Analysis of the Accountability of Corruption Crimes Due to Losses of Soes Based on the Doctrine of Business Judgement Rule (Study of Supreme Court Decision No. 34/PID. SUS-TPK/2019/PT. DKI)

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ABSTRACT
State-Owned Enterprises (SOEs) in the form of Limited Liability Companies and run by a board of directors and their ranks do not cover the possibility of losses in running the company. If the board of directors takes a decision that harms the company, it will be considered to fulfill the elements of Article 2 paragraph (1) of the Law on the Eradication of Corruption. Business Judgement Rule is one of the doctrines that exist in business law to protect directors and the ranks in legal liability for business decisions they take. The Business Judgement Rule arises as a result of the implementation of fiduciary duties by a board of directors. The Board of Directors required to take full responsibility for the management of the company, in the interests of the company. In carrying out its duties the board of directors is often faced with business decisions that are not in accordance with the agreed business strategy. As in the Supreme Court's Decision 34/PID. SUS-TPK/2019/PT. DKI, a state-owned company board of directors of PT Pertamina is said to be found guilty of corruption offences due to the harm to the state's finances amounting to Rp. 568,066,000,000 as a result of the acquisition or investment in BMG Australia. Thus, the doctrine of Business Judgement Rule should be applied as long as the board of directors can prove the business decisions taken in good faith, and prudence and not enrich themselves.

Keywords: *Business Judgement Rule, Fiduciary Duties*, Direksi, *Corruption*, *State-Owned Enterprises (SOEs),director.*

1. INTRODUCTION

Indonesia is a country of law in accordance with the Constitution of the Republic of Indonesia year 1945 Article 1 paragraph (3), therefore, in order for all kinds of acts of national and state life must have a clear legal basis to ensure the protection and certainty of the law. One of the areas that must have a strong legal basis is the economic field, namely the legal basis for criminal acts related to the economy. *State-Owned Enterprises (SOEs)* contribute positively to the development of the state economy/ income. BUMN in this case consists of Public Companies and Persroan Companies. Organs in limited liability companies consist of the General Meeting of Shareholders, Commissioners, and directors. Each organ in a limited liability company has its own duties and authorities but is closely related and complements each other. The Board of Directors in a Limited Liability Company is the organ of the company that is fully responsible for the management of the company for the interests and purposes of the company representing the company, both inside and outside the court.[1] BUMN in Indonesia plays a very strategic role in the task of carrying out dual functions as agents of development and social function for the welfare of the People of Indonesia. The dual function of SOEs can cause various activities carried out by SOEs can pose risks, both business risks and risks that have criminal implications. Various forms of irregularities and violations that occur in SOEs are usually called business crimes. Corruption crimes according to its development is the most prominent criminal in Indonesia to date. In response to the problem of corruption in Indonesia, legislation was established that aims to provide protection and legal certainty for the people of Indonesia. The regulation is Law No. 31 of 1999 on Eradication of Corruption Crimes as has been refined by Law No. 20 of 2001 on The Eradication of Corruption. State-Owned Enterprises (SOEs) in Indonesia is a tool to cultivate profits. But not always in its activities BUMN earns profits there are also not in accordance with expectations or can be called losses. PT Pertamina in the Supreme Court Decision No. 34/PID. SUS-TPK/2019/PT. DKI which suffered losses of up to Rp. 568,066,000,000 (five hundred sixty-eight billion sixty-six million rupiah) due to the acquisition or investment in basker Manta Gummy Block (BMG) Australia conducted by the former President Director of PT Pertamina. PT Pertamina can get protection

by using the Doctrine of Business Judgement Rule.Business Judgement Rule is one form of legal protection for directors and their ra to be responsible for business decis taken to cause losses to the company as long as the decisions taken are based on good faith, prudence. Indonesia adopts the doctrine of Business Judgement Rule in Article 97 paragraph (5) of Law No. 40 of 2007 concerning Limited Liability Companies.

