

# Conflict of Law Enforcement by State Institutions over Abuse of Power and Authority: A Case Study of "Former President Director of PT. Pertamina"

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**Abstract:** This study, wants to analyze the very significant differences in the application of legal considerations on the abuse of power and authority by the former President Director of PT. Pertamina, which caused losses to the state based on legal considerations by the Corruption Court Judge and the Jakarta High Court, decided to imprisonment for 8 years and a fine. However, a cassation decision by the Panel of Judges at the Supreme Court of the Republic of Indonesia stated that the defendant was presumed innocent and freed the defendant from the demands of imprisonment and unconditional release. The problem of this research is, Why are there very significant differences in the application of law in the same state institution? The purpose of this study, for Constitutional Law academics can provide a very significant difference study in legal considerations in the Court of Justice in Indonesia. For judges at the Supreme Court of the Republic of Indonesia as an introspection in the legal consideration of abuse of power that results in losses to the state. This research approach method was a qualitative method. Creswell defines a qualitative method as a research method that is based on the perspective of constructivism, in which various meanings are socially and historically constructed with a view to develop a theory or pattern. The researcher analysis was based on legal regulations where conflicts occurred in the law enforcement among the three state institutions acting as the basis of constitutional law, which were; Jakarta Corruption Court; High Court of Appeals for the Special Capital Region of Jakarta; and Supreme Court of the Republic of Indonesia. The results of the research show real evidence, the application of law, abuse of power and authority in state-owned enterprises, which was carried out by the former President Director of PT Pertamina so that the state suffered losses. At the Corruption Crime Court and the Jakarta High Court apply the Corruption Crime Law, but the Supreme Court of the Republic of Indonesia applies business law. In terms of this significant difference, it has resulted in constitutional law academics assessing decisions that do not reflect a sense of justice. The researcher's suggestion is that the panel of judges in a state institution should have no differences in taking legal considerations on abuse of power and authority that harm the state.

**Keywords:** Conflict of law enforcement, abuse of power, corruption court, Jakarta high court, Supreme Court of the Republic of Indonesia.

## 1. INTRODUCTION

This study analyzes the difference in the significant application of law that occurs in one institution of the Judicial State Institution of the Republic of Indonesia, between the Panel of Judges at the Corruption Crime Court, the Panel of Judges at the Jakarta High Court to implement legal considerations referring to the article of abuse of power and authority in the Corruption Crime Law. However, the Supreme Court of Justice at the Supreme Court of the Republic of Indonesia applied business law contained in the Limited Company Law. In terms of the significant differences in the application of these laws, researchers are very interested in normative legal research and analysis with several criminological theories.

The research begins with the corruption case committed by the former President Director of PT

Pertamina has been related to the company's investment in Australian Basker Manta Gummy (BMG) Block in 2009, where PT Pertamina through its subsidiary, PT Pertamina Hulu Energi (PHE) has acquired 10 percent of stocks in ROC Oil Ltd, to work on the Basker Manta Gummy (BMG) Block. The agreement with ROC Oil or the Agreement for sale and Purchase of the BMG Project has been made on May 27th, 2009 with a transaction value of 31 million US dollars. As a result of this acquisition, PT Pertamina have to bear other costs incurred (cash call) from Basker Manta Gummy (BMG) Block by 26 million US dollars. Through the funds that have been issued, PT Pertamina hopes that Basker Manta Gummy Block can produce 812 barrels of oil per day.

The term "conflict" means a fight, war, or struggle, involving physical confrontation between some parties. According to Wayne Pace and Don Faules, conflict can also be defined as the expression of a dispute between one individual or group and another for a certain reason. The dispute suggests that there is a difference which is expressed or experienced between individuals

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or groups involved. In addition to individual conflict, conflict also occurs at an organizational level. It is an interaction between two or more parties which are related and dependent to one another but separated by their different purposes.<sup>1</sup> In this case, the legal conflict of abuse of power means that the assets of state-owned enterprises as legal entities that are managed is not a part of the state assets. As a result of the legal conflict of the Panel of Judges at the Supreme Court of the Republic of Indonesia, the meaning of state assets resulted in allegations of corruption by the former President Director of PT. Pertamina.

