



ISSN Print: 2394-7500  
ISSN Online: 2394-5869  
Impact Factor: 5.2  
IJAR 2018; 4(3): 100-108  
www.allresearchjournal.com  
Received: 06-01-2018  
Accepted: 08-02-2018

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## Legal construction of the law enforcement system against financial abuse of state-owned enterprises in connection with the criminal act of corruption

**Antho Arie Kimbal, Ronald Mawuntu, Wulanmas Frederik and Flora Kalalo**

### Abstract

Article 1 paragraph 1 of Act No. 19/2003 on State-Owned Enterprises states that state participation is a separated state asset. On the other hand, article 11 of the State-Owned Enterprises Act states that the management of state-owned enterprises is conducted based on Act No. 1/1995 which was amended with Act No. 40/2007 on limited liability companies/incorporated companies and their implementation regulations. The loss at State-Owned Enterprises of law enforcers and state apparatus holds to Article 2 sub-article g of the State Finance Act which states that the property of the state / property of the region is to be self managed or managed by another party in the form of money, securities, receivables, goods and other rights which can be valued with money, including property that is separated from state-owned companies and a general explanation of the crime of corruption which states that state-owned separated shares are state assets that remain in the public jurisdiction. This indicates the absence of synchronization or uniformity regarding the definition of state finance between the state finance act, the state-owned enterprises act and the corruption act. Differences in the definition or meaning of the legislation causes problems in the effort to eradicate corruption. Based on the background mentioned above, the problems in this study are as follows: *first* What is corruption in the management of State-Owned Enterprises (SOEs)? And *second* What is the system of law enforcement in the case of state financial loss to State-Owned Enterprises (SOEs)? The method of legal research in this study is the normative approach. The results of the research show that, *first* Practices that occur so far against the troubled SOEs are that the perpetrators are punished with the crime of corruption; *second* There are three elements that must be considered in the Law Enforcement of the Crime of Corruption in the management of state finances: Legal Structure, Legal Substance and Legal Culture.

**Keywords:** law construction, law enforcement, soes, corruption

### 1. Introduction

#### 1.1 Background

The purpose of the state is found in the Preamble of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The 1945 Constitution of the Republic of Indonesia) which is to protect the entire nation and the entire motherland of Indonesia and to promote the common welfare, to educate the lives of the nation, and to participate in a world order based on freedom, eternal peace and social justice.

The achievement of the state's purpose is always related to the state finances as a form of financing for the implementation of state government conducted by state organizers. Without state finances, the purpose of the state will not be established hence they will only become legal ideals. State finances as a form of financing state purposes, should be in the legal framework permitted by *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. In addition to the Preamble of the Constitution, it is also found that there are several other Articles in *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* that are related to state finances.

In the national economic system, SOEs participate in producing goods and/or/services necessary in order to realize the maximum prosperity of the community. The role of SOEs is perceived as increasingly important as a pioneer and/or trailblazer in sectors of business that private businesses are not yet interested in. SOEs also have strategic roles as public service operators, as the balance to large private powers, and assisting in the development of small

businesses. SOEs is also a significant source of state revenue in the form of various types of taxes, dividends and privatization proceeds <sup>[1]</sup>.

SOEs is one of the economic actors in the national economy based on economic democracy. SOEs have an important role in the implementation of the national economy to realize the welfare of society (consideration clause in Act No. 19/2003). In the perspective of the theory of legislation, the birth of the legislation package: Act No. 17/2003 on State Finance; Act No. 1/2004 on State Treasury; Act No.15/2004 on the Audit of State Financial Management and Accountability; Act No. 40/2007 on Limited Liability Companies; Act No. 15/2006 on the Audit Board; Act No. 31/1999 amended by Act No. 20/2001 on the Eradication of Corruption; Act No. 19/2003 on State-Owned Enterprises shows the dynamics of legal norms either vertically or horizontally. Based on the vertical dynamic, legal norms are tiered from top to bottom, while horizontal dynamics indicate the existence of legal norms moving sideways, namely the withdrawal of a legal norm for facts or events that are considered similar.

The reality is issued by the package of legislation in the field of state finance <sup>[2]</sup> that has raised various problems, both in theoretical level and in practical level. One of the main causes of disharmony in legal politics in the field of state finance, is due to the absence of legal and consequential judicial distinction between public law and private law. The absence of a clear separation between public and private law in legal politics of legislation in the field of state finance, making the notion of state finances able to be seen from different perspectives <sup>[3]</sup>.

One of the fundamental elements of corruption is the loss of state finances. Before determining the existence of state financial losses, it is necessary to clarify the definition of judicial understanding of state finances. Various laws and regulations still have no similarities about the understanding of state finances until this day. Article 1 sub-article 1 of Act 17/2003 on State Finance defines state finance as all rights and obligations of the state which can be assessed with money, as well as everything in the form of money or goods which may be the property of the state due to the exercise of such rights and obligations.

Article 1 paragraph 1 of Act No. 19/2003 on State-Owned Enterprises states that state participation is a separated state asset. On the other hand, Article 11 of the State-Owned Enterprises Act states that the management of state-owned enterprises is conducted based on Act No. 1/1995 amended by Act 40/2007 on limited liability companies and their implementation regulation <sup>[4]</sup>.

The loss of State-Owned Enterprises of law enforcers and state apparatus holds to Article 2 sub-article g of the State Finance Act states that state property/regional property is to be self managed or managed by other parties in the form of money, securities, receivables, goods and other rights which can be valued with money, including property that is

separated from state-owned companies and a general explanation of the crime of corruption which states that state-owned separated shares are state assets that remain in the public jurisdiction.

