JURIDICAL ANALYSIS OF CONTRADICTIONS FOR SETTING FINANCIAL STATUS AND STATE ASSETS IN STATE-OWNED ENTERPRISES (BUMN) REVIEWED FROM THE ORIGIN OF LEGAL CONCEPT

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Abstract

The purpose of this study was to determine and to analyze the impact of legislation contradiction toward legal security for individuals and managers of the State-Owned Entity (SOEs) in managing SOE. In analyzing the problems in this study, the researcher used descriptive analysis methods which conducted by the researcher to see how the impact of legislation contradictions on legal security for individuals and managers of State-Owned Entity (SOEs) in managing SOE. The obtained results showed that the impact of legislation contradictions on legal security for individuals and managers of State-Owned Entity (SOEs) in managing SOE raised the impact of the lack of protection against the managers of SOE, the unjustified actions in the interpretation of losses, where every loss was considered as a form detrimental to the State, there was no clear separation between the law in civil, criminal and administrative state, therefore the law enforcement more inclined to criminal law or corruption, the emergence anxiety in managers and shareholders of SOE in taking action, which can bother the economic activities of SOE. In addition, the taken policy could not set the individuals and managers of SOE freely in running economic activities accordingly based on civil economic law.

Keywords: Contradiction, Finance and State Assets Status, Fundamentals of Legal Certainty
A. INTRODUCTION
1. Background of the Research

SOE is one of the prominent business in Indonesia of which the owning status is largely or wholly owned by the state. According to Munir Fuady, SOE is a form of business in specific areas that are generally related to public interest, where the government's role in it is relatively large.\(^1\) State-Owned Entity (SOEs) as one of the main pillars of the Indonesian economy is based on the delineation of the Constitution of 1945 in addition to the existence of private businesses and cooperation. State involvement in such activity basically is a reflection of the substance of Article 33 of the Constitution of 1945, which among other states that:

"Branches of production that are important for the country and are in control of the lives of many people controlled by the state and are used for the greatest for the prosperity of the people"

One embodiment of the aforementioned article is that state through the unit or its business units, namely enterprises, runs business activities that produce goods and services as well as managing natural resources to meet the needs many people. Thus, SOE plays a decisive role in supporting the implementation of national development, especially in the field of economy. SOE may take the form of Perum (Public Company) or Persero (Limited Liability Company), for the SOE in the form of Limited Liability Company is a state-owned limited liability company whose capital is divided into shares which all or at least 51% (fifty one percent) of the shares owned by the Republic of Indonesia in which its main purpose is the pursuit of profit. Article 1 verse (1) of Law Number 40 the Year 2007 regarding Limited Liability Company confirms that:

"Limited Liability Company, hereinafter referred to as Perseroan is a legal entity in the form of capital alliance, which is established under the agreement to engage in business activities with an initial capital which is entirely divided into shares and meet the requirements set out in this Act and its implementing regulations."

Moreover, Article 7 Paragraph verse (4) of Law Number 40 Year 2007 regarding Limited Liability Company confirms that:

"The Limited Liability Company obtains legal status on the date of issuance of Ministerial Decree concerning ratification of Liability Company."

Based on the above description, SOE is a liability company whose ratification is made by the Minister of Justice and Human Rights (HAM) and are subject to private law. As with the company in general, the state has a separate wealth with the wealth of the country as well as the shareholders (owners), directors (the board), and the commissioner (supervisor). The legal status of state finances placed through capital investment decisions by the government in the form of shares in the state-owned legal entity continues to be a polemic law. Even now, the country's financial status in the state capital participation in SOE lead to the Constitutional Court, there are some parties which proposed materials test to cancel the regulation that put states financial managed by SOE as part of state financial by Center for Strategic Studies University of Indonesia (CSSUI).

