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Demarcation BUMN: Between Private Laws and Public Laws

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Abstract

The article titled “BUMN between Private Law and Public Law” aims to find the best solution for crossing the position of BUMN that meets in it two different legal regimes namely private law and public law in Indonesia. Until now it has not been found yet, the most appropriate measure to differentiate BUMN/BUMD is subject to state finance or whether it is subject to the private financial system. Law Number 17 of 2003 concerning state finance has a strong public law nuance representing Hobbes’s thinking, while Law Number 19 of 2003 concerning BUMN is stronger in the spirit of private law which represents Grotius’ ideas, the problem that arises, namely how to resolve the law dogmatically fairly between the two laws that contain the opposite spirit. The article uses normative legal research methods with a conceptual approach, a statutes approach and a legal case approach. This research resulted in recommendations for the use of legal philosophy as a meta theory for legal theory to be the settlement of the meeting point to find an equilibrium that fulfills a sense of justice.

Keywords: Philosophy of Law; Meeting Point; BUMN.

Introduction

Indonesia in the 1945 Constitution The third amendment confirms in article 1 paragraph (3), that Indonesia is a state of law. The rule of law is a core concept, providing guarantees that both public and private legal entities, including individuals, can only carry out actions if they are based on law.¹ The concept of the rule of law states that the commander in the dynamic of state life is law, not politics or economics.² The rule of law itself developed in the 20th century. The State’s position as guardian of order and security began to change. The conception

¹ Hari Sugiharto and Bagus Oktafian Abrianto, ‘Perlindungan Hukum Non Yudisial Terhadap Perbuatan Hukum Publik’ (33AD) 1 Yuridika.[45].

² Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (PT-Buana Ilmu Populer 2008).[297].

of *nachwachterstaat* shifted to *welvarsstaat*,³ namely the State organizing welfare or also known as *verzorgingsstaat*. According to Imanuel Kant, the emergence of a classical rule of law (Continental Europe) is to guarantee that the same position must not influence each other, and intervene with each other, where according to Kant, the rule of law must have two main elements namely, the existence of legal protection of human rights human beings and the separation of powers in the State.⁴ Thus in the rule of law model like this the State functions as an intermediary in the event of disputes between citizens. With this function the State is referred to as the “night watchman” (*nachwachter staat*). To ensure that there is no arbitrary action by the State in running the government. The law for the life of the nation and state is also an implementation of the principle of legality, *nullum delictum nulla poena sinne praevia lege poenali* where a person cannot be punished without provisions that precede the prohibited act. In addition to ensuring legal certainty, the principle of legality has two other functions, namely, as a measure of the validity of the actions of the authorities, and as a guarantee of protection for legal subjects in the country.⁵

The concept or idea of the rule of law which controversially confronts the States of power (a State with the absolute government) is essentially the result of centuries of long debate from scholars and philosophers about the State and law, namely about the nature of its origin, purpose Country and so on. In particular the core problem is from which the State derives its power to take actions and obeyed by the people. In this case, two major theories can be noted, namely the theory of sovereignty and the theory of the origin of the State which produces the State pattern, namely the pattern of the State of power and the rule of law, several theories of social contracts, namely:⁶

³ Sudargo Gautama, *Pengertian Tentang Negara Hukum* (Alumni 1983).[10].

⁴ Juniarso Ridwan and Achmad Sodik Sudrajat, *Hukum Administrasi Neagara Dan Kebijakan Pelayanan Publik* (Nuansa Cendekia 2009).[59].

⁵ Sukardi dan E Prajwalita, ‘Pendelegasian Pengaturan Oleh Undang-Undang Kepada Peraturan Yang Lebih Rendah Dan Akibat Hukumnya’ (2012) 27 *Yuridika*. [141-156].

⁶ Jimly Asshiddiqie (n 2).[144].