1.1. Related Work

Based on the above background, the problems studied are

1.1.1. How is the application of the doctrine of Business Judgement Rule in the case of corruption involving State-Owned Enterprises (SOEs)?

The Doctrine of Business Judgement Rule is a doctrine in the company's law that teaches that the company's directors are not responsible for losses incurred as a result of bu ess decisions made by the board of directors, as long as the action is based on good faith and prudence. Business Judgement Rule itself is a doctrine derived from the common law system.Business Judgement Rule itself regulates the division of responsibility between the company and its governing organs, especially directors and shareholders when there is a loss of the company caused by human error. Black's Law Dictionary defines the Business Judgement Rule as an act of making a business decision by not involving self-interest, honesty and balancing the best for the company.In Indonesia, it has been explained about the provisions on the enforcement of theBusiness Judgement Rule in the Law of The Company Limited to Article 97 paragraph (5). In addition, the Decision of the Constitutional Court of the Republic of Indonesia No. 48/PUU-XI/2013 also mentions the Business Judgement le is one of the doctrines in corporate law that states that the board of directors and or bo d of commissioners of a company cannot be held liable for losses arising from an act of decision-making or supervisory action, if the action is based on good faith and with prudence. If there is a claim that the board of directors has made a decision that is considered detrimental to t e company, then the doctrine can waive the personal responsibility of the board of directors, provided that the decision is based on good faith, not contrary to individual interests and as needed when making decisions, as long as the decision is based on good faith and careful attitude. Management in BUMN is also run by the board of directors. The Board of Directors holds two main functions, namely the management function in leading the company and the representation function as the com ny's management. The theory related to this states that the relationship between the board of directors and the company arises because of trust by the company, called fiduciary relationship. Fiduciary duties are esse ally related to the position, authority, and responsibilities of the board of directors. If there is a violation of fiduciary duty, the board of directors' personal responsibility will arise. Editors may have the right to defend themselves through the use of the principles of Busin s Judgement Rule based on fiduciary duties. Article 11 of Law No. 19 of 2003 concerning St -Owned Enterprises (SOEs) explains that against SOEs in the form of persero applies all provisions and principles applicable to Limited L ility Companies as stipulated in Law No. 1 of 1995 and Law No. 40 of 2007 concerning Limited Liability Companies. The Law indicates that the principle of Business Judgement Rule can also be implemented in SOEs so that, with the two provisions, it proves that the business judgement rule should be applied in SOEs. The Board of Directors of BUMN may use Article 97 paragraph (5) of the Uupt Business Judgment Rule based on fiduciary duty as a defense if it is prosecuted for policies or business decisions taken. Bumn losses can be classified as corruption crimes that reflect the zero implementation of Business Judgement Rule in SOEs. In fact, indirect transaction losses are classified as limited liability company losses, because there are other transactions from the past balance sheet and the financial year in question are profitable and the profit has not been calculated. If the State continues to feel harmed, then the State ma sue in the civil domain. Article 61 paragraph (1) and Article 97 paragraph (6) of Law No. 40 of 2007 concerning Limited Liability Companies states that every shareholder has the right to file a civil lawsuit if the mpany's actions are deemed unfair and out of bounds due to the resolutions of the GMS, directors, and/or board of commissioners.The culprit will be sentenced if convicted of other crimes, abusing authority, or taking bribes.

Law No. 19 of 2003 on State-Owned Enterprises explains that SOEs aim to gain profit. Profit is compensation for the risks borne by the company. The greater the profit earned, the greater the risk. Therefore, the state as the largest shareholder of SOEs must carefully look at the risk of losses through all business transactions conducted by SOEs, including the risk of default from outside parties.

1.1.2. What is the accountability of the board of directors in corruption crimes in Decision No. 34/PID. SUS-TPK/2019/PT. DKI?

