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Research Article

Proof of State Financial Losses in State-Owned Banking Enterprises Related to Corruption Crimes

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Abstract: Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Eradication of Corruption Crimes (Tipikor Law) requires the existence of state financial losses as an important element in Article 2 paragraph (1) and Article 3. Following Constitutional Court Decision No. 25/PUU-XIV/2016, proof of state losses must be actual losses, rather than potential losses. However, in practice, there is a discrepancy between legal norms and the reality of law enforcement, especially in state-owned enterprises (SOEs) engaged in banking. There is disharmony between the Anti-Corruption Law, the State Finance Law, and the SOE Law, particularly regarding the financial status of SOEs as separate state assets. This study uses a normative legal method with *a statute approach*. The results show that proving state financial losses in banking SOEs related to corruption requires an examination by an authorised institution to declare state financial losses. Based on Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Audit Board, it is explained that the Audit Board has the authority to determine the existence or absence of state losses. The audit process carried out by the Audit Board on state-owned banking enterprises suspected of causing state financial losses must be an investigative audit process, not a state loss calculation audit that is usually carried out on government institutions.

Keywords: Audit Board of Indonesia; Corruption Offences**;** Regulatory Disharmony**;** State Financial Losses; State-Owned Enterprises.

1. Introduction

Indonesia is a country based on the rule of law. One of the characteristics of a country based on the rule of law is the existence of legal norms that regulate the protection of human interests. The purpose of these legal norms is to protect human interests so that there is order and peace in society. Law is divided into two types, namely private law and public law. Private law regulates legal relationships relating to the interests of one legal subject with another legal subject. Public law regulates public interests. Public law has a fairly broad scope. One of the areas covered by public law is criminal law on corruption (Rodliyah and H. Salim, 2022).

The enforcement of criminal law on corruption in Indonesia is currently carried out based on Law Number 31 of 1999 concerning Eradication of Corruption as amended by Law Number 20 of 2001 concerning Amendments to LawLaw Number 31 of 1999 concerning Eradication of Corruption Crimes, hereinafter referred to as the Anti-Corruption Law. However, if we look closely, the Anti-Corruption Law does not provide a definition of corruption other than determining the types of acts that are categorised as corruptive acts. There are two articles in the Anti-Corruption Law that include the element of state financial loss in their formulation, making it the most important element, but with the condition that a loss has occurred, namely Article 2 paragraph (1) and Article 3. The formulation of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law was originally a formal offence. The consequence is that in proving the elements of the offences in Article 2 paragraph (1) and Article 3, the act of committing a prohibited act punishable by law is sufficient, meaning that the focus is on the act itself, disregarding the consequences (P.A.F. Lamintang, 2011).

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This formal nature was confirmed by Constitutional Court Decision Number 003/PUU-IV/2006 dated 25 July 2006, which considered that corruption offences do not depend on whether or not there is loss to the state, but rather it is sufficient to prove acts that have the potential to cause loss to state finances (*potential loss*).

The formal nature of Article 2 paragraph (1) and Article 3 ended with Constitutional Court Decision Number 25/PUU-XIV/2016 dated 8 September 2016, although it was marked by *a dissenting opinion* by four constitutional judges. In its ruling, the Court decided that the word "may" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law was contrary to the 1945 Constitution and had no binding legal force.

Constitutional Court Decision No. 25/PUU-XIV/2016, which interprets actual and definite state financial losses, has consequences for the enforcement of criminal corruption laws in terms of evidence. The evidence for the elements of the article is no longer based solely on the fulfilment of unlawful acts but must also fulfil the consequence of those acts, namely causing losses to state finances. Law enforcement officials must find *actual* state *losses,* not just *potential losses* (Kiki Kristanto, 2019).

Evidence in criminal cases is different from evidence in other cases. The evidence in criminal cases even begins at the preliminary stage, namely the investigation, which is automatically directly related to the provisions of evidence regulated by the Criminal Procedure Code (Fachrul Rozi, 2018). In fact, the collection of evidence is the main objective of the investigation to determine whether a criminal act has occurred or not.

Criminal acts, including corruption offences as defined by law, always contain many elements, each of which must be proven (Adami Chazawi, 2008). Evidence is an important issue because the presentation of evidence is the core stage of criminal case examination. Through the court process, it will be determined whether a person can be convicted on the basis of the defendant's guilt being proven beyond reasonable doubt, or otherwise (Alfitra, 2011).

