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CIVIL LIABILITY: A COMPARATIVE STUDY OF STATE OWNED ENTERPRISES AND CORPORATIONS

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ABSTRACT

In Article 1 number 1 of Law Number 19 of 2003 concerning State-Owned Enterprises, State-Owned Enterprises, it states that State-Owned Enterprises, hereinafter referred to as SOE, are business entities whose capital is wholly or largely owned by the state through equity participation, directly originating from separated state assets. SOEs have a vital and very important role in national development, as a source of state revenue in the State Revenue and Expenditure Budget. Given its very important position as a source of funds, SOE should be managed properly based on the principles of good corporate government. As actors of development in the economic sector, SOE carry out economic functions in all aspects of people's lives, especially those related to the field of services and the procurement of goods needed by the community.

KEY WORDS

Civil liability, comparison study, public service, law.

In Article 1 number 1 of Law Number 19 of 2003 concerning State-Owned Enterprises, State-Owned Enterprises, it states that State-Owned Enterprises, hereinafter referred to as SOE, are business entities whose capital is wholly or largely owned by the state through equity participation. directly originating from separated state assets. SOEs have a vital and very important role in national development, as a source of state revenue in the State Revenue and Expenditure Budget. Given its very important position as a source of funds, SOE should be managed properly based on the principles of *good corporate government* [1]. As actors of development in the economic sector, SOE carry out economic functions in all aspects of people's lives, especially those related to the field of services and the procurement of goods needed by the community [2]. SOEs in their capacity, like corporations in general, are also oriented towards making a profit, or have a *profitable* nature. In order to achieve these benefits, SOE take various methods, often even exceeding the legal provisions that are permitted, such as committing fraud, embezzlement, and corruption, and other deviant acts, which are detrimental to society, even to the SOE itself. Of course, these deviations must be accounted for, both criminally (*responsibility*) and civilly [3].

Liability is a person's obligation to bear compensation as a result of violating norms. Acts violating these norms can occur due to (1) unlawful acts; and (2). Losses due to unlawful acts may occur as a result of the mistake or negligence of a State-Owned Enterprise, which may cause harm to other people. This loss can be caused by the actions of management on behalf of the State-Owned Enterprise or by the management using the State-Owned Enterprise as the Means. Juridically, the two types of actions, whether due to unlawful acts or breach of contract, are both acts that give rise to civil liability, both for SOE and by the management personally. In this case, the law separates civil liability for SOEs as corporations, and civil liability for the management of State-Owned Enterprises, as individuals or individuals whose actions have caused harm to the other party.

Research Problem: SOEs are responsible for losses suffered by third parties as a result of their business activities.

METHODS OF RESEARCH

This research is a normative legal research, which is a review of the laws and regulations related to the responsibility of SOE to third party losses (S & Michael, 2023).



RESULTS AND DISCUSSION

Principle of Legal Liability. Responsibility comes from English liability. According to Yudha Hernoko, the notion of liability can be explained by understanding the meaning of "liability" and "aanspraakelijkheid" [4].¹ Blak's Law Dictionary, has a broad meaning, which includes: a) *an obligation one is bound in law or justice to perform;* b) *condition of being responsible for a possible or actual loss;* c) *condition which creates a duty to perform an act immediately before in the future.* Meanwhile, liability is defined as "liability which court recognizes and enforces as between litigant parties" [5]. Liability is a responsibility recognized by the Court in the context of law enforcement for the parties whose dispute is carried out through the Court [6].

Article 1238 of the Civil Code, stipulates that: "Conditions in which the debtor is declared negligent with a warrant, or with a similar deed, or based on the strength of the agreement itself, that is, if this agreement results in the debtor being deemed negligent with the lapse of the allotted time. Thus, default means that we cannot be separated from the problem of negligence (*ingebrekke stelling*) and negligence (*verzuim*). Determined or in carrying out achievements not according to proper/proper. Meanwhile, liability for unlawful acts is liability for losses incurred as a result of unlawful acts. Liability due to unlawful acts is regulated in Article 1365 of the Criminal Code, which is formulated, that: "Any unlawful act which causes harm to other people, obliges the person who because of his mistake to compensate for the loss".

Based on this understanding, the principle of accountability has elements, namely: a) the plaintiff feels aggrieved; b) the existence of the defendant as the party causing the loss; c) there is a loss arising as a result of the actions of the defendant. Thus, the principle of liability requires that there be an error by the defendant, and the error was committed against the law. Therefore, the perpetrator must be responsible for the actions that caused the loss.