Besides CSSUI, SOE Legal Forum also filed a judicial review against the State Finance Law and the Law of Financial Audit Agency (BPK). The judicial review made to the article governing state assets set aside in the State Finance Act and article which regulates about and authorizes BPK to audit against the separate state property.\(^2\)

The applicant of materials testing argues that all the phrases concerning state assets set aside in the SOE in the State Finance Law are in contrary to the Constitution so it does not have the force of law. Therefore, the BPK authority to audit SOE also unenforceable and is in contrary to the norms of the rule of law guaranteed by the Constitution.\(^3\) Applicant judicial review relies on two narrow interpretations on State Financial system and a corporate doctrine of classics. Both of these things, if they fail to be digested by the constitutional judge handling the case, is expected to result in a positivistic erroneous decision and potentially cause a remarkable domino effect in the financial system of our country.\(^4\) Article 2 letter g of Law Number 17 Year 2003 on State Finance, confirms:

“The wealth of countries/regions are managed privately and by or other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including the wealth

\(^2\)HasanBisri, Wkl.ketua-cpc-starting-material-test-on-uu-finance-state http://www.bpk.go.id/news/-downloadon 16-2-2018

\(^3\)Ibid

\(^4\)Ibid
separated in the state enterprise/region enterprise”.

Article 2 letter i of Law No. 17 Year 2003 on State Finance, confirms:

"The wealth of others obtained by using the facilities provided by the government"

The formulation of the above provisions shows that the wealth of the country that has been separated is still regarded as state financial authority which is discretionary so that the legal position remains as part of the state finance and supervision is still conducted by the State. With this discretionary authority, the entire board of directors of SOE in accountability is done by using the principles of company law, financial law and criminal law. While Law No. 19 Year 2003 on State-Owned Entity (SOEs) states that:

Article 1 verse (1) of State-Owned Entity, hereinafter referred to SEO, is a business entity that is wholly or largely owned by the state through direct investments originating from separated state wealth. Paragraph (2) Limited Liability Company, hereinafter called Persero, is an SEO in the form of limited liability company whose capital is divided into shares of all or at least 51% (fifty-one per cent) of its shares owned by the Republic of Indonesia with the main objective to get profit.

Under Article 1 paragraph (1) of the SOE, Law showed that the wealth of a country that is separated is the state capital participation, coaching and management are no longer based on a Budgetsystem of the State, but the coaching and management based on the principles of a healthy company. Article 4 paragraph (1) of Law No. 19 of 2003 on SOE states:

"What is meant to be separated is the separation of state assets from the Budget of the State to serve as the state capital participation in SOE to further the development and management is no longer based on a Budget system of the State, but the coaching and management are based on the principles of safe corporate."

The mechanism of accountability of the national and regional budgets to House of Representatives, the financial statements of state enterprises (SOE) becomes parts that are not separated as an annexe of the government's financial statements consist of Budget Realization Statement, Balance Sheet, Cash Flow Statement, and Notes to Financial Statements of the government. This was confirmed in Law No. 1 of 2004 on State Treasury stating that the state treasury is the state financial management and accountability,
including investment and wealth that are separated, in national and regional budgets. Article 1 paragraph (1) on The State Treasury is the financial management and accountability of countries, including investment and wealth that are separated, in national and regional budgets. Paragraph (6) State-Owned Properties are all the properties which are bought or obtained by using national budget or are derived from other valid sources.

Setting the legal status of state finances in state enterprises, consider the provisions of Article 2 letter g of Law No. 17 Year 2003 on State Finance linked to the provisions of Article 4 paragraph (1) of Law No. 19 of 2003 on SOE then emerges the conflicts of interest, on the one hand the wealth of SOE as a wealth of state-owned enterprises, while on the other hand the wealth of SOE as the wealth of the countries included in the Financial State, resulting in causing legal uncertainty and confusion among the managers of the Company as well as law enforcement officers.

As a result of confusion of such juridical aspect, it raises the interpretation that states that the financial state enterprises are state finances, it makes the SOE boardfall in fears when they want to make business decisions or actions of the corporation, because maybe it can lead to legal process to alleged corruption case which can be detrimental to their personal, family, and the company.

Based on the description above, the writer was interested to know and to analyze how the contradiction of legislation on financial status and state assets in SOE in terms of the principle of legal certainty, therefore the writer make a scientific paper in the form of a journal entitled: “JURIDICAL ANALYSIS OF CONTRADICTIONS FOR SETTING FINANCIAL STATUS AND STATE ASSETS IN STATE-OWNED ENTERPRISES (BUMN) REVIEWED FROM THE ORIGIN OF LEGAL CONCEPT”.