Evidence is a very important process for the parties involved in the trial. For the public prosecutor, evidence is an effort to convince the judge, based on the available evidence, to declare the defendant guilty. Conversely, for the defendant, evidence is an effort that is contrary to the public prosecutor's objective, namely to convince the judge based on the available evidence to acquit or declare the defendant not guilty of the public prosecutor's charges. Meanwhile, for the judge, evidence is the basis for making a decision based on the evidence presented at the trial (Flora Dianti, 2023).

The evidence for Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law is related to the Constitutional Court's decision Number 25/PUU-XIV/2016, which has shifted the element of state financial loss that must be proven to the occurrence of consequences, no longer limited to proving that an act has occurred so that there is a causal relationship between the unlawful act committed and *the actual loss* incurred by the state.

The elements of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law that must be proven are the elements of "any person" who commits an "unlawful act" or "abuses authority" in the form of "enriching themselves or others or a corporation" which results in "loss to state finances or the state economy". The element of "any person" is the element that must be proven first, followed by the elements of "unlawful" and "enriching oneself or others or a corporation". Prior to the Constitutional Court's decision No. 25/PUU-XIV/2016, the evidence was considered complete regardless of whether there was financial loss to the state or not. This was due to the formal nature of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law.

Following Constitutional Court Decision No. 25/PUU-XIV/2016, each element must be proven completely in order to establish whether there has been financial loss to the state. State financial losses must be proven to have occurred in a real and definite manner, and the existence of state financial losses ( ) is a determining factor in proving the existence of a criminal act of corruption. Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, which require this, must be fulfilled with the formulation of the element of state financial losses in the formulation of the article.

Regarding the element of state financial loss contained in the formulation of Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, the law does not provide limitations and definitions regarding state financial loss. The formulation in the articles of the law only explains the conditions under which state losses have actually occurred and can cause state financial losses. Meanwhile, the calculation of state financial losses is based on findings from the competent authority or a designated public accountant (Theodorus M. Tuanakota, 2014).

Various existing laws and regulations do not yet have a common understanding of state finances. One of them is regarding state finances in State-Owned Enterprises (SOEs). Article 1 Paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the SOE Law) states that state capital participation is separate state assets. The meaning of this article is that when state assets have been separated, they no longer belong to the public domain but to the private domain (Febby Mutiara Nelson, 2020).

Efforts to resolve criminal acts of corruption by law enforcement officials in various SOEs have attracted much criticism. Law enforcement officials are often said to not understand the concept of legal entities and the legal consequences of state capital participation in the form of separating state assets to be used as SOE capital (Ridwan Kahirandy, 2009). On the one hand, the State Finance Law positions SOEs in the public law sphere, but on the other hand, Article 11 of the SOE Law states that SOEs are managed based on Law Number 1 of 1995 (amended by Law Number 40 of 2007) concerning Limited Liability Companies (Ridwan Kahirandy, 2009).

The most fundamental legal consequence of a limited liability company as a legal entity is the separation of assets. The capital of a limited liability company originating from shareholders is assets that have been separated from the personal assets of the shareholders. With this separation of assets, all assets owned by the limited liability company no longer belong to the shareholders, but become the assets of the limited liability company (Ridwan Khairandy, 2013).

State-Owned Enterprises (SOEs), particularly Persero, conduct their business activities in various fields, one of which is in the financial services or banking sector. Currently, there are four major SOE banks that have financial services clusters, namely Bank Rakyat Indonesia (Persero) Tbk, Bank Tabungan Negara (Persero) Tbk, Bank Mandiri (Persero) Tbk, and Bank Negara Indonesia (Persero) Tbk. Apart from the four banks mentioned above, there is one bank whose majority shares are controlled by Bank Mandiri (Persero) Tbk, which is a state-owned bank, namely Bank Syariah Indonesia (BSI). Simply put, BSI is a subsidiary of Bank Mandiri (Persero) Tbk in its sharia unit, so BSI is classified as a subsidiary of a SOE.

State-owned enterprises (SOEs), especially those engaged in banking, which are established by the government as the majority shareholder, have implications for efforts to eradicate corruption. However, it should be understood that the funds used by banks to distribute funds to the public in the form of credit and financing are not only the banks' own funds but also the funds of the public deposited in those banks.

The element of financial loss to the state is an essential element in criminal acts of corruption because it concerns crimes against the state that harm the interests of the people. The concept of material state losses is that state losses must have actually occurred, except in cases of bribery, gratification and other crimes related to corruption that do not require the direct element of state losses (Raden Roro Theresia Tri Widorini, 2023).