Principle of Liability on the Basis of Unlawful Acts. Participant liability based on the provisions of Article 1365 of the Criminal Code, is often referred to as liability on the basis of unlawful acts, or what is called *onrechtmatigedaad*. The principle of liability on the basis of *onrechtmatigedaad* adheres to the principle of liability based on fault. The principle of liability based on fault, is the principle of accountability which imposes the obligation of proof on the injured party (plaintiff) for the fault of the party causing the loss (defendant) [9].

According to Rosa Agustina, the definition of an unlawful act as stipulated in Article 1365 of Indonesian Criminal Code initially contained a narrow understanding as influence teachings of legism [7]. The definition adopted is that an unlawful act is an act that is contrary to legal rights and obligations according to law. In other words, an act against the law (*onrechtmatige daad*) is the same as an act against the law (*onwetmatigedaad*). The obligation of proof that is borne by the plaintiff (the injured party) as stipulated in the provisions of Article 1356 of the Civil Code, includes the following elements: there is an error; the error violates the law; there is an element of loss; there is a causal relationship.

The elements in the provisions of Article 1365 of the Criminal Code. This must be proven by the defendant whose interests have been harmed. The plaintiff must be able to prove that the defendant committed a wrongful act, whether the act was intentional or unintentional, including the omission of an act that caused harm to the plaintiff. Concerning the elements of wrongdoing According to Rosa Agustina, the elements of wrongdoing in an act are not much different from the elements against the law. Furthermore, Moegni explained that in the act of "fighting" there are two active and passive characteristics attached. If a person deliberately commits an act that causes harm to other people, and then he deliberately makes a move, thus the active nature of term "against" is clearly seen [10].

On the other hand, if he is deliberately silent, knowing that he must do something not to harm other people or in other words, if he is passive, that if he does not want to do something he must have violated something that must cause harm to other people, then he has "fought" without having to move his body. This is the passive nature of the nature of "against" [11].



Furthermore, the plaintiff must be able to prove that wrongdoing committed by defendant violated the provisions of legislation, which prohibits the act from being committed. The next element is that the act of wrongdoing that violates the law must cause real harm to be suffered by plaintiff, that is, the defendant must be able to prove that there was a mistake. The last element is proving the existence of a causal relationship or a causal relationship between the wrongdoing that violates the law and loss suffered by the plaintiff.

Limits of Liability of State-Owned Enterprises. Referring to the principle of liability which divides between liability based on unlawful acts, and liability based on default. In liability on the basis of unlawful acts, the main element is the existence an element of error on the part of party who committed the act, causing a loss. The element of error is an essential and absolute element that must be proven by the aggrieved party. Proof of the existence of an element of error to ensure that the perpetrators of the act can be held accountable. This element of error is one of the burdens of the plaintiff's responsibility to prove it.

Before determining whether there is liability for a State-Owned Enterprise as a corporation, it must first be understood that its establishment is based on the articles of association. The articles of association of SOE are specified in Article 41 (1) of Law Number 19 year 2003 concerning State-Owned Enterprises, which stipulates that: "Perum's statutes are stipulated in Government Regulations regarding its establishment". As is the case with corporations in general, within a SOE there are Shareholders, Commissioners, Directors and other equipment that carry out the daily activities of SOE. In carrying out their daily duties, the Board of Directors has the duties, authorities and responsibilities specified in the SOE's articles of association. In addition, the Board of Directors must also comply with and comply with legal norms set by SOE concerned.

Determining whether there is a SOE liability basically cannot be separated from the causes on birth of losses suffered by other parties as a result of their business activities. In addition, to determine the accountability of SOE, it must also be ensured that the loss is the fault of SOE as a corporation. Corporate responsibility must be separated between the actions of corporation as a legal entity and actions of the Directors as corporate organs, acting in their own interests. In other words, losses suffered by third parties are not necessarily the responsibility of SOE [12].

As a comparison, it can be stated regarding liability of the Directors of Limited Liability Companies in Law Number 40 year 2007 concerning Limited Liability Companies (Law No. 40-2007). According to Company Law, there is no clarity on accountability of Board Directors who commits unlawful acts that cause harm to third parties [14]. Regarding unlawful acts, it is contained in Article 138 paragraph (1) Law No. 40-2007 which stipulates: An examination of a company can be carried out with the aim of obtaining data or information in event that there is an allegation that: a). The company commits an unlawful act that is detrimental to shareholders or third parties; or b). members of the Board of Directors or the Board of Commissioners commit acts against the law that are detrimental by Company or shareholders or third parties.