2. Identification of Problem

The formulation of the issues raised in this paper was: how is the impact of legislation contradiction to the legal security for individuals and

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5Heriyanto Agung Putra, KeputusanBisnisBerujungTindakPidanaKorupsi, RisalahKeteranganSaksidanSidangNo. 48 and 62 / PUU-XI / 2013, the Constitutional Court, Page 13
managers of the State-Owned Entity (SOEs) in managing SOE?

B. RESEARCH METHODS

The method used in this research is a qualitative research with Normative law approach. Qualitative research is research that takes a holistic approach, the approach that requires a variety of information to be analyzed, so as to understand certain aspects of human behaviour.6

C. RESULTS AND DISCUSSION
The Impact of Legislation Contradiction toward Legal Security for Individuals and Managers of State-Owned Entity (SOEs) in Managing SOE

State capital ownership in SOE is important, it is related to state finances. Article 1 paragraph 1 of Law No. 17 of 2003 on State Finance states that:

"Financial State was all the rights and responsibilities which can be valued in money, as well as everything in cash or in kind which could be turned into state property in connection with the implementation of the rights and obligations."

Based on the article, State finance is the existing rights and obligations that can be valued in money and goods in this assessment can be used as properties belonging to the State and State assets. Juridical-normatively, state assets were divided into three sub-state assets, namely: firstly, which is managed by the government called the State Property (BMN), for example, soil and the building of the Ministry/Institution, a car belonging to the Ministry / Agency. Secondly, managed by the other party called the separated state wealth, for example in the form of state equity participation shares in state enterprises, or initial wealth in the various state-owned legal entity (BHMN) expressed as a separate wealth based on the founding Law. Thirdly, controlled by the state in the form of potential richness associated with the earth, water, air and natural resources contained therein are controlled by the state as the highest organization, for example, mining, coal, oil, geothermal, ex-foreign asset nationalization and cultural heritage. Government-issued government Regulation (PP) No. 6 of 2006 on the management of state / Regional governing the management of state

assets that are in the control of the Minister of Finance as the state general treasurer.\(^7\)

Government-owned state assets divided by two, ie assets that are not separated and segregated assets. Assets that are separated or the so-called State/Regional goods obtained / purchased at the expense of national dan regional budgets and goods originating from the acquisition of other legitimate cover goods obtained from grants/donations or the like, obtained as the implementation of the agreement/contract, gained based on the provisions of law and obtained under a court decision has had permanent legal force. Management of state assets that are not separated was regulated in several laws and regulations, such as Law No. 17 of 2003 on State Financial and Law No. 1 of 2004 on State Treasury, and implementation stipulated in Government Regulation No. 6 of 2006 on the Management of State/Regional Properties.

Implementation of Good Corporate Governance (GCG) has become one of the important agenda in the business world nowadays, particularly for SOEs and Limited Liability Company, Corporate Good governance (GCG) by Erman Rajagukguk from the angle focuses on the theory and practice of the system by which companies are directed and controlled. Good corporate governance includes prosperity from an economy standpoint of legal aspect and social accountability for the benefit not only shareholders but also the public and stakeholders as a whole.

Law of SOE Number 19 of 2003 have adopted several principles of Good Corporate Governance, this is clearly stated in article 36 paragraph (1) of SOE Law which states that *Persero* (Limited Liability Company) and *Perum* (Public Company) in conducting their business must be based on the principles of corporate management. But in fact there are still many company management which is under the red plate of SOE is managed unprofessionally even many deviations that result in harming the State, especially occurring in branch of SOE lot of irregularities and collusion between management holding company with the management of its subsidiary, Unlike some instances the findings of

\(^7\)Heriyanto Agung Putra, Keputusan Bisnis Berujung Tindak Pidana Korupsi, Risalah Keterangan Saksi dalam Sidang No. 48 and 62 / PUU-XI / 2013, the Constitutional Court, Page 13
the House of Representatives and the Supreme Audit Agency (BPK) below:

1. M AzamAzmanNatawijaya, the member of the House of Representatives Commission VI of the Republic of Indonesia said, Revision of SOE Legislation is possible to supervise subsidiaries of SOE, post revision of the law No. 19 of 2003 on SOE, the parliament is possible to supervise the child's branch of State-Owned Entity (SOE). During this time the parliament is not the slightest touch or supervisethe subsidiary of SOE, "Azamsaid in the event of the democratic dialectic" revised Law on State Enterprises ", in the House of Representatives, Thursday, April 7th 2016, according to Azam, before the revisions were made, the parliament does not have the authority to supervise the performance of children a subsidiary of state-owned enterprises "Hands" of House of Representatives only able to reach SOE itself. Meanwhile, hundreds of subsidiaries of SOE who experienced irregularities in the management and potentially detrimental to the country's financial, cannot be monitored by parliament.

2. House of Representatives found the irregularities in the management of subsidiaries of SOE in which the state-owned land lend to SOE child, then the child SOE land built property and then sold. It's a mode, "said Azam. And other findings, Azamsaid, it was found there were echelons of the ministry did not recognize the subsidiaries of SOE assets belong to the state. "There is a deputy minister of state who said that the assets of subsidiaries of SOE are the SOE’s, not state property, "continued Azam. While Constitutional Court, said Azam, had decided that all subsidiaries of SOE assets the state assets. Thus, the release must pass through mechanisms. "The Constitutional Court decided that it is a state asset. So once the state assets it remains the country's assets.

3. SOE allegedly corrupt, About 200 officials of state-owned companies are being examined in various cases of alleged corruption. Most of them (already) be a suspect, said Secretary of the Ministry of State-Owned
Entity Said Didu told Tempo yesterday. The expert of Minister of State-Owned Entity, Lendo Novo, revealed that officials were problematic are the decision makers in the company, from managers to directors. Most are directors, he said yesterday Lendo added, some of them already imprisoned. Today, the number of SOE around 158. Plus subsidiaries, there are around 600 companies, with 6,000 officials at the level of directors and commissioners. From the examination of the Ministry of SOE internal team, 43 cases of alleged corruption occurred in 25-30 SOE. Allegations of corruption include fertilizer companies, banks (Mandiri and BRI), PT Jiwasraya, PT PLN, PT Telkom, PT Jamsostek, PT Pelindo, PT AngkasaPura, and PT Sandang. Several suspected corruption has been investigated by the Corruption Eradication Team. Cases handled by the Corruption Eradication Team is a case that has been thoroughly prepared, including the evidence.

4. The member of Supreme Audit Agency, Achsanul Qosasi, has visited the Minister of State-Owned Entity (SOE), Rini Soemarno, in her office, Jalan Merdeka Selatan of Central Jakarta. Achsanul meet Rini to report the audit results to the SOE and its subsidiaries of SOE. From the meeting, Achsanul mentioned that current corporate management issues of subsidiaries company are bigger came from state-owned entity amounted to 600 companies. BPK leave a note to the minister that the problem of SOE today began many turns to a subsidiary. Pointed out that the establishment of a subsidiary tends to be a place used for specific purposes, "said Achsanul in the SOE Ministry, Central Jakarta, Friday (16/01/2015).

5. Achsanul added BPK has conducted an examination of 45 600 of the subsidiary of SOE. Audits conducted found that there were 801 findings and the 1294 recommendation. "The ratio of the problems that could potentially harm the state and corporations is 62%," he said. The supervision was done specifically to the large subsidiary that owned by SOE as a subsidiary of PT Pertamina (Persero), PT PLN (
Persero), SOE of and insurance, PT PGN Tbk (PGAS) to PT Telkom Tbk (TLKM). The results of this audit, Achsanulsaid that, can help SOE to improve towards transparency.

One of the different perspectives in looking at the state's financial status is the background of the law controversy relating to state finance and SOE in defining state finances. Article 2 letter g of Law No. 17 of 2003 concerning State Finances states:

"state/regional assets managed on its own or by other parties in the form of cash, securities, receivables, goods and other rights that can be valued in money, including assets separated on state entity/local company; ".