1. God's social contract theory, in which considers God as the highest authority in the State. In practice, the sovereignty of God is incarnated in laws that must be obeyed by the head of the State or can also incarnate in the power of the king as the head of the State claiming the authority to establish laws in the name of God, advocates of this understanding include Augustine and Thomas Aquinas.⁷
2. The king's social contract theory assumes that it is the king who holds the highest sovereignty in a State⁸ such a view especially arises after the period of the secularization of the State and law in Europe.
3. The theory of the social contract of the State, as a reaction to the arbitrariness of the king which appeared simultaneously with the emergence of the concept of the nation state in historical experience in Europe. Each kingdom in Europe broke free from the ties of the world state ruled by the king who once held power as the head of the church, the social contract theory among other countries spearheaded by Jean Bodin, Thomas Hobbes, Paul Laband, and Groge Jelinek.
4. The legal social contract theory which assumes that the State actually does not hold sovereignty. The highest source of power is law and every head of state must submit to the law.
5. People's social contract theory which believes that the real sovereign in each country is the people. The will of the people is the only source of power for every government.

Of the various social contract theory options, the fifth social contract theory in which sovereignty is placed in the hands of the people is a theory that is widely accepted by the countries in the world, as many as 90-95% of countries in the world claim to embrace democracy.⁹ Democracy which according to its origin means "the people in power" or "*government or rule by the people*" comes from the Greek word *demos* meaning people, and *kratos* or *kratein* means power or power.¹⁰

In a country that embraces democracy, it is always based on a system that guarantees the principles of popular sovereignty. C.F. Strong stated a system of government in which the majority of adult members of the political community participate on the basis of a system of representation that ensures that the government is ultimately accountable for its actions to the majority.¹¹

⁷ Theo Huijbers, *Filasafat Hukum Dalam Lintasan Sejarah* (Kanisius 1982).[37-44].

⁸ Dwi Andayani Budisetyowati, *Hukum Otonomi Daerah Dalam Negara Kesatuan Republik Indonesia* (Roda Inti Media 2009).[15-16].

⁹ Jimly Asshiddiqie (n 2).[146].

¹⁰ Miriam Budiarjo, *Fundamentals of Political Science* (Gramedia Pustaka Utama 1996).[50].

¹¹ Irfan Fachrudin, *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah* (Alumni 2004).[98].

Referring to the concept of democracy, all state institutions or public offices are essentially positions that have the legitimacy of the sovereign people, so not only the duties and authority of the office must be carried out according to the constitution, but must also be accountable to the people, through the principle of accountability, transparency and participatory ways of working. Every citizen must get the widest access to the performance of state institutions. Periodically the relevant state institutions are required to submit open reports to the public, accompanied by freedom of the press to obtain information and preach that information to the wider community.

The state according to *Plato* in his book entitled *Politeia* is a collaborative activity between humans in order to fulfill common interests.¹² Thomas Hobbes describes that humans (since ancient times) have been dominated by natural passions to fight for their own interests. Understanding just or not fair, there is nothing but human desires, in this condition there are *a bellum omnium contra omnes* where every person shows a desire that is truly selfish. For humans like this, if there is no law, then for the sake of pursuing self-interest, they will be involved in *the war of all against all (all war against all)*. Without laws enforced by powerful rulers, individuals will destroy one another (*homo homini lupus*).¹³ That is why for Hobbes, power is no less than the means available now to get real good in the future. Even though the abuse of power implies that the law is wide open, it is still better than the initial brutal natural conditions.¹⁴ Unlike Hobbes, Grotius was an early modernist humanist. Therefore, he views humans as personal person who is free and has certain rights. This applies to every human being, because of Grotius 'attention to the autonomous and free side of the private person; the natural law in Grotius' eyes is only related to private law.¹⁵

The ontological conflict between Hobbes and Grotius about humans was "reconciled" by Samuel Pufendorf (1632-1694) who lived in the *Aufklärung*

¹² Inu Kencana, *Ilmu Pemerintahan Jakarta* (Bumi Aksara 2013).[59].

¹³ Bernard, [et.,al.], *Teori Hukum, Strategi Tertib Manusia Lintas Ruang Dan Generasi* (Genta Publishing 2013).[61-62].