The issue of responsibility in the management of the company concerns the obligation of the board of directors to manage t e company as the duties it performs, both based on the provisions f the laws and articles of association of a company. The issue of responsibility itself is inseparable from the issue of awareness and freedom. The existence of responsibility here begins with the existence of consciousness and freed m in man, which then leads to responsibility. In relation to the responsibility

of the board of directors in the management of the company, it becomes necessary to be studied not only about its responsibilities but also the conditions that lead to such responsibilities, in this case "awareness" and "freedom" in conducting the management of the company. The three, namely "consciousness", "freedom", and "responsibility", in this case need to be seen as a related entity. Because of the context of the management of the company, the "awareness", "freedom" and "responsibility" associated with the duties and obligations in conducting the management of the company._In relation to the management of the company, this brief description of awareness and freedom wants to convey that the management of the company by the board of directors means that it must be accompanied by an awareness to the board of directors about its duties and obligations as a board of directors in managing the company. Awareness is so important that his actions are in line with what he is tasked and obliged to do. the freedom must also be in line with the signs in the management of a company, which are generally contained in a company's articles of association, in addition to the signs in the legislation. Therefore, it is necessary to elaborate further on the duties, obligations, and signs in carrying out the management of the company. The Board of Directors in sharia UUPT Year 2007 is an organ of the company that is person and responsible for the management of the company's supervisors for the company. In its role, the board of directors has a relationship with a company that has a trust (fiduciary duty) as described in the sub-chapter on. Therefore, the board of directors in management of manaan must depart from the basic basis and the task on which who is the two basic security, namely believing that gives the company (fiduciary duty) and actions based on ability and prudence (duty of skill and care). These principles turned out that the board of directors for the management of the company is in good faith, careful, and solely for the sharing and purpose of the company. The management of the company based on good faith, prudence, and solely for the interests and objectives of the company, must be the awareness of the board of directors in carrying out their duties, roles, and obligations. In the awareness of carrying out its role, the board of directors also has the freedom, namely the freedom to conduct management based on policies that it sees appropriate, which among others refers to the consideration of prevalence in the business world. This freedom does have limitations, namely on certain management based on the provisions of the Uupt or the articles of association of the company requires the approval of the GMS or the board of commissioners.But for management based on UUPT and articles of association does not require the approval of other organs of the company, especially in daily management, therefore the board of directors actually has complete freedom. However, such freedoms must also be accompanied by appropriate and customary policy considerations. This means that the freedom of the board of directors must also be exercised according to skill or ability, good faith, and prudence. With such awareness and freedom, directors can be burdened with responsibility._If so, that responsibility is a consequence of awareness and freedom, then what is the responsibility of the board of directors in the management of the company. First, it needs to be reiterated, as the definition given by uupt, that the board of directors is an authorized organ and fully responsible for the management of the company. From this it is clear that responsibility is a series with authority. The authority of the board of directors is followed or assumes responsibility for it. If with authority then the board of directors has the power to conduct management, with the imposition of responsibility then the board of directors is required to exercise that power based on the applicable signs._Discussion of the responsibilities of the board of directors in the management of the company also needs to study it from concrete cases. As outlined in Verdict No. 34/PID. SUS-TPK/2019/PT. DKI, where it is explained that the case in the ruling relates to the board of directors of Pertamina through its subsidiary PT. Pertamina Hulu Energi (PHE) which began the process of acquiring a 10 percent stake in Roc Oil Company Limited (ROC, Ltd) Australia on May 27, 2009. This case was brought to court as a corruption crime with the accused former president director of Pertamina Karen Agustiawan.This acquisition itself is done for participating interest investment in order to work on the field or block Basker Manta Gummy (BMG) Australia. In its development, BMG block could not produce crude oil as targeted, which is 812 barrels per day, but only 252 barrels per day. On November 5, 2010, the BMG block was even closed after the ROC decided to stop crude oil production. From the acquisition for investment purposes, Pertamina suffered losses of more than 568 billion rupiah. Karen's actions as President Director of Pertaminan by the Corruption Criminal Court at the Central Jakarta District Court were declared as corruption crimes committed together, stated in the previous ruling, namely the Verdict of the Corruption Criminal Court at the Central Jakarta District Court Number 15/Pid.Sus-TPK/2019/PN.Jkt.Pst related to the corruption case against Karen Agustiawan. However, in the ruling one of the judges dissented opinion, stating that the defendant's actions were business actions, not for personal gain so as not to be a loss to the state. In the appeal verdict contained in The Decision No. 34/PID. SUS-TPK/2019/PT. DKI him firmly strengthened the previous ruling, Decision No. 15/Pid.Sus-TPK/2019/PN.Jkt.Pst._Reviewing the court's decision on the case, it can be known that in judicial practice it is not easy to determine when the board of directors should be responsible for the decision or actions of the board of directors in conducting management, and whenever the board of directors is relieved of such responsibilities. The dynamic was seen in the decision of the first court and the appeals court that categorised the business action in the form of acquisitions commanded by Karen Agustiawan impacted losses on the company and was categorised as an act against the law. On the contrary, at the cassation level, it is considered part of the business risk.