Definitions of corruption in society are identical with all behaviors that break the criminal law including 'evil act'. Crime can be defined as an illegal act, negligence or event. If the perpetrator is found guilty and decided to be prosecuted, the perpetrator will be prosecuted by or in the name of the State. Reiner uses these statements as a means to explain that attorneys have accepted for a long time that no human activity is criminal and deviance is not a quality of the act the person commits, but rather a consequence of the application of rules and sanctions by others.<sup>2</sup>

Indonesia is equipped with abundant natural resources. According to the 1945 Constitution, these natural resources should be controlled by the state for the maximum prosperity of the people. In fact, the Indonesian people are still not prosperous even with all these natural resources. This is due to the management of natural resources that is full with abuse of power and corruption.<sup>3</sup> Regarding legal implications of abuse of power to the administration of justice by public officials that harm state finances, the administrative law opinion of Philipus M Hadjon that is known as authority, which is also aligned with the term "bevoegdheid" is used. The difference between authority and "bevoegdheid" is that they are used both in the concept of public law and private law, whereas in Indonesia they are always used in the concept of public law where the use of authority is intended to control the behavior of society as legal subject. Authority must have legitimacy and conformity of the law, contains

interpretation of authority standards, which are general standards and special standards.<sup>4</sup>

Sutherland sometimes asserts that abuse of power is a white-collar crime committed by people with high status, while at other times he stresses that it is carried out on one's journey. In his major empirical contribution studying white-collar crime, he focuses on crimes committed by organizations or individuals acting in organizational capacities. Although he uses various explanations, the most frequently cited explanations are the established social status of white-collar criminals and the special opportunities for crime that come from distinguished occupational positions.<sup>5</sup>

Transnational criminal organizations that gain significant profits from their links to legal businesses find it necessary and beneficial to deal with government officials to assist them in money laundering and counterintelligence. Established links may be based on bribery, coercion, or a combination of the two. Organized criminal groups prefer systematic corruption that aims to ensure that a favorable and secure base in their country or a suitable environment in their host countries is maintained. The widespread use of bribes is typical for the implementation and application of this method to ensure compliance of officials in the key positions and institutions, and to finance political parties so that politicians feel obligated to criminal organizations and pay in secret the law enforcement officials for providing information to criminals. These links between the illegal and legal worlds undermine the system of governance.<sup>6</sup> In the 1945 Constitution of the Republic of Indonesia and Constitutional Law, there are several authorities, namely legislative, executive, and judiciary. Indonesia as a legal state means that there is a guarantee for the exercise of an independent judicial power in carrying out the judiciary and other duties and for the sake of upholding law and justice based on the state constitution and applicable regulations.<sup>7</sup>

<sup>1</sup>Efendi *et al.* (2020) Conflict of Law Regarding Natural Resource Management in Indonesia, *International Journal of Criminology and Sociology*, Vol. 9, page 255.

<sup>2</sup>Bambang Slamet Riyadi *et al.* (2020) Corruption Culture on Managing Natural Resources: The Case Political Crime "Papa asking Stock of PT. Freeport Indonesia", *International Journal of Criminology and Sociology* Vol. 9 Page 27.

<sup>3</sup>Bambang Slamet Riyadi (2020). Culture of Corruption Politicians' Behavior in Parliament and State Official During Reform Government Indonesia (Genealogical Study), *International Journal of Criminology and Sociology*, Vol. 9, page 52.

<sup>4</sup>Bambang Slamet Riyadi (2020). Culture of Abuse of Power Due to Conflict of Interest to Corruption for Too Long on The Management form Resources of Oil and Gas in Indonesia, *International Journal of Criminology and Sociology* Vol. 9 Page: 248.

<sup>5</sup>Bambang Slamet Riyadi (2020). Culture of Abuse of Power in Indonesia from the Perspective of Criminology and Law, *International Journal of Criminology and Sociology* Vol. 9 Page 274.

