

**CONSTITUTIONAL COURT OF**

**THE REPUBLIC OF INDONESIA**

**SUMMARY OF LAWSUIT VERDICT**

**NUMBER 32/PUU-XVII/2019**

**REGARDING**

**SEPARATED NATIONAL WEALTH ARE MANAGED BASED ON STATE-OWNED ENTERPRISE LAW AND LIMITED LIABILITY COMPANY LAW**

**Petitioner** : The United Federation of Pertamina Trade Unions (FSPPB) was represented by Arie Gumilar as President of the FSPPB.

**Type of Lawsuit** : Judicial Review of Law Number 31 of 1999 concerning Eradication of Corruption Crimes (Corruption Law) as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes Against the 1945 Constitution of the Republic of Indonesia (1945 Constitution).

**Case of Lawsuit** : Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law harms the Petitioner's constitutional rights by criminalizing all persons who harm the state's financial or economy, without exception, including state-owned enterprise officials, although the person concerned has a good intention when carrying out corporate actions, thus contradicting the 1945 Constitution.

**Injunction** : Rejecting the Petitioner’s petition in its entirety.

**Date of Verdict** : Wednesday, October 23, 2019

**Verdict Summary** :

The petitioner who filed this petition is the Unitied Federation of Pertamina Trade Unions (FSPPB), represented by Arie Gumilar as President of the FSPPB, with legal counsel, namely Janses E. Sihaloho, S.H.; B.P. Beni Dikty Sinaga, S.H.; Riando Tambunan, S.H.; Anton Febrianto, S.H.; Arif Suherman, S.H.; Azis Purnayudha, S.H.; Imelda, S.H.; and Reza Setiawan, S.H.

Regarding the authority to review and the legal standing of the Petitioner, the Court has the opinion that the petition for reviewing filed by the Petitioner is the reviewing of norms which become the authority of the Court, and the Petitioner has the legal standing to file a quo petition because the Petitioner has the potential to suffer constitutional losses due to the enactment of the provisions petitioned for a quo review.

The constitutional issue petitioned for review in a quo petition is the provision of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law impairing the Petitioner's constitutional rights by criminalizing all persons who harm the state finance or economy, without exception, including SOE officials, even though the person concerned is in good faith when conducting corporate action. The Petitioner also believes that the phrase "detrimental to the state finance or economy" raises legal uncertainty for the Petitioner because the loss of SOEs in the form of state share companies is equated with state losses. In fact, the actual loss of SOEs in the form of state share companies is corporate losses (state share company concerned) not related to state losses.

The Anti-Corruption Law has been several times petitioned for review and decided by the Court, including through Verdict Number 003/PUU-IV/2006, Verdict Number 20/PUU-VI/2008, Verdict Number 3/PUU-IX/2011, Verdict Number 16/PUU-X/2012, Verdict Number 39/PUU-X/2012, Verdict Number 8/PUU-XI/2013, Verdict Number 44/PUU-XI/2013, Verdict Number 75/PUU-XI/2013, Verdict Number 44/PUU -XII/2014, Verdict Number 112/PUU-XIII/2015, Verdict Number 20/PUU-XIV/2016, Verdict Number 21/PUU-XIV/2016, Verdict Number 25/PUU-XIV/2016, Verdict Number 111/PUU-XIV/2016, and Verdict Number 7/PUU-XVI/2018. However, because the Petitioner filed a reason or basis for reviewing different from the previous lawsuit, the petition of a quo of the Petitioner will be further reviewed by the Court.

The Petitioner requested the Court that the phrase "every person" in Article 2 paragraph (1) and Article 3 of the Corruption Act be declared contrary to the 1945 Constitution, as long as the phrase is not being interpreted as excluding officials/employees who in good faith carry out corporate actions in order to achieve the objectives of the SOE itself.

The Court has the opinion that the phrase "everyone" in a quo norm does not contain any obscurity because the subject is certain, namely individuals and legal entities. Precisely when the phrase "everyone" is excluded for officials or employees of SOEs will trigger legal uncertainty because when there is an offense as provided for in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law will be applied differently. Such matter is certainly contrary to Article 28D paragraph (1) of the 1945 Constitution which mandates that everyone be treated equally before the law.

The phrase "everyone" is a formulation of the subject of offense that applies generally to all legal subjects. The formulation of generally accepted norms which is the standard of treatment for all people (both persons and legal entities) is the same before the law. In juridical manner, exceptions to the offense subject can only be done in the application of offense, namely to the person whose actions cannot be held accountable to him.

The Petitioner's argument about the phrase "everyone" can also reach directors who in good faith take corporate action, according to the Court it is not at all related to legal uncertainty caused by the phrase "everyone".