1.2 Our Contribution

According to Peter Mahmud Marzuki, Legal Research is a process to find the rule of law, legal principles, and legal doctrines to be able to answer the legal issues faced, with the result to be achieved is to provide a prescription of what is appropriate.[2]

1. Types of Research

The type of method used in this study is the normative legal research method. Normative legal research, which is a process in which in obtaining a rule of law, legal principles, and legal doctrines in order to answer the legal issues that are facing.[2] This study uses normative legal methods because the problems raised in this thesis focus on rules or principles in the sense that the law is conceptualized as norms or rules derived from laws and regulations, court rulings, and doctrines of leading legal experts.

2. Research Specifications

Based on the above problems, the nature of the research used is descriptive research. Descriptive research is research that reveals legislation related to legal theories that become the object of research.

3. Types and Techniques of Data Collection

To solve legal issues in this study using 3 (three) kinds or sources of legal materials, namely primary legal materials and secondary legal materials that will be described as follows :

a. Primary Legal Materials consist of legislation, official records in lawmaking, and decisions of judges. In this study, the authors used primary legal materials that are :
   1. Criminal Code, Constitution of the Republic of Indonesia 1945
   2. Law No. 40 of 2007 on Limited Liability Companies.
   3. Law No. 19 of 2003 on State-Owned Enterprises.
   4. Law No. 17 of 2003 on State Finance.
   5. Law No. 31 of 1999 jo Law No. 20 of 2001 on The Eradication of Corruption.
   6. District Court Decision No. 15/Pid.Sus-TPK/2019/PN Jkt.Pst..
   7. Decision of the High Court No. 34/PID. TPK/2019/PT DKI.
   8. Supreme Court Decision No. 34/Pid.Sus-/2TPK019/PT. DKI.
   9. Decision of the Constitutional Court No. 48/PUU-XI/2013.

b. Secondary Legal Materials has the purpose to give the author some kind of direction in which direction the author steps. Secondary legal materials mainly used are legal books including thesis, thesis, and legal dissertations and legal journals.[3]

c. Tertiary Legal Materials are materials that provide instructions and explanations to primary legal materials and secondary legal materials. The tertiary legal materials used by the authors in this study are the legal dictionary and the Great Dictionary of The Indonesian Language (KBBI).

4. Data Analysis Techniques

The data analysis used in this study is qualitative analysis. Qualitative data analysis techniques are methods of data analysis by grouping and selecting data obtained from field research according to its quality and truth and then systematically compiled, which is then studied by deductive thinking methods linked to theories of literature studies (secondary data), then made useful conclusions to answer the problem formulation in this study.[4]

2. BACKGROUND

2.1. Theory of Criminal Acts

Criminal acts are one of the terms used as a translation of the Dutch term "straafbaar feit". The Dutch word feit is interpreted in part from reality, while strafbaar means punishable, so that in dayophin the word strafbaarfeit means part of the punishable reality. In Indonesian as a translation of straafbaar feit there are several terms such as criminal acts, criminal acts, criminal events, criminal offenses, punishable acts, punishable deeds. Elements of criminal acts in the science of criminal law can be distinguished in 2 (two) kinds, namely objective elements and subjective elements.