The legal assessment of state financial losses in state-owned enterprises (Persero) that are subject to private law will certainly have consequences for proving the existence or absence of state financial losses in the field of private law (Eny Suastuti, 2022). Proving this becomes even more difficult when the object of the investigation is the finances of a *publicly listed* state-owned banking company, as there are other shareholders who have invested capital in the state-owned company besides the state. In addition, banks, as intermediary institutions, have third-party funds from customers, which are actually greater in amount than the capital invested by the state.

The issue of state assets that have been separated in the context of capital participation in a SOE, so that the capital has become money or assets of the company (SOE), has become a subject of academic and practitioner study and debate in terms of whether the SOE's losses are corporate losses or state losses (M. Irsan Arief, 2022). An example of a case that has occurred is that which befell Bank Mandiri (Persero), Tbk, namely Mandiri Mikro Unit (MMU) Bireun, Aceh Province, in 2013-2014. The modus operandi was to manipulate credit data for 113 debtors who were civil servants in the Bireun Regency Government, carried out by contract employees of Mandiri Mikro Unit (MMU) Bireun, resulting in the realisation of credit amounting to IDR 19,265,000,000.

Based on the report on the calculation of state losses by the Aceh Representative of the Financial and Development Supervisory Agency (BPKP), there were state losses of almost one hundred per cent, amounting to Rp.18,535,000,000. The Aceh Representative of the BPKP, as an expert, explained in his statement that Bank Mandiri's finances were state finances, so he had the right to calculate state financial losses. This opinion is based on the state's 60% share ownership, which originated from the separation of state assets based on

Government Regulation No. 75 of 1998. In their calculations, the auditors concluded that the irregularities in the granting of credit by Mandiri Mikro Unit (MMU) Bireun had a direct impact on state losses.

Meanwhile, Government Regulation No. 72 of 2016 concerning Amendments to Government Regulation No. 44 of 2005 concerning Procedures for State Capital Participation and Administration in State-Owned Enterprises and Limited Liability Companies Article 2A paragraph (3) and (4) stipulate that state assets that have been separated for state capital participation in SOEs or Limited Liability Companies are transformed into shares/state capital in SOEs, and these shares/state capital become the assets of the state or the SOE in question. Therefore, when related to SOEs in the context of alleged unlawful acts, what is calculated by the State Audit Agency is essentially the finances or assets of the SOEs, not state finances.

Based on the description in the background above, the author assesses that there is legal uncertainty and inconsistency in efforts to eradicate corruption in SOEs due to the disharmonisation of laws related to state finances. This is especially true if the object of the audit is a banking SOE that uses third-party funds to conduct its business activities, as this is related to proving the status of state finances as the most important element that must be proven clearly and transparently before the competent authority can determine the state financial losses.

2. Research Method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this paper is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data (Soerjono Soekanto & Sri Mamudji, 2011). Based on the above background, the problem formulation in this research focuses on Proving State Financial Losses in State-Owned Banking Enterprises Related to Corruption Crimes.

3. Results and Discussion

3.1. Proving State Financial Losses in State-Owned Banking Enterprises Related to Corruption Crimes

State financial losses are an important element of corruption offences. Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law stipulate that state financial losses are one of the consequences of mismanagement of state finances, resulting in their misuse, and must also be linked to a person's intent *(culpa)* in committing an unlawful act or abusing their position or authority. Relatively large state financial losses need to *be recovered* through the return of state financial losses. This can be done through existing legal instruments, whether through state administrative law, civil law or criminal law instruments.

To prove the existence of state financial losses in order to fulfil the elements of state financial losses, an examination by an authorised institution is required *to* declare state financial losses. Based on Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Supreme Audit Agency. states that the BPK assesses and/or determines the amount of state losses caused by unlawful acts, whether intentional or negligent, committed by treasurers, managers of State-Owned Enterprises/Regional-Owned Enterprises and other institutions or agencies that administer state finances.

Supreme Court Circular Letter (SEMA) No. 4 of 2016 concerning the Enforcement of the 2016 Supreme Court Plenary Meeting Results as guidelines for the implementation of court duties explains that:

> "The authority to declare state financial losses is vested in the Supreme Audit Agency (BPK), which has constitutional authority, while other agencies such as the Financial and Development Supervisory Agency/Inspectorate/Regional Work Units remain authorised to examine and audit state financial management, but are not authorised to declare state losses."