<sup>6</sup>Vladimir Golubovskii *et al.* (2020) The Current State of Transnational Organized Crime, *International Journal of Criminology and Sociology* Vol. 9 Page 797.

<sup>7</sup>Asep Bambang Hermanto *et al.* (2020) Constitutional Law on The Discretionary of Prosecutor's Power Against Abuse of Power Implications of Corruption Culture in The Prosecutor's Office Republic of Indonesia, *International Journal of Criminology and Sociology* Vol. 9 Page 763.

The Panel of Judges at Jakarta Corruption Court have sentenced the former President Director of PT Pertamina to 8 years in prison. The panel of judges at Corruption Court judge that the former President Director of PT Pertamina is found guilty of committing corruption for investing in Basker Manta Gummy Block (BMG) in Australia. Apart from being sentenced to prison, she is also obliged to pay a fine of 1 billion rupiahs, a subsidiary of 4 months in prison.<sup>8</sup> Based on Article 3 of Law of the Republic of Indonesia Number 31 of 1999 on Corruption, any individual who aims to benefit him/herself or others or corporation, misuses his/her authority, opportunity, or means because of his/her position or facilities available that can cause losses to the state finances or the state economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp50,000,000 (fifty million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiahs).

The Supreme Court (MA) has decided that the former President Director of Pertamina as the corruption perpetrator is acquitted of charges and released from the detention. The decision has been ruled on Monday, March 9, 2020 by five Supreme Court justices, namely Suhadi as chairman of the panel, Krisna Harahap, Abdul Latif, Mohammad Askin and Sofyan Sitompul as members. The Supreme Court justices agree that what the former President Director of PT Pertamina does is a business risk, so it is not a criminal act. This decision itself is unanimous, not a single Supreme Court judge expresses any disagreement.<sup>9</sup>

The research problem is that there is a state institutional legal conflict in the punishment of corruption cases committed by the former president director of PT Pertamina between the Panel of Judges at Corruption Court and Supreme Court of the Republic of Indonesia.

## 2. RESEARCH METHOD

This research clarifies a case study of state institutional legal conflicts over the abuse of power that

is detrimental to the state, through norms and values that are mutually recognized as the basis for interaction, built by the panel of judges at Corruption Court and Supreme Court of the Republic of Indonesia. The case study method certainly has its advantages. According to Shover and Hochstetler in Wim Huisman and Gudrun Vande Walle, 'case study findings can be used to generate hypotheses or to cast doubt on theory-based hypotheses'. Case study also enables the researcher to study the 'real thing', and gain a better understanding of what corruption means in the social environment in which it is committed.<sup>10</sup> Corruption is generally seen as the abuse of power. Then, we need to find about the scope of abuse of power to be regarded as corrupt. One definition will restrict the concept scope on the unlawful use of power for personal gain or other personal objectives, thus limiting corruption only on corrupt action and self-interest which are the archetypical illustrations of graft and bribery.<sup>11</sup> Pierre Bourdieu on "Habitus" views power as a tendency to corrupt in the context of social theory, where he sees power as corruption being continually re-legitimized through the interaction of agents and structures. It mostly occurs through what he calls 'habitus' or socialized norms.<sup>12</sup> Habitus is a habit of power attached to a person in the form of an eternal disposition, or a trained capacity and a structured tendency to think, feel and act in a determinant way, which then guides them. So the habitus grows in power naturally through a very long social process, internalized and acculturated in power into a habit that is structured by itself.

The research which is conducted is legal research. According to Morris L. Cohen in Peter Mahmud Marzuki, "Legal research is the process of finding the law that governs actions in human society".<sup>13</sup> Legal research according to Morris L. Cohen is more towards law in community practice. This research approach method was a qualitative method. Creswell defines a qualitative method as a research method that is based on the perspective of constructivism, in which various meanings are socially and historically constructed with a view to develop a theory or pattern<sup>14</sup>. The researcher

<sup>8</sup>Susilo Ari Wibowo (2019). Karen Agustawan Case: The former President Director of Pertamina is appealing the eight-year prison sentence and other facts <https://www.bbc.com/indonesia/indonesia-48590781>