1. Objective Elements

Objective element is an element that is outside the perpetrator of a criminal act. The objective elements of a criminal act are:

a.Unlawful nature, any act that is prohibited and threatened criminally by the laws and regulations of criminal law.

b.Causality (causation) of the act.

2. Subjective Elements

Subjective elements are elements that are inherent to the perpetrator including those contained in his heart. Subjective elements of criminal acts are:

a. Intentionality or accident (dolus or culpa)

b. Intention on an experiment

c. Various purposes in the crime of theft (Article 362 of the Criminal Code), extortion (Article 368 of the Criminal Code), fraud (Article 378 of the Criminal Code), etc.

d. Plan in advance (met voorbedachte rade).

Experts divide criminal law based on several things. One of them, criminal law can be divided into general criminal law and special criminal law. General criminal law is a law that is established and enforced for everyone and regulated in the Criminal Code. While the special criminal law is a law that is deliberately established to be applied to certain people or groups only. Corruption is an extraordinary crime that can damage the country's economy and the welfare of the people.Corruption crimes contained in Law No. 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Law No. 20 of 2001 on The Eradication of Corruption Crimes mention two subjects of corruption crimes, namely people and corporations.

2.2. Criminal Liability

Criminal liability is a person who can be convicted or not because of his ability to account for his actions. In a foreign language known as toerekeningsvatbaarheid and the accused will be released from responsibility if it does not violate the law. The concept of legal liability for a person who has committed an act against the law in Indonesia is inseparable from the concept of a legal state that becomes the main basis in law enforcement in Indonesia. The ability to be responsible, according to the Indonesian Penal Code a person who can be convicted is not enough if the person has committed an act that is contrary to the law or is against the law, but in criminal prosecution the person must also be eligible "that the person who committed the act has a mistake or guilt. In other words the person can be held accountable for his actions or if seen from the point of his actions, his actions can be accounted for", here applies the principle of no criminal without fault (Nulla poena sine culpa. Furthermore, according to the theory of criminal liability Roeslan Saleh in criminal law is known by the existence of three main elements, namely:

1. Elements of deeds

2. Elements of the person or perpetrator

3. Criminal element, seeing from the perpetrator

2.3. Theory of Justice

Aristotle, was the first philosopher to formulate the meaning of justice. He said that justice is to give everyone what is rightfully (fiat jutitia bereat mundus) i.e. in other words worthiness in human actions. Aristotle taught two kinds of justice, distributive justice (distributief) and commutatief. The term justice comes from the word "fair" which means; unearthed, impartial, unbiased, un bring down, un regulating, not arbitrary. Some of these definitions can be concluded that the notion of justice is all things related to everyday human life. Justice has a heavy burden and a very important role to be able to treat every human being according to their own rights and obligations indiscriminately or impartially.

In Pancasila sila 5 (fifth) namely social justice for all Indonesians, means that every society has the right to justice fairly, neutral and impartial. Justice is the right of the whole community where in this case it is very important that the freedom of citizens is upheld without any element of unilateral interest and benefit the other party but justice is proposed for the comfort and security of the entire community.

2.4. Fiduciary Duty

Fiduciary duty is a duty of a person called a "trustee" derived from a legal relationship between the trustee and the other party called the beneficiary, where the beneficiary has high trust to the trustee and on the contrary the trustee also has a high obligation to carry out his duties in the best possible with high good faith, fair, and full responsibility in carrying out its duties or to manage the property / assets belonging to the beneficiary and for the benefit of the beneficiary, whether arising from legal relations or his position as a trustee (technically) or from positions, such as lawyers (with his clients), guardians, executors, brokers, curators, public officials, or directors of a company. Fiduciary duty is divided into two main components namely duty of care and duty of loyalty. Duty of care can be said as an obligation for directors not to be negligent of their responsibilities, to be careful in making business decisions, and to conduct business with care and conscientious nature. Duty of loyalty includes the obligation of the board of directors not to place their personal interests above the interests of the company in carrying out transactions in which the transaction can benefit the board of directors by using the costs borne by the company or corporate opportunity. Not everyone can get a fiduciary duty, unless that person has the ability, that is, the ability to hold and carry out the mandate of the