On 25 January 2017, the Constitutional Court issued Decision Number 25/PUU-XIV/2016, which revoked the phrase "may" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law. This Constitutional Court ruling interprets that the phrase "may cause losses to state finances or the state economy" in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law must be proven by *actual losses* to state finances, not *potential* or estimated

losses to state finances. The meaning of the phrase "may" cause harm to state finances is that the state has not yet suffered actual loss (*potential loss)*.

Referring to the above description, it can be interpreted that the formulation of offences in the provisions of Article 2 paragraph (1) and Article 3 of the Corruption Eradication Law has undergone a significant change, whereby acts of corruption after Constitutional Court Decision Number 25/PUU-XIV/2016 must be calculated precisely and actually in terms of the value of state losses (*actual loss*), rather than based on suspicion, estimates, or *potential losses*. This has led to a shift in the meaning of the offences contained in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, which were originally formal and material offences, to become material offences only. One of the considerations of the Constitutional Court in this case is that the application of the element of state losses using the concept of actual loss provides greater legal certainty and is in line with efforts to synchronise and harmonise legal instruments.

Taking into account the provisions of Article 2 paragraph (1) of the Anti-Corruption Law, it can be realised that acts to prove state financial losses contain elements of unlawfulness. However, acts that do not contain elements of unlawfulness and do not constitute state financial losses cannot be considered criminal acts of corruption under this article.

Meanwhile, the phrase "abuse of authority" contained in Article 3 of the Anti-Corruption Law inherently always contains an unlawful nature. From these elements, "purpose" is a cause that can result in oneself, another person, or a corporation receiving benefits. Enriching another person can also be done, but on the condition that there must be a motive for the perpetrator to receive something in return, or other benefits obtained by the perpetrator, so that the perpetrator's purpose is reflected in the act he commits, thereby fulfilling mens rea. In addition, it must also be proven that there was malicious intent to enrich oneself, others, or a corporation. In essence, in committing an act that can be categorised as unlawful in a corruption crime, it must be proven that there was malicious intent (*mens rea)* and a malicious act (*actus reus)*.

Based on the description of the evidence of corruption and the element of state financial loss above, a question arises regarding whether the financial losses suffered by state-owned enterprises (SOEs), particularly banks, can be categorised as corruption as referred to in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law.

Proving the existence of state financial losses in SOEs is not based on authority, requirements, and procedures, or the implementation of incorrect financial and budget management activities, but is based on the existence of bribery and deception against the state, which is deposited into the state treasury through documents. Thus, it is very wrong to assume that state financial losses occur in state finances that have been separated ( ) because the status of the money has changed ownership (public money becomes private money) (Dian Puji Nugraha Simatupang, 2022).

The finances of state-owned enterprises are essentially separate finances and have a civil law relationship with the state as a shareholder, not as a holder of power. Thus, the approach taken to the management of state-owned enterprise finances is a holistic approach in civil law and corporate law. In the event of corporate losses, these losses affect the state as a shareholder and its share ownership, which does not directly affect state finances. This is because the ups and downs of business activities and state dividends in SOEs as shareholders are business risks that the state, as a shareholder, understands exist in business activities. In addition, losses incurred by the state as a shareholder cannot be categorised as losses incurred by the state as a holder of power, because when the state separates state finances into SOEs, it is aware that the risks of business activities may result in losses or profits (Dian Puji Nugraha Simatupang, 2022).

The state's control of finances in SOEs is control as a shareholder, so the state's ownership is not recorded in money but in shares. The recognition of money that has been converted into shares as state finances has caused controversy in the state financial legal system in Indonesia, because how can the state record money and shares as its property, when the essence of state capital participation is the transfer of ownership and financial transformation.

Following the Constitutional Court's decision No. 25/PUU-XIV/2016, the qualification of offences under Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law was changed to material offences, which means that the phrase "state financial loss" contained in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law must be actual (*actual loss*). meaning that the state must actually suffer financial losses, and these financial losses must be

real, not potential. When correlated with the ownership of shares and other financial instruments by state-owned enterprises, there are no state financial losses because fluctuations in value do not make the losses real and certain, as these conditions are business risks that the state, as a shareholder, must understand.