The information above shows that there is no synchronization or uniformity regarding the definition of state finance between the state finance act, the state enterprises act and the corruption act. The differences in definition or meaning of the legislation can cause problems in the effort to eradicate corruption.

### 1.2 Statement of the problem

Based on the background mentioned above, the problems in this study are as follows:

1. How is corruption in the financial management of State-Owned Enterprises (SOEs)?
2. What is the system of law enforcement in terms of state financial loss to State-Owned Enterprises (SOEs)?

### 1.3 Research objectives

The research objectives are as follows:

1. To examine and analyze corruption in the management of State-Owned Enterprises (SOEs).
2. To review and analyze the system of law enforcement in terms of state financial loss to State-Owned Enterprises (SOEs).

### 1.4 Research significance

**This research is beneficial in terms of**

1. Academically, it can be a means to develop the ability of understanding, reasoning and experience of the author in the context of law science and is expected to strengthen and develop concepts and theories related to the process and application of criminal law in Indonesia.
2. Practically, it is expected to be a reference for the government and state-owned enterprises in the territory of Indonesia.

## 2. Thinking framework

### 2.1 Theoretical framework

#### 2.1.1 Theory of the State of Law

Aristotle argued that the concept of a good State of Law is a State governed by the constitution. The State of Law is meant to govern not the man but the just thought of the man. In order to think justly, the mind must be fenced with the constitution.

The concept of the legal State that was pioneered by Plato was later confirmed by Aristotle who was inspired from his country's circumstances that at the time it was led by a man who was hungry for power, treasure, and honor. With the intention that all authorities and actions of state equipment or rulers shall be solely in accordance with the law, or in other words regulated by the law. The form of a despotic state persisted for several centuries until the emergence of the concept of the State of formal law and Human Rights that must be protected <sup>[5]</sup>.

Jimly Asshiddiqie states that the rule of law is unique, because the state wants to be understood as a legal concept. It is said to be a unique concept because there is no other concept. In a State of Law there will be a unity of the legal system culminating in the constitution.

<sup>1</sup>Penjelasan Undang Undang Republik Indonesia Nomor 19 Tahun 2003 Tentang Badan Usaha Milik Negara. (Elucidation of the Act of the Republic of Indonesia Number 19 or the Year 2003 on State-Owned Enterprises)

<sup>2</sup>Ibid

<sup>3</sup>D. Andhi Nirwanto, 2013, Dikotomi Terminologi Keuangan Negara Dalam Perspektif Tindak Pidana Korupsi. P. 47.

<sup>4</sup>Undang Undang No. 40 Tahun 2007 tentang perseroan terbatas dan peraturan pelaksanaannya (Act No.40/2007 on limited liability companies and their implementation regulation)

<sup>5</sup><http://www.negarahukum.com/hukum/konsep-negara-hukum.html> accessed on 09 July 2015 at 23.00

The foothold /foundation that the state of Indonesia is a State of Law can be found in Article 1 paragraph 3 of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* which states that “the State of Indonesia is a State of Law”. The inclusion of this provision in that section of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* shows the strengthening of the legal basis and the mandate of the state, that the state of Indonesia is and should be a State of Law. Previously, the foundation of the State of Law of Indonesia is found in the section of the General Elucidation of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* on the State Government System, as follows:

- a) Indonesia is a law-based country (*Rechtsstaat*). The state of Indonesia is based on the law (*Rechtsstaat*), not based only on power (*Machtsstaat*).
- b) Constitutional System. The government is based on the constitutional system (basic law), not absolutism (unlimited power).

The conception of the State of Law of Indonesia can be included in a constitutional State of Law, which can be seen in the Paragraph IV of the Preamble of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Another basis that can be used as a foundation that the state of Indonesia is a State of Law is found in *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* Chapter XIV on State Economy and Social Welfare Article 33 and 34, which asserts that the state participates actively and responsibly for the state economy and the people's welfare.

The State of Law Indonesia according to *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* contains the following principles: The legal norm stems from the *Pancasila* as the foundation of national law; The system used is the Constitutional System; The sovereignty of the people or the Principle of Democracy; The principle of equality before the law and the government (Article 27 paragraph 1 of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*); The existence of legislative organs (the President and the House of Representatives); The governmental system is Presidential; Judicial power that is free from other powers (executive); The law aims to protect the entire nation and motherland of Indonesia, to improve public welfare, to educate the life of the people, and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice; There is a guarantee of human rights and basic human obligations (Article 28 A-J *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*).

### 2.1.2 The theory of justice

Aristotle<sup>[6]</sup> suggests that there are 5 types of deeds that are classified justly. The five types of justice proposed by Aristotle are as follows:

- a) Commutative Justice: Commutative justice is the treatment towards a person regardless of the services that they have given to ourselves.

- b) Distributive Justice: Distributive justice is the treatment towards someone in accordance to the services that they have given to ourselves.
- c) Natural Justice/Justice of Nature: Natural justice/Justice of Nature is to give something to others in accordance to what others have given to ourselves.
- d) Conventional Justice: Conventional justice is a condition where if a citizen has obeyed all the laws and regulations that have been issued.
- e) Restorational Justice/Justice of Improvement: Restorational justice/Justice of improvement is if a person has tried to restore the good name of someone whose name has been tainted.