<sup>9</sup>Andi Samsan Nganro (2020) Former President Director of PT. Pertamina was released by the Supreme Court. <https://www.cnnindonesia.com/nasional/20200309202923-12-481918/eks-dirut-pertamina-karen-agustiawan-divonis-lepas-ma>

<sup>10</sup>Wim Huisman dan Gudrun Vande Walle (2006). *Theoretical Perspectives on Corruption*, God Cases, Verlag Barbara Budrich. Page 142 <http://www.jstor.com/stable/j.ctvbj7k5p.12>

<sup>11</sup>Franklin E. Zimring and David T. Johnson (2005), *On The Comparative Study of Corruption*, The British Journal of Criminology, Oxford University Press, Vol. 45 No.6 , page 796.

<sup>12</sup>Ampy Kali, (2013) Discourse on Sexuality, Ledalero Yogyakarta, page. 13

<sup>13</sup>Peter Mahmud Marzuki, 2014, *Legal Research*, Revised Edition, Kencana Prenada Media Group, Jakarta, page 57.

<sup>14</sup>John. W. Creswell. (2003). *Research Design Qualitative-Quantitative and Mixed Methods Approach*. London: Sage Publication. page. 18.

collected open data and developed it, with the aim to develop a theme from the data obtained. Soerjono Soekanto defines legal research as a scientific activity, which is based on methods, systematics and certain thoughts, by analyzing them. An in-depth examination of the legal facts is carried out, to then seek a solution to the problems that arise in the phenomenon concerned.<sup>15</sup> The definition of law according to Soerjono Soekanto is not only from a practical point of view in society, but also from a theoretical point of view. This study analyzes *dassollen* legal arrangements for abuse of power and authority in the Corruption Crime Act by the Former President Director of PT. Pertamina with the application of the law by the Corruption Crime Court Trial, the Jakarta High Court and the Supreme Court of the Republic of Indonesia.

The reason for choosing a legal research. is because this research is emphasized more in an effort to answer research problems through formal and argumentative ways of thinking. In other words, qualitative data processing and analysis emphasize the analysis on the deductive and inductive inference processes as well as on the dynamics of the relationship between observed phenomena using scientific logic. In this connection, we will look for the reasons for legal conflicts between the state institutions. The legal research. used in this study aims to analyze the occurrence of abuse of power in legal conflicts between state institutions and the tendency of corruption allegation through criminological theory.

Data analysis technique, the researcher analyzes the abuse of power and authority in the articles contained in the Corruption Crime Law with the Limited Company Law, classification can be made on the basis of chronology, the parts regulated by the regulation, and so on. Then an analysis is carried out using the basic notions of the legal system, which usually include legal subjects, rights and obligations, legal events, legal relations and legal objects. The analysis is only carried out on articles whose contents are legal principles. After the analysis is carried out, the construction is carried out by entering certain articles into categories based on the understanding of the abuse of power and authority as state administrators or state enterprise officials that can harm the state. According to Bogdan and Biklen in Lexy J. Moleong, data analysis is an effort made by using, organizing,

and sorting the data into manageable units, synthesizing it, looking for and finding patterns, finding what is important and what is learned and deciding what which can be explained to others.<sup>16</sup>

### 3. DISCUSSION AND ANALYSIS

Before analyzing the legal conflict case of state institutions, first the researcher reviewed the regulations regarding the abuse of power resulting in losses for state-owned enterprises.

#### 3.1. Review of Regulations on Abuse of Power in Corruption

Law of the Republic of Indonesia Number 31 of 1999 on Corruption, based on the Constitutional Law as regulated in Article 5 paragraph (1) and Article 20 paragraph (1) of the 1945 Constitution states that;<sup>17</sup> corruption is highly detrimental to state finance economy and hinders national development, so that it must be eradicated in the context of society in realizing justice and prosperity based on Pancasila and the 1945 Constitution<sup>18</sup>; the consequences of corruption that have occurred so far cause losses in state finance or economy and inhibit the growth and continuity of national development which demands high efficiency;