¹⁴ *ibid.*

¹⁵ *ibid.*[64].

era. Pufendorf combined the two theories into a new conception. He made the sociability of Grotius and the ‘initial incapacity’ of Hobbes the basis of ontological and epistemological law. Humans are not only physical beings, but also not merely moral beings per se. Humans are both physical and moral creatures. With ‘initial incapacity’, humans are in a natural world where they have needs and face danger. But with his sociability, which is related to understanding values, he participates in a moral world that cares about things that are noble and peaceful.¹⁶

Each individual lives in the country, has the right to develop themselves in the guidance of the ratio of each individual. So here comes the theory of law as an order to protect basic human rights. The thinkers of that era included John Locke, Montesquieu, Rousseau and Kant. Locke adheres to the principle of individual freedom and the primacy of ratio as the principle of natural law. In addition to the principle of individual freedom and the virtue of ratio, Locke also teaches about social contracts. If Hobbes’s social contract presupposes the surrender of all individual rights in total to the ruler, Locke does not. According to Locke, people who make social contracts are not people who are afraid and resigned as imagined Hobbes. According to Locke they are people who are orderly and respect freedom, the right to life, and ownership of property as an innate right as a human being. In fact, according to Locke, it is an ideal society because basic human rights are not violated.¹⁷

According to Immanuel Kant, in his freedom and autonomy, each individual tends to fight for the independence he has. But it is possible the implementation of one’s independence can be detrimental to others. To avoid the loss, it requires law. Law is the need of every free and autonomous creature that wants or does not want to live together. According to Kant, the law must be free from pragmatic considerations based on sensory experience such as good taste, liking, fortune, and so on, so the law must be *imperative* and apply *heteronomous*.¹⁸

¹⁶ *ibid.*[65].

¹⁷ *ibid.*[66].

¹⁸ *ibid.*[72-73].

Jacques Rousseau developed his theory of law from the basic question, why did humans who originally lived in a natural state, free to independence, be willing to become a person who was 'bound' by rules?, because the law was public property and because it was objective in nature. The next question is, why is law public property and objective? Because the basic nature of the law is:¹⁹

1. General volition (*volonte generale*);
2. Not the will of the group (*voltare de corps*);
3. Nor is the will and self-interest of people in a disorderly mob (*voltare de tortuous*); and
4. Nor is the will of the individual per person (*voltare particuliere*).

As a manifestation of *volonte generale*, the law functions as an order that protects common interests as well as personal interests, including private property. In such a law, the rights and freedoms of each person are still respected, so that they feel free and free. Living in an orderly manner is considered to be far better than the atmosphere of the previous life, where people were competing with one another to pursue their own interests without specifically building a common interest. In short, living in an orderly manner will inevitably bring people to justice and decency.²⁰

When a draft regulation is submitted, the main issue is not the body's agreement or disagreement, but whether the draft is in line with *volonte generale* or not. This is an absolute requirement because it will bind individuals who have autonomy and are free. For Rosseau, the law is a "private public" and a "moral person" whose existence comes from social contracts to defend and protect shared power, in addition to personal power and private property.²¹ Meanwhile in Indonesia, a common goal (*volunte generale*) as a national entity is stated in the opening of the 1945 Constitution which states that the goal of the nation of Indonesia as a state is to protect all Indonesians and all Indonesian bloodspots, promote public welfare, improve the life of the nation, and participate Implement world order based on eternal peace and social justice.

¹⁹ *ibid.*[72-73].

²⁰ *ibid.*[80].

²¹ *ibid.*

Law has a spirit, a spirit that builds the formation of a rule. The spirit and spirit of the law are determined by the enthusiasm of its compilers, for example Law Number 17 of 2003 concerning State Finance and Law Number 19 of 2003 concerning SOEs. In Law Number 17 of 2003 concerning State Finances states that State finances include State assets/regional assets that are managed alone or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including State assets separated in State/regional company. Meanwhile Law No. 19/2003 concerning SOEs Article 4 paragraph (1) states that SOEs' capital is and originates from separated state assets. State assets that are separated here means the separation of state assets from the State Revenue and Expenditure Budget from the State Revenue and Expenditure Budget (APBN) to be used as an inclusion capital in SOEs for further development and management is no longer based on the APBN system, but guidance and management are based on sound corporate principles. Two different provisions of the two unequal laws, according to Prasetyo, put the BUMN/BUMD in a dilemma.²² In addition, Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Law Number 20 of 2001, which generally contains explanations that state finance means all state assets in any form, separated or not separated, including all parts of the State's assets and all rights and obligations arising because one of them is in the possession, management and accountability of BUMN/BUMD, legal entities, and companies that include state capital, or companies that include third party capital based on agreements with the state. In juridical normative, the obscurity of legal norms (absure norm) in a statutory regulation can cause obstacles and government stagnation and can even be a factor in the emergence of disputes between the people and the government and there is no guarantee of certainty of legal protection in resolving disputes between the people and the government.²³

²² Prasetyo, *Dilema BUMN, Benturan Penerapan Business Judgement Rule Dalam Keputusan Bisnis Direksi* (Rayyana Komunikasindo 2014).[106].