Based on provisions of Article 138 paragraph (1) Law No. 40-2007, it can be concluded that those who can commit unlawful acts are companies as legal entities or company organs (members of the board of directors or board of commissioners) which harm the corporation, in this case the company, and or shareholders, and or third parties. The Law No. 40-2007 does not further regulate liability for unlawful acts that cause such losses. This means that there is no liability arrangement to company or directors who commit acts that violate in law.

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The basis for consideration is provisions of Article 1365 the Indonesian Criminal Code. These are general in nature, meaning that they do not limit who committed the act, and what



type of action caused the loss. Thus, the provisions of papal can be used as a basis for accountability to directors of SOE and the directors of P.T. who because of his actions cause losses to Company, and or shareholders, as well as to third parties.

CONCLUSION

SOEs are basically legal subjects as a result of embodiment by law, so they have rights and obligations as individual legal subjects (*naturlijke person*). SOEs as legal subjects of legal entities (*rechts person*). In carrying out daily activities, SOEs are represented by the Board of Directors, and are responsible to SOEs. In the event of a claim for loss by a third party, the SOE must be held accountable, as long as the Directors who run the SOE have not made a mistake. However, if the loss is caused by an unlawful act of error, then the loss should not be the responsibility of the SOE, but responsibility of Board Directors who made some mistake. However, the problem is not that easy, because Board of Directors works within the framework of carrying out duties and authorities of SOE.

REFERENCES

1. M. Shattock, Good Governance in Higher Education. 2006.
2. G. Ayu, K. Rachmi, and H. Corresponding, "Embodying Green Constitution by Applying Good Governance Principle for Maintaining Sustainable Environment," vol. 11, no. 2002, pp. 18–25, 2013.
3. Alhakim and E. Suponyono, "Kebijakan Pertanggungjawaban Pidana Korporasi," 2019.
4. Y. Hernoko, Bahan Kuliah Tanggung Gugat. Surabaya: Universitas Airlangga, 2012.
5. M. Chief, Black's Dictionary. St Paul Minessota: Mwest Group, 2000.
6. D. Prinst, Strategi Menyusun and Menangani Gugatan Perdata. Bandung: Citra Aditya Bakti, 2002.
7. R. Agustina, Hukum Perikatan (Law Obligation), Seri Unsur-Unsur Penyusun Bangunan Negara Hukum. Denpasar Bali: Pustaka Larasan, 2012.
8. S, M. W. C., & Michael, T. (2023). Kedudukan Lembaga Serta Tindak Lanjut Mengenai Putusan Dewan Kehormatan Penyelenggara Pemilu. Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance, 3(2), 1746–1764. <https://doi.org/10.53363/bureau.v3i2.278y>. Harahap, Ruang Lingkup Pelaksanaan Eksekusi Bidang Perdata. Jakarta: Gramedia, 1989.
9. Satria Wijaya, "Pertanggungjawaban Pengurus Badan Usaha Milik Negara Terhadap Kerugian Keuangan Negara Pada Pengelolaan Persero Ivan Satria Wijaya," 2015.
10. N. Jati Hamonangan Sihite and I. Afrita, "Tanggung Jawab Perdata Bagi Direksi Perseroan Terbatas Pada Anak Perusahaan Dalam Holding Company Perusahaan Perkebunan Badan Usaha Milik Negara," Riau, 2023.
11. M. Djojodirjo, Perbuatan Melawan Hukum: Tanggung gugat (Aansprakelijkheid) untuk kerugian yang disebabkan karena perbuatan melawan hukum. Jakarta: Prandnya Paramita, 1982.
12. H. Julaiani, "Pertanggungjawaban Dreksi BUMN terhadap Kerugian Keuangan Negara," Universitas Diponegoro, vol. 2, 2016.
13. Yatini, "Reformulasi Konstruksi Pidana dalam Menjerat Pelaku Tindak Pidana Korporasi," Jurnal Pasca Sarjana Hukum UNS, 2019.
14. Kinanti and H. Saptono, "Tanggungjawab Direksi dalam Tindakan Ultra Vires menurut Undang-Undang Nomor 40 tahun 2007 Tentang Perseroan Terbatas," vol. 5, no. 40, 2016.
15. Y. A. Mangesti and S. Suhartono, Ilmu Hukum Kontemporer. Malang: Setara Press, 2021.
16. S, M. W. C., & Michael, T. (2023). Kedudukan Lembaga Serta Tindak Lanjut Mengenai Putusan Dewan Kehormatan Penyelenggara Pemilu. Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance, 3(2), 1746–1764. <https://doi.org/10.53363/bureau.v3i2.278>.