Based on Article 1 of Law of the Republic of Indonesia Number 31 of 1999 on Corruption Eradication; Corporation is a group of people and/or assets that are organized either as legal entities or non-legal entities. Each person is an individual or including a corporation. Article 2; Paragraph (1) states that any individual who unlawfully commits an act of enrichment of him/herself or others or a corporation which can harm the state finance or economy, is sentenced to imprisonment with life imprisonment or imprisonment of a minimum of 4 (four) years and a maximum of 20 years (twenty) years and a fine of at least Rp200,000,000.00 (two hundred million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiahs). Then, Paragraph (2) informs that in the event that corruption as referred to in paragraph (1) is committed under certain circumstances, the death penalty may be imposed.<sup>19</sup> In Article 3, it describes that any individual who aims to benefit him/herself or others

<sup>15</sup>Soerjono Soekanto, 2014, Introduction to Legal Research, UI Press, Jakarta, p. 43.

<sup>16</sup>Lexy J Moleong, (2006) Qualitative Research Methodology, Bandung: PT Remaja Rosdakarya, page 248.

<sup>17</sup>1945 Constitution of the Republic of Indonesia.

<sup>18</sup>Law of the Republic of Indonesia Number 31 of 1999 on Corruption Eradication.

<sup>19</sup>Law of the Republic of Indonesia Number 31 of 1999 on Corruption Eradication.

or a corporation, misuses his/her authority, opportunity or means because of his/her position or the facilities available, which may cause loss to state finance or economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and/or a fine of at least Rp50,000,000.00 (fifty million rupiahs) and a maximum of Rp1,000,000,000.00 (one billion rupiahs).<sup>20</sup>

Abuse of power or authority is closely related to the existence of illegality (legal defect) of a decision and or action of the government/state administrator. This is generally involve three main elements, which are authority, procedure, and substance. These three things are the essence of the abuse of power. The basis for testing the presence or absence of this abuse is the basic rule (legality) as a positive written law which provides the background for the presence or absence of authority when issuing a decision. It means that the measure or criterion to decide whether there is any element of abuse of power must be based on the basic rules regarding duties, positions, functions, organizational structure and work procedures.

The definition of abuse of power in administrative law can be interpreted in 3 (three) forms as follows: First, abuse of power to carry out actions that are contrary to public interest or to benefit personal, group or group interests; Second; abuse of power in the sense that the official's actions are properly intended for the public interest, but deviating from the purpose of the authority granted by law or other regulations; Third, abuse of power means abusing procedures that should be used to achieve certain goals, but have used other procedures to make them happen. Analysis of the form of abuse of power or authority by the former President Director of PT. Pertamina, resulting in corruption that causes losses to the company as well as the state.

### **3.2. Conflict of Law Enforcement by State Institutions over Abuse of Power and Authority**

The Panel of Judges at the Jakarta Corruption Court had sentenced the former President Director of PT. Pertamina. They judged that the former President Director of PT Pertamina was found guilty of committing corruption for investing in Basker Manta Gummy Block (BMG) in Australia. Apart from being sentenced to prison, the former President Director was

obliged to pay a fine of 1 billion rupiahs in addition to 4 months in prison. In fact, the panel of judges did not fully agree with the prosecution's indictment. The 8-year sentence was far from what the prosecutor had previously demanded, which was 15 years in prison. The former President Director escaped the primary charge of Article 2 paragraph (1) in conjunction with Article 18 paragraph (1) letter b of Law no. 31 of 1999 on Corruption Eradication as amended by Law no. 20 of 2001 in conjunction with Article 55 paragraph (1) 1st of the Criminal Code. However, according to the panel of judges, she was found guilty of violating Article 3 of the Corruption Eradication Law in conjunction with Article 55 paragraph 1 (one) of the Criminal Code which was a subsidiary indictment.<sup>21</sup>