The notion of justice according to Aristotle states that justice is an act that lies between giving too much and little can be interpreted to give something to everyone in accordance with what is rightfully theirs.

The meaning of justice according to Frans Magnis Suseno is the condition when people are treated equally in accordance with their respectful rights and obligations.

The meaning of justice according to Notonegoro is the condition that is said to be fair if it is in accordance with the applicable law.

The meaning of justice according to Thomas Hubbes is that an act/deed is said to be just if it has been based on an agreement.

The meaning of justice according to Plato is beyond the ability of an ordinary human that justice can exist in law and legislation made by experts who are particularly concerned about it.

The meaning of justice according to Poerwadarminto W.J.S is that it is not one-sided, but should not be arbitrary.

The meaning of justice according to Imam Al-Khasim is to take the right of the person who is obliged to give it and to give it to the person who is entitled to receive it.

According to Has Kelsen, liberating the legal concept of the idea of justice is quite difficult because it is constantly mixed politically with regard to the ideological tendency to make the law look like justice. The tendency to identify law and justice is the tendency to denote a social order. This is the tendency and way of working politics, not the tendency of science. The question of whether a law is just or not and what is the essential element of justice cannot be answered scientifically, then the pure theory of law as a scientific analysis cannot answer it. All that can be answered is that the rules/regulations that govern the human behavior applies to everyone and everyone finds joy in it. So then social justice is social happiness<sup>[7]</sup>.

The greatest justice is the fulfillment of as many desires as possible. To what extent is the level of fulfillment in order to fulfill the happiness that deserves to be called justice. It cannot be answered based on rational knowledge. The answer is based on a judgement of value, determined by the emotional factor and subject to the subjective character which makes it relative. A judgement of value is a statement in which something is declared as a goal. Such statements are always determined by emotional factors<sup>[8]</sup>.

<sup>6</sup>Syafruddin, *Hukum yang Menjamin Kepastian Hukum Dan Rasa Keadilan Masyarakat*; Paper presented at the Inauguration of the Indonesian Task Manager of North Sumatera Regional Coordinatoe, Friday, April 27, 2007 at Gayo Room Garuda Plaza Hotel, Jl. Sisingamangaraja No. 18 Medan.

<sup>7</sup> Asshiddiqie, Jimly, *et al* teori hans kelsen tentang hukum (Kelsen, General Theory, *Op.Cit.*, p. 5-6) Secretariat General & Registrar of the Constitutional Court of the Republic of Indonesia JAKARTA, 2006

<sup>8</sup> *Ibid.*, p. 6.

### 2.1.3 The theory of law enforcement

Lawrence M. Friedman points out three elements that must be considered in law enforcement. These three elements include the legal structure, legal substance, and legal culture<sup>[9]</sup>.

Legal structure relates to legal institutions. In Indonesia, institutions authorized to enforce the law, such as police officers, prosecutors, courts. Meanwhile, legal substance relates to the content of legal norms. These legal norms are made by the state (state law) and there are also laws that live and thrive in society (living law or also known as non state law). Legal culture is bound with the legal culture of society.

The meaning/understanding of legal substance includes: rules/regulations, norms, and manifest behavior of humans within the legal system; the products produced, by the people within the legal system, the decisions they make, the new rules/regulations they legislate.

Legal culture as attitudes and values that exist with respect to the law and the legal system, along with attitudes and values that influence both positively and negatively to the behavior of the law.

Legal culture is divided into two types, namely: external legal culture; and internal legal culture<sup>[10]</sup>.

External legal culture is a legal culture that exists in the general population. Internal legal culture is a legal culture of community members who perform specialized legal duties. All societies have a legal culture, but only societies with legal specialists have internal legal culture.

Esmi Warassih Pujirahayu points out that: The legal culture of a judge (internal legal culture) will be different from the legal culture of the society in general (external legal culture). Even differences in education, nationality, income, etc can be factors that affect a person's legal culture. Legal culture is the key to understanding the differences that exist in other legal systems. Furthermore, it is argued that the application of a legal system that is not derived or grown from the content of society is a problem, especially in countries that are changing because there is a discrepancy between the values that support the legal system of other countries with the value lived by members of said community<sup>[11]</sup>.

Soerjono Soekanto mentioned five factors that must be considered in law enforcement, that includes: legal or statutory factors; law enforcement factors; means or facilities factors; community/society factors; and cultural factors<sup>[12]</sup>.

## 2.2 Conceptual framework

### 2.2.1 Corporations/cooperatives

Subekti and Tjitrosudibio declare that the Meaning of Corporation is a corporation that is a legal entity<sup>[13]</sup>. In Indonesia, legal entities can take the form of: *Perum*, *Persero*, Limited Liability Company, Foundation and

Cooperative, and Andil Airlines Indonesia that has been erased since March 7 1998. Among these organizations, Limited Liability Companies (*PT*) are the most popular and most widely used as a tool by entrepreneurs to conduct activities in the economic field.

The legal basis for the establishment of a *PT*, previously regulated by Act No. 1/1995 on Limited Liability Companies, where it states in Article 1 sub-article 1 that the Limited Liability Company hereinafter called the company is a legal entity established under the agreement, engages in business activities with the authorized capital that is divided into shares, and meets the requirements stipulated in this Act and its implementation regulations.