²³ Bambang Arwanto, 'Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah' (2016) 31 Yuridika <<https://e-journal.unair.ac.id/YDK/article/view/4857>>.[362].

In practice, law enforcement officials do not differentiate the status of state assets in a state-owned enterprise that is included in the public or private law environment.²⁴ The ontological conflict between Hobbes and Grotius about humans seems to reappear in another form of law, Law Number 17 of 2003 concerning state finance has a strong public law nuance representing Hobbes's thinking, while Law Number 19 of 2003 concerning SOEs the spirit of private law is stronger which represents the thoughts of Grotius.

On the other hand, the mode of corruption is faced with the *modus operandi*, which is sometimes difficult to detect by law. as stated by the Public Prosecutor in his article entitled "The Position of Justice Collaborator to Reveal Corruption in Financial Management of Regional Government" which states that, Corruption occurs with a variety of motives and supports from many parties. This crime is by design and neat on its conceptual draft of development budgeting and operational planning. With good preparation for the implementation of development, corruption may occur neatly without being found by the law.²⁵ Financial accountability is not only assessed from the final report submitted, but from the beginning the process of design, discussion, and endorsement, and implementation. In addition, financial accountability is not only in terms of the formality of the procedure, but also must substantively fulfill the elements of accountability.²⁶

The decision of the Constitutional Court No. 77/puu-ix/2011 has always been used as the basis of the private sector to impose the argument of the separation of its wealth from state property which in carrying out all its business actions is a private *an sich*. The government's civil action is like a delta where the fresh water meets the river mouth and salt water originating from sea water. In a delta no expert neither can claim that only one type of salt water from the sea or fresh water from a river

²⁴ Prasetyo (n 23).[108].

²⁵ Nurma Rosyida, 'The Position of Justice Collaborator to Reveal Corruption in Financial Management of Regional Government' (2020) 35 *Yuridika*. [93-111].

²⁶ Indrawati and Herini Siti Aisyah, 'Kajian Akademik Tentang Pemotongan Gaji Pegawai Negeri Sipil Yang Sedang Menempuh Tugas Belajar Di Lingkungan Kementerian Pendidikan Nasional Dalam Sistem Keuangan Negara' (2020) 25 *Yuridika*. [182-183].

is a good fact of mixing. From this description arises a philosophical problem that needs to be resolved, that is, the dogmatic legal settlement of the losses suffered by SOEs/BUMD fairly between the two laws that contain the opposite spirit.

Government as a Public and Private

The meeting between the government as a public and private legal entity as a private legal entity in a legal act is a legal event that has two legal characteristics at once, namely a meeting between public law and private law. Between public law and private law has its own character that is different from one another. The character of public law is marked by the involvement of the government in one area of community life where the emphasis is only on eradicating matters that are detrimental to society by issuing orders and prohibitions that are deemed necessary.²⁷ Another distinctive feature of the character of public law is the need for legality (the principle of legality) while civil law is characterized by the autonomy of the parties.²⁸

Prasetyo in his book titled BUMN Dilemma, in one of the chapters in the book Prasetyo explained that there are differences between the two laws (Law Number 17 of 2003 concerning State Finance and Law Number 19 of 2003 concerning SOEs) bringing SOE directors in a dilemma position when making decisions, especially decisions that carry the risk of causing harm. This is because the losses that have arisen can result in them being accused of creating potential losses to the State that has the potential to be entangled in Corruption.²⁹

In line with the spirit of the Public Service Act, Sogar Simamora, states that if an entity is formed by law and established in the context of carrying out public service functions, the relevant body is a public body.³⁰ Sogar Simamora's opinion is different from the opinion of Arifin Soeria Admaja, who stated that

²⁷ Indroharto, *Perbuatan Pemerintah Menurut Hukum Publik Dan Hukum Perdata, Lembaga Penelitian Dan Pengembangan Hukum Administrasi Negara* (Jakarta 1995).[15].

²⁸ *ibid.*[19].