Article 2 letter i of Law No. 17 Year 2003 on State Finances stated:

"Assets of other parties obtained using facilities provided by the government"

Based on the formulation of the Article above, it shows that state assets that have been separated are still considered as state finances, while in the Article 4 paragraph (1) of Law No. 19 of 2003 on SOE states:

"Separated" means separation of the state assets from the State Budget to be used for state's capital participation in a State-Owned Entity (BUMN), and further, the direction and management thereof are no longer based on the State Budget system, but on the principles of sound corporate governance

According to the author's analysis, Regulating the legal status of state finances in State-Owned Entity, taking into account the provisions contained in Article 2 letter g of Law Number 17 of 2003 concerning State Finances is related to the provisions of Article 4 paragraph (1) of Law Number 19 Year 2003 concerning State-Owned Entity there appears to be a clash of interests, on the one hand the wealth of SOE as a wealth of the SOE itself while on the other hand the wealth of SOE as state wealth, resulting in creating legal uncertainty that impedes the smooth functioning of directors and commissioners in carrying out their business activities and impacting the
results can be achieved in activities of SOE.

Differences in contents and provisions regarding State Finances make different interpretations and if the focus is on state finance law, capital included in State-Owned Entity is capital from the state's wealth and if it causes losses in state-owned finances it is detrimental to state finances so that corruption can be acted upon the criminal. State as a shareholder can still sue these losses as stated by Article 61 (1) and Article 97 paragraph (6) of Law Number 40 Year 2007 regarding Limited Liability Company if the form of state-owned SOEs.

"Each shareholder is entitled to file suit against the Company in the District Court if the shareholder has been harmed by any action of the company considered unfair and unreasonable as a result of a resolution of the RUPS, Board of Directors and/or Board of Commissioners."

Based on the contents of the Article-mentioned, each shareholder in the company has the right to file a lawsuit against the company to court if aggrieved it is a form of protection provided laws to shareholders in perseroan activity. However, this protection is felt to be lacking, where it is still not supported by laws or other related regulations. This lack of protection is one of the impacts arising from the contradiction of laws and regulations. The impact of the contradictions of laws and regulations on legal guarantees for individuals and administrators of State-Owned Entity(SOE) in managing other SOEs is as follows:

1. The lack of protection for SOE managers;
2. The existence of acts of arbitrariness in the interpretation of losses incurred, where each loss is considered as a form of harming the State;
3. There is no clear separation between the law in a civil, criminal and administrative state moreover the law enforcement more inclined to criminal or corruption;
4. There are concerns of management and shareholders of SOE in taking action so that this can disrupt the wheels of SOE economic activity;
5. The policies taken cannot liberate freely for individuals and
administrators of SOE in running the economy properly in accordance with civil economic law.

Impact of contradiction of legislation on legal guarantees for individuals and administrators of the State-Owned Entity (SOE/S) in managing SOE when analyzed using the theory of legal certainty, the contradiction of legislation on legal guarantees for individuals and administrators of the State-Owned Entity (SOE/D) in managing SOE is not yet reflect a legal certainty.

D. CLOSING

1. Conclusion
   Based on the results of the research and descriptions described above, it can be concluded that the impact of the contradictions of laws and regulations on legal guarantees for individuals and administrators of State-Owned Entity (SOEs) in managing SOE has resulted in a lack of protection for SOE management, there is an act of arbitrariness in the interpretation of losses incurred, where each loss is considered as a form of detrimental to the State, there is no clear separation between civil, criminal and state administration, moreover in law enforcement it is more inclined to criminal law or corruption, the emergence of concern and SOE shareholders in taking action, moreover it can disrupt the economic activity of SOE, as well as the policies are taken, cannot freely to individuals and administrators of SOE in running the economy properly in accordance with civil economic law.

2. Suggestion
   Based on these conclusions, the suggestions that the writer can give are as follows:
   1. Executive and legislature should work together in making rules or new legislation which makes SOE become independent but cannot be separated from the government control through the finance minister;
   2. The improvement of SOE and the guarantee of legal certainty given by the government to the policies that were taken by the directors of SOE and the separation between the application of a civil and criminal law.
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