The development is stipulated by Act No. 40/2007 on Limited Liability Companies to replace Act No. 1/1995, where in Article 1 sub-article 1 it is mentioned that:

The meaning of a corporation is derived from the English term Corporation which means a legal entity or group of persons which by law is allowed to act as the legal subject of an individual, in contrast to its shareholders. The term in the Dutch dictionary for corporations is *corporatie* which means association, organization or union. In the World Book Dictionary 1999, it is mentioned that corporations are a group of people who are authorized to act as individuals. One of the hallmarks of such corporations is that it always requires investment to support targeted business expansion. Often these investments are government funds derived from the state treasury through, *Bank Indonesia*, Government Banks and other state-owned enterprises.

David J. Rachman, in his book *Business Today* 6<sup>th</sup> Edition<sup>[14]</sup>, stated that the corporation has five important features, among others: is a subject of artificial law which has special legal standing; has an unlimited life span; attains power (from the state) to conduct certain business activities; owned by shareholders; the shareholder's responsibility for corporate losses is usually the upper limit of its shares.

### 2.2.2 Definition, function, and form of state-owned enterprises (SOEs)

State-Owned Enterprises are a state-owned entity. The definition of a State-Owned Enterprise is a business entity which all or most of its capital is owned by the state through direct participation derived from separated state assets (under Act No.19/2003)<sup>[15]</sup>.

State-Owned Enterprises are one of the economic actors in the national economic system, in addition to private enterprises and corporations. State-Owned Enterprises come from contributions in the Indonesian economy that play a role in producing goods and services to realize the welfare of the people. State-Owned Enterprises are located in various sectors such as agriculture, plantation, forestry, finance, manufacturing, transportation, mining, electricity, telecommunication, trade and construction.

State-Owned Enterprises have various kinds or types of forms based on Act No. 19/2003 on State-Owned Enterprises. State-owned enterprises consist of two forms, namely corporate business entities (*persero*) and general business entities (*perum*). The explanations of the two forms

<sup>9</sup>Lawrence M. Friedman, *American Law*, London: W.W. Norton & Company, 1984 2001, p 7-9.

<sup>10</sup>Ibid P. 293.

<sup>11</sup>Esmi Warassih Pujirahayu, *Pemberdayaan Masyarakat Dalam Mewujudkan Tujuan Hukum (Proses Penegakan Hukum Dan Persoalan Keadilan)*, (Speech for the Inauguration of Professors of UNDIP's Law Faculty Semarang, 14 April 2001). P. 11.

<sup>12</sup>Soerjono Soekanto, *Faktor-faktor yang Memengaruhi Penegakan Hukum*, (Jakarta: Raja GraFindo, 2008), Hlm. 8.

<sup>13</sup>R. Subekti, R. Tjitrosudibio. 2008. *Kitab Undang-Undang Hukum Perdata burgerlijk Wetboek*, PT. Pradnya paramita 30<sup>th</sup> Print, Jakarta, P. 3.

<sup>14</sup>I.S. Susanto, *Kriminologi*, Semarang: Badan Penerbit Universitas Diponegoro, 1995, p. 1. Downloaded from: <http://zulakrial.blogspot.co.id/2009/04/kejahatan-korporasi-sebagai-kajian.html#sthash.h89NAX1v.dpuf>. Downloaded on 14 October 2015

<sup>15</sup>*Undang Undang Republik Indonesia No.19 Tahun 2003 (Act No. 19/2003 of the Republic of Indonesia)*

of State-Owned Enterprises are as follows: <sup>[16]</sup> Business company entity (*Persero*). A business company entity (*Persero*) is a state-owned company in the form of a limited liability company whose capital is all or at least 51% (fifty one percent) divided into shares owned by the Republic of Indonesia whose main purpose is to pursue profits; General Business Entity (*Perum*). General business entities (*Perum*) are: <sup>[17]</sup> SOEs whose capital is in whole owned by the state and not divided into shares. General business entities have the purpose and are supported by the approval of the minister [in charge] to engage in equity participation in other businesses.

The Benefits of State-Owned Enterprises (SOEs), are: State-Owned Enterprises in their functions and roles provide various benefits for the state and for the people of Indonesia. The Benefits of State-Owned Enterprises are as follows: <sup>[18]</sup> Provides convenience for the community in obtaining the necessities of life in the form of goods and services; Opens and expands employment opportunities for the workplace population; Prevents private sector monopoly on the market in the fulfillment of goods and services; Increasing quantity and quality in export commodity in the form of increasing foreign exchange of both oil and gas and non oil. Fills state coffers aimed at promoting and developing the country's economy. Business Entity Forms of *BUMS* <sup>[19]</sup> consist of: Individual Companies; Firms; CV Commandit Guild; Limited Guild (*PT*). Business Entity Organs <sup>[20]</sup> consist of: General Meeting of Shareholders (GMS); Board of Directors <sup>[21]</sup>; Board of Commissioners <sup>[22]</sup>.

#### 2.2.4 State finances

Financial management of State-Owned Enterprises, hereinafter abbreviated as SOEs begin with the notion of state finances from experts as follows: <sup>[23]</sup>

According to M. Ichwan: Quantitative plans of action (with numbers represented by the amount of currency), which will be executed for the future, usually 1 (one) year to come.

Glenn A. Welsch states, *budget* is a form of statement of the plan and management policy used in a certain period as a hint or blueprint in that period.

The elements of the definition according to John F. Due are <sup>[24]</sup>: Usually the budget contains financial data on expenditures and receipts from past years; Proposed amounts for the coming year; The number of estimates for the current year; The financial plan for a certain period.