²⁹ Prasetyo (n 23).[101].

³⁰ *ibid.*[56].

if the government is incorporated in certain collaborations such as state-owned companies (even though BUMN or BUMD) applies Civil law regulations, Arifin further explained that based on Law No. 19 of 2003 concerning SOEs, Perum capital is state property that is separated and does not consist of shares. This is different from state-owned companies whose capital is separated from the State assets. This separation of wealth means that the State has set aside wealth to strengthen the capital structure of the state-owned company. Such state capital participation according to Arifin has a logical consequence that in the company, the government takes the risk of the loss of the business; the government's position in this case cannot be a public legal entity.³¹

Perception of the meaning of state money continues to be debated, it can be seen in the decision Number: 40/Pid.Sus.TPK/2014/PT SMG regarding corruption acts that occur in SOEs, the judge sentenced as a criminal act of corruption, in contrast to the Decision of the Constitutional Court No. 77/PUU-IX/2011 which states SOEs are business entities that have separate assets from state assets so that the authority to manage business assets, including debt settlement of SOEs is subject to limited company law, namely Law No. 40 of 2007, even though the two decisions are equally about BUMN accounts receivable. Law Number 17 of 2003 concerning State Finance has the dominance of the color of public law while Law Number 19 of 2003 concerning SOEs is interpreted to have the dominance of private law. Indonesian Supreme Court Research and Development Research Year 2005-2011 itself, about the interpretation of the meaning of state money and state losses in corruption cases in the BUMN environment. The results of a review of 12 (files) of the Indonesian Supreme Court Judge's Decision adjudicating Corruption Crimes Regarding SOEs, the Researcher took four (4) sample decisions that were considered quite representative, concluding that there was no/no common perception in interpreting the meaning of State money and Losses State in Corruption Case Related to BUMN.

³¹ Arifin Soeria Atmaja, *Keuangan Publik Dalam Perspektif Hukum, Teori, Praktik, Dan Kritik* (Raja Grafindo Persada 2010).[95].

The difference in the spirit of the two laws is similar to the ontological conflict between Hobbes and Grotius. One must look for what can unite the two laws which have different spirits. Bringing together the point of balance normally accepted by both sides, both supporters of public law or supporters of private law freedom, so that the dogmatic conflict of law finds a solution. It is not easy to bridge the meeting of the two camps who have opposing zeal backgrounds as described above, the only meeting point is moral justice. Moral justice as a principle that is considered general and universal.³² Pufendorf combines the sociability of Grotius and the 'initial incapacity' of Hobbes as the ontological and epistemological foundation of law. Humans are not only physical beings, but also not merely moral beings per se. humans are both physical and moral creatures. With 'initial incapacity', humans are in a natural world where they have needs and face danger. But with his sociability, which is related to understanding values, he participates in a moral world that cares about things that are noble and peaceful.³³

Humans are driven by a variety of interests, desires and power, prestige, wealth and the like. Humans although adept at creating moral arguments to support their claims between one side of the opinions are not coherent with the principle of justice.³⁴ Society is well ordered when it is not only designed to improve the welfare of its members, but is also effectively governed by the public conception of justice.³⁵

The legal layer as quoted by Bruggink in his book, *Reflections on Law*,³⁶ is an alternative to solving the dogmatic problem of law about whether SOEs are included in state finance in public law or purely private in private law. Legal theory notes that there are two theories as supporters of opposing camps, namely the theory of legal entities as supporting SOEs as private finance, and the theory of social contracts

³² John Rawls, *Teori Keadilan, Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara* (Penerjemah: Uzair Fauzan dan Heru Prasetyo ed, Pustaka Pelajar 2011).[319].

³³ Bernard, [*et.,al.*], (n 13).[65].

³⁴ Jhon Rawls, *Teori Keadilan, Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara* (Pustaka Pelajar 2011).[498].

³⁵ *ibid.*[5].

³⁶ Bruggink, *Refleksi Tentang Hukum* (Citra Aditya Bakti 1999).[172].

as supporting SOEs as state finance. Legal entity theory consists of two theories, namely fiction theory and organ theory, which are the basis for supporting SOEs as private finance. The theory of fiction states that given the status as the holder of rights and obligations, then certain groups of people or property, or organizations must be considered (fiction) as if they were like humans. Organ theory holds that the existence of a legal entity is because of him indeed exists in society, not just because it is considered fiction.³⁷ Each theory either supporting BUMN as state finance or BUMN as private finance has its own argumentation building which at the theoretical level is still difficult to meet.