Article 97 paragraph (5) of Law Number 40 of 2007 concerning Limited Liability Companies (Limited Liability Company Law) expressly provides protection for members of SOE directors who carry out corporate activities in good faith. In this Article it is regulated that members of the board of directors cannot be held responsible for the loss of a company, if it can prove that: (a) the loss was not due to a mistake or negligence, (b) has made management in good faith and prudence for the interests and in accordance with the aims and objectives of the company, (c) does not have a conflict of interest, either directly or indirectly for the management actions that result in losses, and (d) has taken action to prevent the loss arising or continuing. This means that as long as the SOE official/employee runs the business of the corporation in the determined corridor, he will not be subject to Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law.

The Court considered that Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law already contained a requirement that everyone must be proven to have bad faith to be convicted with the threat of harming the state finance or economy. Accordingly, the Petitioner's petition for the Court to declare the phrase "everyone" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law contradicts the 1945 Constitution and does not have binding legal force with all its legal consequences conditionally, as long as the phrase "everyone" in these provisions are not interpreted as excluding the Officials/Employees of State-Owned Enterprises which in good faith carry out corporate actions in order to achieve the objectives of the State-Owned Enterprise itself, is not unreasonable under the law;

The Petitioner also argues that the provisions of Article 2 paragraph (1) of the Anti-Corruption Law which declares that "Everyone who unlawfully commits acts of enriching oneself or another person or a corporation that can harm the state finance or economy, ..." and Article 3 of the Anti-Corruption Law which declares that "Everyone who aims to benefit himself or someone else or a corporation, misuse the authority, opportunity, or means available to him because of his position or capacity or means available to him because of a position or capacity that can harm the state finance or economy, ..." constitutes a threat to anyone who commits a criminal act that is detrimental to the state finance due to an unlawful act.

The potential loss of state finance often raises the perception that there has been state loss that has led to allegations of corruption. Even though this condition is very likely to be caused by the state entering into capital participation in business entities which then in its progress the business entity suffers losses, so that the capital participation from the state will also decrease or run out.

Such valuation differences occur because the inclusion of state capital to SOEs is in the slices of public and private areas. The capital that is included in SOEs is basically the wealth/treasury of the state that is in the state budget, so that it is only natural, even must, be managed based on the principles of managing state assets as provided for in the laws and regulations. But in the other side, state assets which are included as business capital to the state share companies and other business entities are in fact managed based on business principles, and legally the said state share companies are subject to Limited Liability Company Law, SOE Law, and other laws and regulations governing business activities, which originates from the principles of civil law, including the principle of freedom of contract. In reasonable reasoning, it is very possible that state assets which are included as state share companies’ business capital will be reduced and/or lost when the business entity that manages the capital suffers a loss.

The Court has the opinion that in relation to the norms of the Anti-Corruption Law petitioned for constitutionality review by the Petitioner, the loss of SOEs due to business activities does not necessarily result in the management being threatened with the criminal punishment because it harms the state finance or economy. In the other side, such potential losses have been anticipated by the business world by applying the concept of business judgment rule for company management, where it is assumed that company management in making decisions do not involve personal interests, act rationally, honestly, and believe that their actions are the best for the company. Therefore, company management cannot be prosecuted when their actions or decisions result in losses for the company. The concept of business judgment rule, or the equivalent, has been accommodated in Article 97 of Law 40/2007.

Article 97 paragraph (5) of Law 40/2007 clearly regulates that members of the board of directors cannot be held responsible for losses, let alone be convicted of them, as long as they can prove that the loss was not due to a mistake or negligence; has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company; does not have a conflict of interest, either directly or indirectly for the management action which results in a loss; and has taken actions to prevent such losses arising or continuing.

The Court considered the meaning petitioned by the Petitioner to be attached to the phrase "Everyone" and the phrase "detrimental to the state finance or economy" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law are in accordance with the meaning of the Anti-Corruption Law, especially Article 2 paragraph (1) and Article 3 in relation to SOEs, whether in the form of state-owned enterprises, public limited liability companies, or general companies. The phrase "detrimental to the state finance or economy" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law according to the Court does not contain legal uncertainty as argued by the Petitioner.

Based on these considerations, the Court considered the Petitioners' argument regarding the conditional unconstitutionality of Article 2 paragraph (1) and Article of the Anti-Corruption Law has no legal grounds, so the Court handed down a verdict, in which the injunction rejected the Petitioner's petition in its entirety.

This document is translated from Indonesian into English by me, **Drs. EMIL SUSANTO**,

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JAKARTA, June 24, 2020