In connection with the understanding of state finances according to John F. Due above comes the impression that John F. Due equalizes the understanding of state finances with the budget. Judging from the position of the state budget in the administration of the state it can be understood but when it is associated with State Budget (*APBN*) Muchsan further clarifies the relationship between the two. Muchsan states that the state budget is at the core of state

finances, because the state budget is a driving force to carry out the use of state finances.

The definition of state finances under Article 1.1 of the State Finances Act <sup>[25]</sup> are all rights and duties/obligations which can be assessed with money and everything that can take the form of money or in the form of goods which may be the property of the state in connection with the exercise of such rights and obligations. The approach used to formulate the definition of state finances is in terms of objects, subjects, processes and objectives <sup>[26]</sup>.

#### 2.2.5 Corruption <sup>[27]</sup>

According to Robert Klitgaard, the notion of corruption is a behavior that deviates from the official duties of office in the state, where to gain personal status or money (personal, family, group), or violate rules of conduct concerning personal behavior. The definition of corruption disclosed by Robert is corruption seen from the perspective of state administration.

The notion of corruption according to Gunnar Myrdal is a problem in the government because the habit of bribery and dishonesty opens the way to dismantling corruption and punitive acts/deeds against offenders. Corruption eradication is usually the main justification against/for *KUP Militer*.

Act No. 31/1999 which was amended by Act No. 20/2001, stipulated the definition of corruption which is any person who deliberately and unlawfully performs an act with the aim of enriching themselves or others or a corporation resulting in financial losses of the state or the economy of the country.

Black's Law Dictionary also discloses Corruption, Corruption is an act done with the intention to give an unofficial advantage by using the rights of the other party, who wrongly used his position of character in obtaining a benefit for himself or another person, as opposed to his obligations as well as the rights of others.

The characteristics of corruption according to Syed Hussein Alatas are as follows: <sup>[28]</sup> The characteristic of corruption is that it always involves more than one person. This is what distinguishes between corruption and theft or embezzlement; A characteristic of corruption is that it is generally secretive, closed off mainly the motive behind the act of corruption; A characteristic of corruption is that it involves elements of mutual obligation and profit. Such obligations and benefits are not always in the form of money; A characteristic of corruption is to seek refuge behind the justification of the law; A characteristic of corruption is that those who engage in corruption are those who have power or authority and influence those decisions; A characteristic of corruption is that every action contains fraud, usually in public bodies or in the general public; A characteristic of corruption is that each of its forms involve a contradictory dual function of those who carry out the action; A characteristic of corruption is that it is based on intent to place public interest under personal interest.

<sup>16</sup>Ibid

<sup>17</sup>Ibid

<sup>18</sup>Ibid

<sup>19</sup>Ibid

<sup>20</sup>Undang-Undang Nomor 19 Tahun 2003 Pasal 13 (Act No. 19/2003 Article 13)

<sup>21</sup>Loc. Cit.

<sup>22</sup>Loc. Cit.

<sup>23</sup>W. Riawan Tjandra, 2013; Hukum Keuangan Negara; Grasindo; Yogyakarta.

<sup>24</sup>Ibid

<sup>25</sup>Pasal 1 ayat (1) Undang Undang Republik Indonesia Nomor 17 Tahun 2003 Tentang Keuangan Negara. (Article 1 paragraph 1 of Act No. 17/2003 on State Finances)

<sup>26</sup>Tjandra W. Riawan, 2013; Hukum Keuangan Negara; Grasindo; Yogyakarta.

<sup>27</sup>Suyatno, 2005, *Korupsi, Kolusi dan Nepotisme*, Pustaka Sinar Harapan, Jakarta

<sup>28</sup>Syed Hussein Alatas, *Korupsi, Sifat, Sebab dan Fungsi*, LP3ES, Jakarta, 1987.

### 2.2.6 Meaning of corruption

The definition of the Criminal Act of Corruption according to Suyatno, the criminal act of Corruption can be defined into 4 types, namely <sup>[29]</sup>. Discretionary corruption is corruption committed because of freedom of discretion, even if it appears to be legitimate, is not a practice acceptable to members of the organization; Illegal corruption is a type of action intended to disrupt the language or legal purposes, rules and regulations; Mercenary corruption is a type of criminal act of corruption intended to gain personal power through abuse of authority and power; Ideological corruption is a kind of illegal or discretionary corruption intended to pursue group goals.

According to Poerwadarmina, the meaning of corruption is a bad deed such as embezzlement of money, reception of bribes and so forth that can be subject to legal or criminal sanctions.

The definition of the Criminal Act of Corruption according to Act No. 31/1999 amended by Act No. 20/2001, Corruption is any person who unlawfully enriches themselves or others or a corporation that can harm state finances or state economy, which may be subject to life imprisonment or a minimum imprisonment of 5 years and a maximum of 20 years and with a fine of at least 200 million rupiahs and a maximum of 1 billion rupiahs.

The Elucidation of Act No. 7/2006 on the Ratification of the United Nations Convention Against Corruption, 2003, the definition of the Criminal Act of Corruption is a threat to the principles of democracy that uphold transparency, integrity and accountability, and the security and stability of the Indonesian nation.

## 3. Research Methods

### 3.1 Type of research

This dissertation research is done by using the legal research method with the normative approach <sup>[30]</sup>.

### 3.2 Data collection technique

The sources of data to be used in this study consist of:

- Primary legal materials, which are: Act of the Republic of Indonesia No. 19/2003 on State-Owned Enterprises and Act No. 20/2001 on Corruption.
- Secondary legal materials: books and opinions of experts on finance, corruption, legal drafting.
- Tertiary legal materials are articles, new, encyclopedias, the Indonesian dictionary, legal dictionaries.

