Jakarta: Kencana Prenada Media Group, 2014.
- Tanya, BL. Dkk, *Teori Hukum Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, 2010.
- W. Riawan Tjandra, *Hukum Administrasi Negara*, Yogyakarta: Penerbit Universitas Atma Jaya, 2008.

Journals.

- Don Hofstrand dan Inda Rahadiyan, “Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN”, *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 4, No. 20, 2013.
- Elli Ruslina, “Makna Pasal 33 Undang-Undang Dasar 1945 Dalam Pembangunan Hukum Ekonomi Indonesia”, *Jurnal Konstitusi*, Vol. 9, No. 1, 2012.
- Henny Juliani, “Pertanggungjawaban Direksi BUMN Terhadap Perbuatan yang Mengakibatkan Kerugian Keuangan Negara”, *Masalah-Masalah Hukum*, Jilid 45, No. 4, Fakultas Hukum Universitas Diponegoro Tahun, 2016.
- Isis Ikhwanisyah, An-an Chandrawulan dan Prita Amalia, “Optimalisasi Peran Badan Usaha Milik Negara (BUMN) pada Era Masyarakat Ekonomi Asean (MEA)”, *Jurnal Media Hukum*, Vol. 25, No. 2, 2018.
- Inda Rahadiyan, “Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN”, *Jurnal Hukum IUS QUIA IUSTUM*, Vol. 4, No. 20, 2013.
- Jefri Porkonanta Tarigan, “Unconstitutionality of Unbundling System in the Business of Providing Electricity”, *Jurnal Konstitusi*, Vol. 15, No.1, 2018.
- Kornelius Benuf dan Muhamad Azhar, “Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer”, *Jurnal Gema Keadilan*, Vol. 7, No. I, 2020.
- Rukly Mokoginta, “Analisis Hukum Bisnis Tentang Kerugian Keuangan Pada Badan Usaha Milik Negara (BUMN)”, *Lex Crimen*, Vol. IV, No. 6, 2015.

Sulaiman, “Epistemologi Negara Hukum Indonesia (Rekonseptualisasi Hukum Indonesia)”, Seminar Nasional Hukum Fakultas Hukum Universitas Negeri Semarang, Vol. 2, No. 1, 2016.

Papers.

- Dwidja Priyatno, “Business Judgement Rule Dalam Pengelolaan Anak Perusahaan BUMN”, *Makalah*, Diskusi Panel, Ruang Udaya Gedung Graha Elnusa, Jakarta, November, 19th, 2019.
- Erman Rajagukguk, “Bukan Keuangan Negara”, *Majalah Konstitusi* 79, September, 2013.
- Hikmahanto Juwana, “Beda Pengelolaan”, *Majalah Konstitusi*, No. 79, September, 2013.
- Jimly Assididqie, “Cita Negara Hukum Kontemporer”, *Makalah*, Disampaikan Pada Orasi Ilmiah pada Wisuda Sarjana Fakultas Hukum Universitas Sriwijaya, Palembang, 2004.

Website.

- Ali Rahman, September, 27th · 2019, *Peran Vital BUMN untuk Pembangunan Ekonomi Indonesia*, <https://indopos.co.id/read/2019/09/27/197010/ini-peran-vital-bumn-untuk-pembangunan-ekonomi-indonesia/> Accessed on August 13th, 2020.
- Bangga 4 BUMN Jadi Perusahaan Terbaik Dunia untuk Bekerja <https://www.cnbcindonesia.com/news/20181024185412-4-38893/bangga-4-bumn-jadi-perusahaan-terbaik-dunia-untuk-bekerja>. Accessed on August 13th, 2020.
- Puput Ady Sukarno, *Kemenkeu : Kontribusi BUMN kepada APBN Terus Meningkat* <https://ekonomi.bisnis.com/read/20190625/10/937757/kemenkeu-kontribusi-bumn-kepada-apbn-terus-meningkat>, Accessed on August 13th, 2020.
- Viva Budy Kusnandar, Inilah 12 BUMN yang Mencatat Kerugian Pada 2018, Kementerian Keuangan Tahun 2019, <https://databoks.katadata.co.id/datapublish/2019/12/16/inilah-12-bumn-yang-mencatat-kerugian-pada-2018>, Accessed on August 13th, 2020.