Philosophy of Law as a Meta-Theory for Legal Theory

Philosophy of law as a meta-theory for legal theory is the hope of resolving the meeting point of the two theories, namely by asking what law exists, what is the purpose of social contracts, and whether individual autonomy will remain free if it is proven to have a bad character harming the public? These questions can be an introduction to how to measure the portion of state or private finance, which will be applied to SOEs, all depends on how the case is sitting, the background of the problem and whether or not there is a good tie in the case of the SOE concerned.

Decision Number: 40/Pid.Sus.TPK/2014/PT SMG regarding Corruption Crimes that occur in SOEs, is different from the Constitutional Court Decision No. 77/PUU-IX/2011 because sitting cases or backgrounds are not the same. In the Decision Number: 40/Pid.Sus.TPK/2014/PT SMG, the judge sentenced it as a criminal act of corruption, because the defendant as an official who has the authority to determine to whom the credit of the BUMN Bank where he worked could be given instead misused his position to enrich himself with the way to create fictitious creditors as one of the modes of operation in the framework of self-benefit. In the decision Number: 40/Pid.Sus.TPK/2014/PT SMG revealed that there was no good intention to enrich themselves at the expense of the said BUMN bank. Although

³⁷ Munir Fuadi, *Teori-Teori Besar Dalam Hukum* (Kencana Prenada Media Grup 2013).[192-193].

there should be two types of protection for the people, namely preventive protection before repressive law, this means that preventive legal protection aims to prevent disputes, whereas conversely repressive protection aims to resolve disputes.³⁸

The decision of the Constitutional Court No. 77/PUU-IX/2011 which states SOEs are business entities that have assets separate from state assets so that the authority to manage business assets, including debt settlement of SOEs is subject to limited company law, namely Law No. 40 of 2007. The decision of the Constitutional Court This was motivated by the initiative of debtors of state-owned banks who want equal treatment of state receivables due to events outside of power (force majeure), namely the occurrence of a monetary crisis. The background of the petition submitted to the Constitutional Court was seen that there was no intentional violation of the rules as *Volunte Generale*, all the mechanisms of debt and debt have followed the procedure. The desire to get special treatment by taking force majeure as a basis for argumentation is done by taking legal means by submitting an application to the Constitutional Court is the right way to remember that BUMN as a public legal entity can not just take legal action without the legality of regulations. The difference between the two judicial decisions does not need to be disputed because it does have a background in the case of a different position even though the material is the same, namely about SOE bank receivables.

MK Decision No. 77/PUU-IX/2011 was motivated by the submission of 6 companies namely PT. Sarana Aspalindo Padang, PT. Bumi Aspalindo Aceh, PT. Citra Aspalindo Sriwijaya, PT. Perintis Aspalindo Luas, PT. Karya Aspalindo Cirebon, and PT. Aspalindo Riau Center. The seven companies submitted applications to examine the constitutionality of Article 4, Article 8, Article 10, and Article 12 paragraph (1) of Law Number 49 Prp of 1960 concerning the Committee on State Receivables Affairs against Article 28D paragraph (1) and Article 33 paragraph (4) The 1945 Constitution of the Republic of Indonesia.

³⁸ Hari Sugiharto and Bagus Oktafian Abrianto (n 1).[44].

Article 4:

The State Receivables Affairs Committee is tasked with:

1. Managing the State's receivables which, according to the Regulations, have been handed over to them by the Government or Bodies as intended in Article 8 of this Regulation;
2. State Receivables submitted as referred to in number 1 above, are receivables that are and the amount is certain according to law, but the guarantor of the debt does not pay it properly;
3. Notwithstanding the provisions referred to in number 1 above, settle State receivables by not having to wait for their surrender, if in their opinion there is a sufficient reason, that the State Receivables must be immediately managed;
4. Supervise the receivables / credits that have been issued by the State / State Agencies whether the credit is actually used in accordance with the application and / or conditions for granting credit and ask information relating to it to Banks by deviating from the provisions in Government Regulation in Lieu of Law No. 23 of 1960 concerning Bank Secrets.