### 3.3 Data analysis

After the necessary data can be obtained, an interactive analysis of the data is analyzed in depth. Furthermore, the processing and analysis of primary legal materials, secondary legal materials and tertiary legal materials are done through interpretation techniques contained in the science of law / legal science. From the results of the interpretation a conclusion is then made based on deductive and inductive reasoning. Deductive reasoning is the withdrawal of conclusions from the rule of law and then applied to concrete cases for a subsequent conclusion. Whereas inductive reasoning is the withdrawal of inference/conclusion from concrete/individual cases, then a qualitative descriptive conclusion is made.

## 4. Discussion

### 4.1 The criminal act of corruption in the financial management of state-owned enterprises *Persero*

The influence of state finance on SOEs is limited to the ownership of shares/capital that are placed into the SOE, while the SOE's assets are owned by the state-owned companies themselves and are no longer state-owned. The influence of the state finance does not fit into the internal state of the SOE.

SOEs as a company that aims to seek maximum profits, in the face of business competition from within the country and abroad sometimes suffer losses. Losses can be caused by directors of SOEs who took a wrong step in trying or when there occurs mismanagement. Can the loss of said SOE can be called a state loss and can the board be punished with the criminal act of corruption.

The criminal act of corruption is regulated in Act No. 31/1999 jo. Act No. 20/2001. In Article 2 and Article 3 of the Act, among others it is stated that the act of corruption can harm state finances. State losses is something that a judge should consider.

In regard to finances in the general elucidation of the *TPPK* (*I don't know, but if this is a typo for TPK [Tindak Pidana Korupsi] then it should be "Criminal Act of Corruption" or just "Corruption"*) Act, it is clear that state finance is all state assets in any form, separated or undivided, including all parts of state property and all rights and obligations arising from/because: first, it is in the control, administration, and accountability of officials of state institutions, both at the central and regional levels; and second, it is in the control, management and accountability of SOEs/ROEs, foundations, legal entities, and companies that include state capital under an agreement with the state. Whereas the meaning of state economy is the economic life that is composed as a joint effort based on the principle of kinship or business community independently based on Government policy, both at the central and regional levels in accordance with the provisions of applicable legislation that aims to provide benefits, prosperity, and welfare to the life of the people.

The explanation of the *TPPK* Act indicates that state finance includes assets that are in the management and controlled by the SOEs. In short, that assets of state-owned companies are state-owned, so the loss of state-owned companies is also the loss of a state. SOE personnel or officials who do harm the SOE can be convicted with the *TPPK* Act.

Taking into account the state loss, there is a conflict of interest between the *TPPK* Act and the SOEs Act, as there are differences in the principles in both acts. The Principles of the *TPPK* Act require state losses including the losses of state enterprises, while the principle of the SOEs Act of SOE losses are a loss of state-owned companies themselves and state losses.

The existence of such principle differences, affect the legal uncertainty and confuses the justice seekers, as well as law enforcers including judges.

The practice that has been going on so far against the troubled SOEs is always that the perpetrator is punished with the criminal act of corruption. For example is a state-owned enterprise whose business is in banking. If there is a bad credit it is a sign of corruption. BNI Bank case with defendant A. Waworuntu and the Mandiri Bank case with ECW as the defendant. Neloe, both convicted by the

<sup>29</sup>Ibid

<sup>30</sup>Peter Mahmud Marzuki, 2011, *Penelitian Hukum*, Kencana, Jakarta.

Supreme Court with the criminal act of corruption because it proved wrong to distribute credit to their customers.

Since SOEs are companies and their management does not follow the State Budget system but has sound corporate principles, and loss of SOE is not a loss of state, the criminal act of corruption cannot be imposed on SOE personnel who harm SOEs.

If a criminal act of corruption cannot be imposed, it does not mean that an SOE official will be able to escape the law, but the perpetrator can still be punished by using another offense. For example, the government as a shareholder has the right to sue the Board of Directors of a state-owned company if it is proven to commit embezzlement, falsification of data and financial reports, violation of the Banking Act, violation of the Capital Market Act, violation of the Anti-Monopoly Act, violation of the Anti Money Laundering Act and other Acts that have criminal sanctions.

#### 4.3 Law enforcement system in the case of State finance losses to state-owned companies

According to Lawrence M Fredman <sup>[31]</sup>, there are three elements that must be considered in the Law Enforcement of the Criminal Act of Corruption in the management of state finances, namely:

##### 1. Structure of the legal system

Law enforcers, police, prosecutors with the inclusion of judges have not had a common perspective on the principle difference between the Criminal Act of Corruption Act, the State-Owned Enterprises Act and the State Finance Act. The SOEs Act states that the SOE capital is derived from separated state assets, meaning the separation of wealth from the state budget of income and expenditure to become state equity participation in SOEs for subsequent coaching/guidance and management is no longer based on the state budget expenditure system. However, its guidance and management is based on sound corporate management principles.

The provision, is clear that with the separation from the state budget of income and expenditure then the capital/wealth of the state becomes broken off from the state budget of income and expenditure, so that when the property is inserted/deposited to SOEs *Persero* results in, namely the transfer of property rights to the SOE *Persero*. The treasury no longer belongs to the state. This is in line with the theory of legal entity, that the legal entity has its own assets separate from the wealth of the founder and his board Prof. DR. Abdul Halim <sup>[32]</sup>.