other party with regard to a matter that is to take care and carry it out for the benefit of the trustee. Fiduciary obligation by the board of directors is a relationship of the board of directors with the company and shareholders, where the board of directors in its day-to-day management is fully responsible to the company and its shareholders. Fiduciary relationships bring a legal consequence that the board of directors are given the authority to act on behalf of the company and act on behalf of the shareholders so that it must be carried out with care. In the implementation of this fiduciary relationship is a relationship of trust attached to the personal shoulders of a board of directors, where the board of directors carry out their duties and authorities for the benefit of other parties in this case shareholders. If there is a violation of the fiduciary duty principle, it will bring severe consequences for the board of directors. Because of this, the board of directors can be held personally accountable for actions that harm the company.

2.5. Business Judgement Rule

Business Judgement Rule is one of the doctrines applied in the business world to protect directors in legal liability for business decisions they take. In the company's law, the doctrine of Business Judgement Rule teaches that the company's directors are not responsible for losses caused by an act of decision-making, if the action is based on good faith and prudence. Its main mission is to achieve justice for the company's directors in making a business decision. Business Judgement Rule arises as a result of the implementation of fiduciary duty by a board of directors, namely duty of skill and care, then all errors arising after the implementation of duty of skill and care has consequences that the board of directors get a personal release of responsibility if there is an error in the decision. If a board of directors is sued by the company or shareholders, on the basis of a claim that the board of directors is deemed to have made a decision that harms the company, then a defense can be filed using the doctrine of business judgement rule. Of course this doctrine will provide protection for directors not to be held accountable as long as the decisions taken by the board of directors in good faith, without negligence, and in the best interests of company. Business Judgement Rule merupakan awan kekebalan atau perlindungan bagi direksi perseroan dari setiap tanggung jawab yang timbul akibat keputusannya dengan pertimbangan keputusan diambil sesuai dengan aspek tanggung jawab dan itikad baik. Business Judgement Rule dimaksudkan untuk memberikan dorongan bagi direksi agar dalam melaksanakan tugasnya, tidak perlu takut terhadap ancaman tanggung jawab pribadi. Perlindungan Business Judgement Rule tidak berlaku apabila anggota direksi mempercayai sepenuhnya pendapat ahli yang dimintanya tanpa memperhatikan alasan yang jelas, atau dalam pengambilan keputusan terdapat kepentingan pribadi di dalamnya dan mengedepankan kepentingan pribadinya. Kesimpulannya adalah bahwa keputusan yang diambil direksi haruslah keputusan yang menurutnya adalah yang terbaik untuk perseroan, dan baginya putusan bisnis tersebut juga dilakukan oleh orang lain yang berada di posisi sama dengannya.

3. CONCLUSION

From the discussion and the results of research on The Analysis of Accountability of Corruption Crimes Due to Losses of SOEs Based on the Doctrine of Business Judgement Rule (Study of Supreme Court Decision 34/PID. SUS-TPK/2019/PT. DKI), then the author concludes as follows: The application of the doctrine of Business Judgement Rule in the case of corruption involving State-Owned Enterprises (SOEs) should be used as a basis for obtaining legal protection for directors for the accountability of their actions. Where the company's directors cannot be held liable for losses arising from a decision or business action based on good faith, prudence, honesty, and in line with its authority. The Panel of Appeal Judges agreed with the First-Tier Panel of Judges who judged Karen to ignore the results of due diligence conducted by PT Delloite Konsultan Indonesia (DKI). Where the defendant's decision to acquire has ignored the results of due diligence that the acquisition is high risk.

ACKNOWLEDGMENT

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