Article 8:

What is meant by State receivables or debt to the State by this Regulation, is the amount of money that must be paid to the State or Agencies that are either directly or indirectly controlled by the State based on a regulation, agreement or any cause.

Article 10 paragraph (1) and paragraph (2):

- (1) After being negotiated by the Panitia with the guarantor of the debt and an agreement is reached on the amount of outstanding debts, including interest on money, penalties that are not criminal, as well as costs related to these receivables, the Chairperson of the Panitia and the guarantor of the debt are made a joint statement containing the amount and the obligation of the guarantor for the debt to pay it off.
- (2) This joint statement has the power of implementation as a judge's decision in a civil case with definite power, for which the joint statement is headed "In the Name of Justice.

Article 12 paragraph (1):

- (1) Government Agencies and State Agencies as referred to in Article 8 of this Regulation are obliged to surrender their receivables, the amount of which is certain according to the law, but the guarantor of the debt does not want to pay it properly to the Registrar of State Receivables Affairs.

The articles in the 1945 Constitution which were used as test stones are:

Article 28D paragraph (1):

- (1) Every person has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law;

Article 33 paragraph (4):

(4) The national economy is carried out based on economic democracy with the principles of togetherness, fair efficiency, sustainable, environmentally sound, 9 independence, and maintaining a balance of progress and national economic unity.

The Petitioners feel impaired their constitutional rights to obtain protection, legal certainty, and equal treatment before the law and feel impaired their constitutional rights because the Petitioners lost the opportunity to try based on the principles of economic democracy, the principle of togetherness and fairness as guaranteed in Article 28D paragraph (1) and Article 33 paragraph (4) UUD 1945. The Petitioners as debtors of PT. Bank Negara Indonesia Tbk. assume that, in the event of a situation that is an event outside of power (*force majeure*) that is the occurrence of a monetary crisis, do not get assistance in the form of relief payment obligations including debt cuts (*hair cut*). Whereas the fact is that non-cooperative non-cooperative debtors who settle their credit through IBRA, have enjoyed a reduction in principal debt (*hair cut*) to reach above 50% of their principal debt, whereas the Petitioners who have restructured their loans through the State Receivables Committee have in fact increased their principal debt big.

The Petitioners argue that the validity of the provisions of Article 4, Article 8, Article 10, and Article 12 paragraph (1) of Law 49/1960 is the source of the causes of the Petitioners' losses, but the Constitutional Court in its legal consideration stated that the debts of the Petitioners by PT. Bank Negara Indonesia Tbk. (Persero) has not submitted its management to the PUPN. Based on the description of the legal considerations, it is natural that the Constitutional Court considers in its legal judgment the verdict that the argument of the applicant's loss due to the validity of the provisions of Article 4, Article 8, Article 10, and Article 12 paragraph (1) of Law 49/1960 is groundless. Therefore, based on the description above, the 7 debts of the applicant have not yet applied the provisions of Law Number 49 Prp of 1960 concerning the State Receivables Affairs Committee.

The Constitutional Court, in one of its legal considerations, stated that the Receivables of 16 BUMN Banks could be settled by the management of each

BUMN Bank based on sound principles in each BUMN Bank. State-owned Bank as a limited liability company has been separated from the wealth of the state which in carrying out all its business actions including management and management of receivables of each bank concerned is carried out by the management of the Bank concerned and not delegated to the PUPN.

The sentence stating that “*BUMN Bank as a limited liability company has separated its wealth from the wealth of the state which in carrying out all its business actions*” has always been a private justification to emphasize the legitimacy that SOEs are always in the area of private law that does not need to have a justification for state losses that lead to accusations corruption. The inclusion of the phrase “*State-Owned Bank as a limited liability company has separated its wealth from the state’s wealth in carrying out all its business actions*” should not need to be included in legal considerations if it was not the point that became the point of differentiation of the demarcation of the public legal regime and the private legal regime in SOE problems. The Constitutional Court stated that the Petitioners’ debts by PT. Bank Negara Indonesia Tbk. (Persero) has not submitted its management to the PUPN so that the management is still in a mechanism that can be resolved by the management of each BUMN Bank based on sound principles in each BUMN Bank. Inclusion of the phrase “*State-owned Bank as a limited liability company has separated its wealth from the state’s wealth in carrying out all its business actions*” so that it does not become a land mark of government inconsistency since this is not the focus of demarcation points between the two regimes different laws namely public law and private law.