As stated in the Criminal Act of Corruption Act there are four elements that must be met to see the financial losses of the State, namely: A legal subject; An unlawful act or abuse of authority/position; That there are actions done to enrich oneself or other people or corporations; and Can harm the state finance and state economy.

The fourth element in the criminal act of corruption in judicial practice is always incomplete because the proofing technique is to invite expert witnesses (always from the State Audit Agency) to give a statement or testimony on financial losses. Of course these statements are subjective which leads to a guilty verdict outside the judicial system itself. The civil servant witnesses of the treasury's oversight body become the judges themselves who preceded the

judges to be judged, even though they were aware of the State Treasury Act (Act No. 1/2004). The apparatus of the financial inspection body did not comply with the reason that the Act was only requested to assistance by the investigating apparatus to eliminate the amount of state financial loss with the data from the investigator. In the context of calculating the amount of losses, the officers will actually also find it difficult to find the basis of calculation because the criminal act of corruption act does not adopt the theory of accumulation and the economic theory. In contrast, the understanding of losses in the state treasury act has adopted it even until the constitutional law. The approach in the criminal corruption act presents only the basis of criminal law theory, so that the technical calculation of losses has an impact on the trial. Even so, there is no financial loss to the state or the economy of the state, the case is still terminated/cannot be given a verdict because there is the word 'can/able'. Thus, it is not mandatory that the calculation of financial losses of the state must state the exact amount of the cost even if there is a miscalculation the judge will still give/provide a verdict.

##### 2. Legal substance

In the perspective of the theory of legislation, the birth of the legislation package in the field of state finance shows the dynamics of legal norms, either vertically or horizontally. In vertical dynamics, legal norms are tiered from top to bottom, while horizontal dynamics indicate the existence of legal norms moving sideways, namely the withdrawal of a legal norm for facts or events that are considered similar.

In addition to the mandate of *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, the existence of reform in the field of state finance is intended to create an efficient state financial system in terms of management procedures and announcements so as to avoid the leak of legal political budget from the package in the field of State finance, directed at the creation of professional state financial management in the framework of the welfare and prosperity of the people. In reality, the issuing of legislation in the field of state finance has raised some issues, both on the theoretical and practical level. Even some people think that the birth of legislative package in state finance and their offspring has caused serious impact from the fiscal angle as well as from micro and macro economy, including investigating judges. One of the main causes of disharmony in politics in the field of state finance, is due to the absence of judicial and consequential juridical distinction between political law and private law and the nature of interdependence between constitutional law and state administrative law. The lack of separation between public law and private law in the politics of legislation in the field of finance makes the definition of state finances able to be seen from different perspectives.

The different views are due to various interpretations of the provisions of legislation can tained in positive law. There are provisional opinions that are in accordance with the State Finance Act, the incorporation of state assets that are separated to state-owned enterprises shall remain recognized as State finances. Whereas according to the State-Owned Enterprises Act it states that the state's assets are separated only by capital in State-Owned Enterprises, so that the wealth of State-Owned Enterprises is not considered as State property. Similarly, the State Receivables Committee Act treats the accounts of State-Owned Enterprises is equal to

<sup>31</sup>Loc.cit.P.227

<sup>32</sup> Hakim Abdul. Loc.cit. P. 14.

State Receivables, State-Owned Enterprises follow the procedures for settling state receivables. Whereas according to the State Treasury Act it states that the State receivable is the amount of money that must be paid to the central government, so that according to the State treasury act, the accounts of State-Owned Enterprise are not State receivables.

The interpretation of the State finances is based on the analogy of paralleling the provisions and explanations of the Act on the administration of a State that is clean and free of corruption, collusion and nepotism, which incorporates directors, commissioners and other structural officials in State-Owned Enterprises as well as other State organizers. Whereas pursuant to the Limited Liability Company Act and State-Owned Enterprises Act states that the Board of Directors and Board of Commissioners are organs of a Limited Liability Company, where the Board of Directors is authorized and fully responsible for the management of the Company for the interest of the Company, the Board of Commissioners shall supervise in general and/or specifically and advise the Board of Directors.

The existence of different perspectives in viewing 'state finances' not only affects the formulative policies undertaken by legislators, but also has an impact on the practice of law enforcement. The reality is seen in the practice of handling cases of the criminal act of corruption, especially those related to activities carried out by State-Owned Enterprises / Region-Owned Enterprises. The national strategy program and *rendana* of government action in eradicating corruption as stated in Presidential Instruction No. 5/2004 on the Acceleration of Corruption Eradication between the loam giving law and Human Rights:

- a) Preparing the formulation of amendments to the law in order to synchronize and optimize efforts to eradicate corruption.
- b) Preparing legislation draft that is treated to implement law/acts relating to the eradication of the criminal act of corruption.

### 3. Legal culture

The existence of different perspectives in viewing 'state finances' not only affects the termulative policies undertaken by the legislator but also has an impact on the practice of law enforcement. The reality is seen from the practice of winning cases on the criminal act of corruption, especially those related to the activities undertaken by SOEs/ROEs.

There are at least 2 (two) principal issues relating to the polemic between law enforcement officials and business practitioners in view of the losses that occur in the environment of SOEs/ROEs. These two differences include: (1) perceptions of 'state finance' and 'separated state finances' and (2) perceptions of 'state receivables' and static Directors and SOE commissioners.