To uncover corporate losses or alleged financial losses to the state in SOEs, if considered as financial losses to the state as a shareholder, an investigative audit must be conducted. If an investigative examination is not carried out based on state financial audit standards, according to Article 56 paragraph (2) of Law No. 30 of 2014 concerning Government Administration, it becomes void/can be cancelled. This is especially true if it turns out that SOE finances do not come from the state revenue and expenditure budget (APBN) but from the SOE's own finances, which have been separated.

It must be understood that SOE finances are not included in state finances because, legally, Article 2A paragraph (4) of Government Regulation No. 72 of 2016 concerning Procedures for State Capital Participation and Management in State-Owned Enterprises and Limited Liability Companies, which states that: "State assets that have been transformed as referred to in paragraph (3) become the assets of the SOE or Limited Liability Company."

Substantively, Article 2A paragraph (4) of Government Regulation No. 72 of 2016 emphasises that the status of state finances invested in SOEs has been transformed into money belonging to SOEs, in which case the state is positioned as a shareholder equal to other parties. Furthermore, Article 4B of Law No. explains that "profits or losses incurred by SOEs are profits or losses of SOEs". This article also emphasises that losses incurred by SOEs are losses of SOEs and not losses of the state. The separation of state finances in SOEs is a form of transfer of ownership, so that the financial status is regulated and managed using sound corporate mechanisms. Mismanagement of SOE finances cannot be categorised or classified as state losses due to a shortage of money, as SOE finances are regulated and managed by the SOEs themselves, and the state never records or manages the operational finances of SOEs.

An example of a case that has occurred is that which befell Bank Mandiri (Persero), Tbk, namely Mandiri Mikro Unit (MMU) Bireun, Aceh Province, in 2013-2014. The modus operandi was to manipulate credit data for 113 debtors who were civil servants (PNS) in the Bireun Regency Government, which was carried out by contract employees of Mandiri Mikro Unit (MMU) Bireun, resulting in the realisation of credit amounting to Rp.19,265,000,000.

Based on the report on the calculation of state losses by the Aceh Representative of the Financial and Development Supervisory Agency (BPKP), there were state losses of almost one hundred per cent, amounting to Rp.18,535,000,000. The Aceh Representative of BPKP, as an expert in his statement, explained that Bank Mandiri's finances were state finances, so he had the right to calculate state financial losses. This opinion is based on the state's 60% share ownership, which originated from the separation of state assets based on Government Regulation No. 75 of 1998. In their calculations, the auditors concluded that the irregularities in the granting of credit by Mandiri Mikro Unit (MMU) Bireun had a direct impact on state losses.

The auditor's conclusion in the above case is incorrect, because based on the results of the review of Decision Number 44/Pid.Sus-TPK/2017/PN Bna, it was found that the state losses reached 100% of the share value, even though the auditor clearly acknowledged that the state's ownership of shares in the state-owned bank was 60%, so that the auditor's calculation of state financial losses mixed up the 60% state shares and the remaining 40% shares owned by other parties. Therefore, it is appropriate to say that in the above case, the calculation of state financial losses made by the auditor and used as the legal standing of the prosecutor in applying the Anti-Corruption Law is incorrect and does not comply with the provisions of the legislation. Thus, according to Article 56 paragraph (2) of Law No. 30 of 2014 concerning Government Administration, the audit results are invalid.

As stated above, the money of state-owned banks is not state finances, so credit agreements made by state-owned banks with their customers do not involve state finances. Therefore, if there are credit problems as a result of granting credit to customers, this cannot be said to be a state financial problem, but rather a financial problem of the state-owned bank as a legal entity. Thus, the above case cannot be categorised as a criminal act of corruption as regulated in the Anti-Corruption Law, but falls within the realm of banking law as regulated in Article 49 paragraph (1) of Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning Banking (Arifin P. Soerja Atmadja, 2017).

3.2. Financial Losses Suffered by State-Owned Banking Enterprises

State-owned enterprises (SOEs) come in two forms, namely Limited Liability Companies (Persero) and Public Companies (Perum). The capital of SOEs in the form of Limited Liability Companies is divided into shares, of which all or at least 51% are owned by the state for the purpose of generating profits. Meanwhile, SOEs in the form of Public Companies (Perum) have all their capital originating from the state and no division of shares. This is aimed at providing public benefits, supplying or maximising high-quality goods and services, and generating profits based on corporate management principles. Therefore, even though Perum-type SOEs are established to serve the public interest, as business entities, SOEs are still required to be independent. Thus, Perum is required to generate profits in order to be sustainable.