Conclusion

Humans are driven by a variety of interests, desires and power, prestige, wealth and the like. Although adept at creating moral arguments to support their claims between one side the opinions are not coherent with the principle of justice. A well-organized society is not only designed to improve the welfare of its members, but is also effectively governed by the public conception of justice. Until now it has not

been found, and it also seems difficult to distinguish the most appropriate measure to distinguish the relationship between civil/private law and public law. Therefore it tends to consider it relative.

Philosophy of law as a meta theory for legal theory is the hope of resolving the meeting points of the two theories, namely by comparing the objectives of what law exists, what is the purpose of social contracts, and whether individual autonomy will remain free if the consequences harm the public. Each theory either supporting BUMN as state finance or BUMN as private finance has its own argumentation building which at the theoretical level is still difficult to meet requires the role of legal philosophy to try to find a balance point that fulfills a sense of justice.

Bibliography

Arifin Soeria Atmaja, *Keuangan Publik Dalam Perspektif Hukum, Teori, Praktik, Dan Kritik* (Raja Grafindo Persada 2010).

Bambang Arwanto, 'Perlindungan Hukum Bagi Rakyat Akibat Tindakan Faktual Pemerintah' (2016) 31 Yuridika <<https://e-journal.unair.ac.id/YDK/article/view/4857>>.

Bernard, [et., al.], *Teori Hukum, Strategi Tertib Manusia Lintas Ruang Dan Generasi* (Genta Publishing 2013).

Bruggink, *Refleksi Tentang Hukum* (Citra Aditya Bakti 1999).

Dwi Andayani Budisetyowati, *Hukum Otonomi Daerah Dalam Negara Kesatuan Republik Indonesia* (Roda Inti Media 2009).

Hari Sugiharto and Bagus Oktafian Abrianto, 'Perlindungan Hukum Non Yudisial Terhadap Perbuatan Hukum Publik' (33AD) 1 Yuridika.

Indrawati and Herini Siti Aisyah, 'Kajian Akademik Tentang Pemotongan Gaji Pegawai Negeri Sipil Yang Sedang Menempuh Tugas Belajar Di Lingkungan Kementerian Pendidikan Nasional Dalam Sistem Keuangan Negara' (2020) 25 Yuridika.

Indroharto, *Perbuatan Pemerintah Menurut Hukum Publik Dan Hukum Perdata, Lembaga Penelitian Dan Pengembangan Hukum Administrasi Negara* (Jakarta 1995).

- Inu Kencana, *Ilmu Pemerintahan Jakarta* (Bumi Aksara 2013).
- Irfan Fachrudin, *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah* (Alumni 2004).
- Jhon Rawls, *Teori Keadilan, Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara* (Pustaka Pelajar 2011).
- Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (PTBuana Ilmu Populer 2008).
- John Rawls, *Teori Keadilan, Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara* (Penerjemah: Uzair Fauzan dan Heru Prasetyo ed, Pustaka Pelajar 2011).
- Miriam Budiarjo, *Fundamentals of Political Science* (Gramedia Pustaka Utama 1996).
- Munir Fuadi, *Teori-Teori Besar Dalam Hukum* (Kencana Prenada Media Grup 2013).
- Nurma Rosyida, 'The Position of Justice Collaborator to Reveal Corruption in Financial Management of Regional Government' (2020) 35 *Yuridika*.
- Prasetyo, *Dilema BUMN, Benturan Penerapan Business Judgement Rule Dalam Keputusan Bisnis Direksi* (Rayyana Komunikasindo 2014).
- Sudargo Gautama, *Pengertian Tentang Negara Hukum* (Alumni 1983).
- Sudrajat JR and AS, *Hukum Administrasi Neagara Dan Kebijakan Pelayanan Publik* (Nuansa Cendekia 2009).
- Sukardi dan E Prajwalita, 'Pendelegasian Pengaturan Oleh Undang-Undang Kepada Peraturan Yang Lebih Rendah Dan Akibat Hukumnya' (2012) 27 *Yuridika*.
- Theo Huijbers, *Filasafat Hukum Dalam Lintasan Sejarah* (Kanisius 1982).