Different views are due to various interpretations of the provisions of legislation contained in various positive laws. There is a temporary opinion that in the State Finance Act, includes that State assets separated to State-Owned Enterprises is still recognized as State finance. Whereas according to the State-Owned Enterprises Act states that the State's wealth which/that is separated is only limited to capital in State-Owned Enterprises, so that the wealth of State-Owned Enterprises is not State property. Similarly, the provision concerning (*PUPN*) which treats the SOEs

receivables as equal to State receivables, State-Owned Enterprises together with the Government agency of the Criminal Settlement of State-Owned Enterprises follows the procedure of settlement of State receivables. Whereas according to the State treasury act it states that the State receivable is the amount of money that must be paid to the central government, so that according to the state treasury act a State-Owned Enterprise's receivable is not a State receivable.

In its development, the polemic around the state financial loss not only happens between state apparatus of law with businessmen but even such difference of opinion also happens among law enforcement officers themselves. The polemic between fellow law enforcement officers relating to the financial losses of the State seem to be clear in the case of the Director of *PT. Pupuk Kaltim (PTK)* Omay Komar Wiraatmadja in a case with corruption of procurement rotor generator *PT. Kaltim Jaya Mandiri (KDM)* of about 4 million US dollars. According to the Panel of Judges, the rotor defense for *KDM* is not legally proven to be detrimental to the State's finances. Because based on Government Regulation No. 29/2007, regarding the transfer of government capital from *PT PKT* to *PT Pupuk Sriwijaya*, the status of the *PKT* is no longer a State-Owned Enterprise that manages the State's finances, therefore Omay K Wiraatadja (CEO of *PKT*), Rukasah Derejat (Technical Director of *PKT*), and Alfian Aman (Head of the Procurement Beurau/Aution of *PKT*) which was involved in a similat case that was sentence by a judge. On the other hand, the Public Prosecutor believes that the losses incurred as a result of the price gap of approximately US \$1,400,000 which constitutes a financial loss of the State.

The state's financial related polemic also occurs in the practice of justice, as the Supreme Court's Decision/Verdict No. 474/Pid.Sus/2007 dated October 22, 2008 in the Case of the Criminal Act of Corruption on behalf of the Defendant Drs. K. Wiraatmadja. In the South Jakarta District Court Decision/Verdict No. 2123/Pid.B/2006/PN.Jak.Sel dated February 23, 2007. It is the opinion of the Panel of Judges that 'the definition of the State's finances under the Criminal Act of Corruption Act does not apply to *PT* Bodies holding its shares is *PT (Persero)* or State-Owned Enterprises, the consideration of the South Jakarta District Court Judges shall be disqualified by the Cassation Panel of Judges'.

With the financial related polemics managed by the State-Owned Enterprises, the National Eradication of Corruption's mission in the first point is to build and establish an integrated system, procedure, mechanism and capacity for preventing corruption at the Central and Regional levels.

## 5. Closing

### 5.1 Conclusion

1. The practices that have occurred so far against the troubled SOEs are always punished by/with the criminal act of corruption. For example is a state-owned enterprise whose business is in banking. If there is a bad credit it means there is a case of corruption. The BNI Bank case with A as the defendant. Waworuntu and the case of Bank Mandiri with the ECW as the defendant. Neloe, both convicted by the Supreme Court with criminal corruption because they were proven wrong in disbursing credit to their customers. If a criminal act of corruption can not be imposed, it does not meant that a state-owned official will get away from / escape the

law, but the perpetrator can still be punished by using another offense. For example, the government as the shareholder has the right to sue the Board of Directors of a state-owned company/enterprise if proven of embezzlement, falsification of data and financial reports, violation of the Banking Act, violation of the Capital Market Act, violation of the Anti-Monopoly Act, violation of the Anti Money Laundering Act and other Acts that have criminal sanctions.

2. There are three elements to be considered in the Law Enforcement of Corruption in the management of state finances. is that: *First*, the structure of the legal system in which law enforcers, police, prosecutors including judges there has been no common perspective on the principle difference between the Criminal Act of Corruption Act, the State-Owned Enterprises Act and the State Financial Act. Where the State-Owned Enterprises Act states that SOEs capital is derived from separated state assets, meaning the separation of wealth from the state budget of income and expenditure to be the participation of state capital in SOEs for subsequent development and management no longer based on the State budget revenues system; b. *Secondly*, the Legal Substance where there is a provisional opinion that in accordance with the State Finance Act, the incorporation of state assets separated in the SOEs shall continue to be recognized as State finances. Whereas according to the Law of State-Owned Enterprises it states that the state assets are separated only to capital in State-Owned Enterprises are not State property. Similarly, the State Receivables Committee Act treats the accounts of State-Owned Enterprises as equal to State Receivables, State-Owned Enterprises Follow the procedures for setting state receivables. Whereas according to the State Treasury Act it states that the State receivable is the amount of money that must be paid to the central government, so according to the State Treasury Act, the receivables of State-Owned Enterprises are not State debts/receivables; *Thirdly*, the legal culture in which the existence of different perspectives in view of 'state finances' not only affects the termulative policies undertaken by the legislator but also affects the practice of law enforcement. The reality is seen from the practice of winning cases of the criminal act of corruption, especially those related to activities carried out by SOEs/ROEs.

## 5.2 Suggestion

1. As a suggested solution, there should be a change or amendment of Act No. 17/2003 on State Finance, Act No.20/2001 on the Eradication of Corruption, in order to avoid confusion for law enforcement officers to implement the prevailing laws/acts and regulations.
2. There needs to be a common understanding of the separated state finances that are used as the capital of State-Owned Enterprises in order that their management can be carried out professionally.

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