In seeking profits, the establishment of a company naturally requires capital to carry out its business activities. This is in line with Article 4 paragraph (1) of Law No. 19 of 2003 concerning SOEs. This regulation explains that the capital of SOEs originates from the state, which is included in the wealth owned by a state, directly separated from the state budget, capitalisation reserves, and others. In accordance with the provisions of Article 2A of Government Regulation No. 72 of 2016 concerning Procedures for State Capital Participation and Management in SOEs and Limited Liability Companies, the source of participation itself comes from the state budget capital, which includes assets in the form of fresh funds, state property, state receivables from SOEs/PTs, state shares in SOEs/PTs, and other state assets. In accordance with the explanation of Article 4 paragraph (1) of the SOE Law above, separated assets are defined as the separation of SOE assets from the state budget used for state capital participation in SOEs, which are then used for development and management no longer based on the state budget system, but rather on the principles of sound corporate management. Government Regulation No. 72 of 2016 serves as the legal basis for capital participation sourced from state assets ( ), which will then become state-owned in BUMN Persero without going through the state budget mechanism. Thus, the state only holds the position of a *shareholder*, equivalent to other shareholders.

From these provisions, it can be concluded that with the separation of SOE finances from the state budget, the state finances (capital) contained in SOEs are "disconnected" because a "legal transformation" has occurred, and the provisions of the state budget (APBN) no longer apply to these separated state finances, but rather private law provisions apply.

According to Arifin Soerja Atmadja, this legal transformation is influenced by the legal environment that applies when this transformation occurs. Therefore, the law that applies to state finances separated in SOEs applies to the private legal environment and does not apply to the public legal environment that applied before these state finances were separated in SOEs (Arifin P. Soerja Atmadja, 2017).

When the state separates its assets in order to establish SOEs whose funds originate from the APBN, it must do so in accordance with government regulations, and this still falls within the realm of public law (state finances). However, when the state expresses its intention to establish a SOE before a notary, at that moment the state submits itself to civil law, and the position of the state is as a subject of ordinary civil law and loses its public immunity. The state as a shareholder has the same position as other shareholders (Arifin P. Soerja Atmadja, 2017).

In line with the theory of legal entities, a legal entity has its own assets that are separate from the assets of its founder (the state) and its management. This is reinforced by the basis of Article 2A paragraphs (3) and (4) of Government Regulation Number 72 of 2020. Furthermore, Article 11 of the SOE Law explicitly states that in running the management of SOEs, the provisions and principles of the Limited Liability Company Law apply, so there is a separation of assets between the founders and the management of the Limited Liability Company. And if there is a loss to the SOE, it is no longer a loss to the state but a loss to the SOE itself.

A characteristic of a legal entity is that there is a separation of assets between the assets of the owners and the management, and SOEs in the form of limited liability companies have assets that are separate from the Board of Directors as the management, the Board of Commissioners as the supervisors, and the Shareholders as the owners. Because the financial status of SOEs is separate, this proves that SOEs are subject to private law. Erman Raja Guguk, in the Proceedings of Case Number 48/PUU-XI/2013 and Case Number 62/PUU-XI/2013, emphasised that a legal entity has its own assets, just like a human being. According to this concept, a legal entity is not artificial or fictitious but real and natural, just like a human being. A legal entity consists of a set of assets intended for specific purposes. Therefore, it

can be concluded that a legal entity is the same as a human being as a legal subject that has its own assets. Erman Raja Guguk also gave an example: for example, as a retired professor, he receives a monthly salary from the state budget, and when he shops at the Monday Market using his salary, he gets pickpocketed. The question is, did the pickpocket steal his money or the state's money? Of course, the pickpocket stole his money, not the state's money. Similarly, when a state-owned enterprise (SOE) receives capital from the state budget, once it is included in the capital, the money is no longer state money. The state owns shares in SOEs because it has invested capital, but the assets of SOEs are not state assets; rather, they are the assets of the SOEs themselves as legal entities.

Based on the above explanation, it is clear that state-owned banks as legal entities have a separate financial status from the state. The state, as the capital provider, is a shareholder and has the same status as other shareholders. The fresh money (capital) provided by the state has been transformed from public money into private money and is operated by the Bank to run its business. The state's ownership as a shareholder is not recorded in terms of money but in terms of shares. Therefore, if a state-owned bank incurs losses in carrying out its business activities, these losses are not considered state losses, but rather losses of the state-owned bank itself, as explained in Article 4B of the State-Owned Enterprises Law, which states that: "profits or losses incurred by state-owned enterprises are profits or losses of state-owned enterprises".

In assessing SOE losses, the mechanism cannot be treated in the same way as a government agency. The concept of state losses is real, certain and not a potential state loss ( ), so the calculation of state losses at SOEs must be carried out on a fiscal year basis and at market value.

Therefore, it must be understood that losses incurred by state-owned banks cannot be categorised as state losses because the finances of state-owned banks do not belong to the state, as the state has never recorded or managed the finances of state-owned banks. The existence of losses incurred by state-owned banks as a result of corporate actions does not necessarily eliminate or reduce the capital that has been invested. Furthermore, in assessing state financial losses at state-owned banks that meet the elements of criminal law, they can be applied in accordance with the legal mitigation of the state-owned banks themselves, in this case Law No. 10 of 1998 concerning Banking.

3.3. Application of Law in the Event of Problems in State-Owned Banking Companies that Cause Financial Losses

PT. Bank Mandiri (Persero) tbk, through its business unit, Mandiri Mikro Unit (MMU) in Bireun Regency, Aceh Province, is a service of Bank Mandiri that provides various types of financing for micro businesses, both in the form of investment credit and working capital credit. The focus is to help develop micro businesses by providing easy and affordable access to capital.

PT. Bank Mandiri (Persero) Tbk became a limited liability company as stated in Deed No. 9, dated 2 October 1998. PT Bank Mandiri (Persero) was established as part of the banking restructuring programme implemented by the Indonesian government. In July 1999, four state-owned banks, namely Bank Bumi Daya, Bank Dagang Negara, Bank Ekspor Impor Indonesia and Bank Pembangunan Indonesia, were merged into Bank Mandiri. As a state-owned bank, the government owns 60% of its shares, including 1 Series A Dwiwarna share. This means that the state is the majority shareholder in Bank Mandiri.

Decision No. 44/Pid.Sus-TPK/2017/PN Bna on behalf of the defendant Cut Malem Bin Jufri as a contract employee with the position of Micro Credit Sales (MKS) in 2013 – 2014, committed an unlawful act by manipulating credit data belonging to 113 debtors who were civil servants (PNS) in the Bireun Regency Government, which was carried out by a contract employee of Mandiri Mikro Unit (MMU) Bireun, resulting in the realisation of credit amounting to IDR 19,265,000,000.

Criminal acts committed in banking are regulated separately and constitute lex specialis in the Criminal Provisions starting from Chapter VIII concerning Criminal Provisions and Administrative Sanctions from Articles 46, 47, 47 A, Article 48, Article 49, Article 50, Article 50A, Article 51, Article 52, which are regulated outside the Criminal Code as lex generalis. Criminal acts related to banking businesses themselves are regulated in Article 49 Paragraph (1) letters a to c and Article 49 Paragraph (2) letters a and b of Law Number 7 of 1992 Jo Law Number 10 of 1998 concerning Banking.

The Banking Law and the Anti-Corruption Law are equal in the hierarchy of legislation, and the criminalisation of fictitious credit cases occurring in state-owned banks using the instruments of the Anti-Corruption Law is a misapplication of the law. The Banking Law has set out a limited list of legal subjects that can be charged with banking crimes, mostly targeting members of the board of commissioners, directors, bank employees, or other affiliated parties. Other affiliated parties in the general provisions of this law are members of the Board of Commissioners, supervisors, directors or their proxies, members of the management, supervisors, managers or their proxies, officials, or bank employees (Lilik Mulyadi, 2007).

The legal subjects or addressees in the Bank Mandiri case were both Bank employees. The defendant, Cut Malem Bin Jufri, in the Bank Mandiri case served as a Micro Credit Sales (MKS) officer. The qualification of the acts committed in the case, when examined from Article 49 paragraph (2) of the Banking Law, is deliberately not taking the necessary steps to ensure the bank's compliance with the provisions of this law and other laws and regulations applicable to banks.

The measures in question are not basing prospective debtor data on actual circumstances by not conducting credit analysis and falsifying credit document results for the provision of credit facilities and financing. The legal dispute in the context of banking crimes and corruption crimes regarding which rules to use can be examined through several aspects, one of which is the type of the Bank's capital itself.

Regarding the capital of state-owned banks from the perspective of public money transformation theory - private money, which is separate from the state's wealth, the state as the owner of the capital has included this capital in SOEs to be managed, so that the state is in the position of a shareholder and the recording of its ownership is recorded in the form of shares with the same status as other shareholders (Arifin P. Soerja Atmadja, 2017).

This is legally explained in Article 4B of the SOE Law, which states that "the profits and losses of SOEs are the profits and losses of SOEs", Furthermore, Article 4A paragraph (4) of Government Regulation No. 72 of 2016 explains that "state assets that are transformed as referred to in paragraph (3) become assets of SOEs or Limited Liability Companies". Based on this description, it is clear that the capital provided by the state as a shareholder has been transformed into the property of state-owned banks. In this case, the state acts as a shareholder and is legally subject to private law provisions and their derivatives.

Article 14 of the Anti-Corruption Law explains that "Any person who violates the provisions of the law which explicitly states that violations of the provisions of the law are criminal acts of corruption shall be subject to the provisions of this law". The provisions of Article 14 of the Anti-Corruption Law serve as a limitation on the application of the Anti-Corruption Law, thus becoming a corridor for the legal principle *of lex specialist systematis*.

One of the principles often used in criminal law and which has become a concrete regulation is the principle *of lex specialis derogat legi generalis*. In Indonesia, the regulation regarding this principle is contained in Article 63 paragraph (2) of the Criminal Code, which stipulates that if an act falls under a general criminal provision but also falls under a special criminal provision, only the special provision shall apply. What is meant by special provisions in Article 63 paragraph (2) of the Criminal Code includes special criminal acts such as economic crimes, banking crimes, narcotics crimes, and corruption, not just the concurrence of two or more special criminal provisions regulated in the Criminal Code (Yahya Harahap, 2000).

Legal problems in dealing with the growth of special criminal law outside of codification have led to the development of the principle of lex specialis derogat legi generali into lex specialis systematis. This principle addresses conflicts between two laws, both of which are specific criminal laws (Edward Omar Sharif Hiariej, 2021). This principle is a development of the *lex specialis derogat legi generali* principle.

Based on the above description, the application of law in the event of problems arising in state-owned banking companies that cause financial losses is Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning Banking, not Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning Eradication of Corruption Crimes. The application of the law on corruption in Decision No. 44/Pid.Sus-TPK/2017/PN Bna on behalf of the defendant Cut Malem Bin Jufri is incorrect, because the defendant's actions cannot be said to fulfil the element of "state financial loss" as referred to in Article 2 paragraph (1) of the Corruption Eradication Law, given that the state capital invested in state-owned banks has been transformed into state-owned money and is managed by state-owned banks in carrying out their business in the banking sector, one of whose products is financing. The state is positioned as a shareholder and its ownership is not

recorded in money but in shares. State finances are never recorded in the state budget and are never managed and accounted for according to state financial mechanisms. Therefore, it is impossible for the state to suffer losses if the money, securities and goods are not owned by the state but by state-owned banks, which are managed in accordance with the Limited Liability Company Law.

4. Conclusions

Proving state financial losses in state-owned banking companies related to criminal acts of corruption requires an examination by an authorised institution to declare state financial losses. Based on Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Audit Board, it is explained that the Audit Board has the authority to determine whether or not there are state losses. The audit process carried out by the Audit Board on state-owned banking companies suspected of causing state financial losses must be an investigative audit, not a state loss calculation audit as is usually carried out on government institutions. If the element of financial loss to the state is proven , the formal proof of the existence or absence of a criminal act of corruption refers to Article 184 of the Criminal Procedure Code.

Losses incurred by state-owned banks cannot be categorised as state losses because the finances of state-owned banks do not belong to the state, as the state has never recorded or managed the finances of state-owned banks. The existence of losses incurred by state-owned banks as a result of corporate actions does not necessarily eliminate or reduce the capital that has been invested.

The application of law in the event of problems at state-owned banks that cause financial losses, based on a systematic analysis of the lex specialis principle, is Law No. 10 of 1998 concerning amendments to Law No. 7 of 1992 concerning Banking, not Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning Eradication of Corruption Crimes. The application of the law on corruption crimes in Decision No. 44/Pid.Sus-TPK/2017/PN Bna is incorrect, because the defendant's actions cannot be said to fulfil the element of "state financial loss" as referred to in Article 2 paragraph (1) of the Corruption Law because the state capital included in state-owned banks has been converted into state-owned money and is managed by state-owned banks in carrying out their business in the banking sector, one of whose products is financing.

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