The panel of judges thought that the defendant was not legally and convincingly proven to commit corruption according to the primary indictment, and therefore released the defendant from the primary indictment. On the other hand, the panel of judges found the Defendant, the former President Director of PT Pertamina, was legally and convincingly guilty of committing corruption as subsidiary charge. "The verdict was read by the head of the panel of judges, Emilia Djaja Subagia, at the trial that took place in Jakarta, Monday, June 10, 2019. This decision was not taken unanimously because there was a judge who expressed a different opinion. From the evidence and witnesses in the judicial process, the panel of judges considered the former President Director was proven to have violated the subsidiary indictment, not the primary indictment. Karen was deemed to have abused the power based on paragraph (1) of Corruption Eradication Law, so she could not be indicted. In fact, according to the panel of judges, Karen was not proven to have violated Article 18 paragraph (1) letter b of the Corruption Eradication Law, which asked her to pay state financial losses of Rp.568 billion.

There were several considerations before the panel of judges gave this verdict. The aggravating factor was the action of the former President Director of PT. Pertamina that was in conflict with the government's program which was actively combating corruption, she did not recognize her crime, and the fact that corruption was an extraordinary crime. On the other hand, the

<sup>20</sup>Law of the Republic of Indonesia Number 31 of 1999 on Corruption Eradication.

<sup>21</sup>Aji Prasetyo (2019) The Jakarta Corruption Court Says the Former Director of Pertamina is Proven Guilty for Corruption and Sentenced to 8 years in prison, the former director and her legal advisor immediately appealed. <https://www.hukumonline.com/berita/baca/lt5cfe3fb497ba2/pengadilan-tipikor-jakarta-nyatakan-mantan-dirut-pertamina-terbukti-korupsi>

panel of judges also considered the mitigating factors. The former President Director as the defendant behaved politely and the defendant had never been convicted before. Moreover, the panel of judges considered Karen to have ignored the results of due diligence conducted by PT Delloite Konsultan Indonesia. The decision of the defendant to acquire had ignored the results of due diligence that the acquisition had high risk," explained the panel of judges for corruption, Jakarta.<sup>22</sup>

The former President Director had denied the prosecutors' allegations. The attorneys used arguments about the concept of business judgment rule, to assert that the former director's actions were corporate actions in the domain of civil law. One form of this was participation in the Australian BMG Block. Pertamina's participation in this block was carried out for and on behalf of corporate interests, not for personal interests. However, the panel of judges had already handed down the verdict. The appeal statement submitted by Karen and her team of lawyers meant that the Jakarta Corruption Court decision was not legally binding.

Upon this decision, the former President Director of PT. Pertamina immediately declared an appeal and shouted hysterically "*Innalillahi wa innailaihi raji'un, Allahu Akbar, Allahu Akbar, Allahu Akbar*" (Verily we belong to Allah, and verily to Him do we return, God is the Greatest, God is the Greatest, God is the Greatest). Actually, this sentence was lower than the demands of the public prosecutor who asked the panel to sentence the former President Director of PT. Pertamina to 15 years in prison, fine of Rp1 billion, and subsidiary of six months in prison. In addition, Karen was also demanded to pay a replacement fee of Rp284 billion because she was considered proven to have neglected investment procedures in Pertamina in Participating Interest (PI) over BMG Australia block in 2009. Prosecutors accused the former Upstream Director of PT Pertamina for 2008-2009 and the Managing Director of PT Pertamina for 2009-2014 period together with the Director of Finance of PT Pertamina for conducting the Merger and Acquisition of PT Pertamina 2008-2010, an act against the law. This action was reflected when the PI investment was made in the Australian BMG block without due diligence and risk analysis which was followed up by signing a Sale Purchase Agreement (SPA) without the approval of the

legal department and the Board of Commissioners of PT Pertamina, so that it enriched oneself or others, which was ROC Oil Company (ROC) Limited Australia and caused state financial loss of Rp566 billion.<sup>23</sup>

The High Court of Appeals of Special Capital Region of Jakarta rejected the appeal made by the former President Director of Pertamina, while the Panel of Judges at the appeal level (second level) assessed the verdict decided by the Corruption Court, Jakarta. It was true that they decided to uphold the decision. It strengthened the decision of the Corruption Court at the Central Jakarta Court Number 15/Pid.Sus-TPK/2019/PN.Jkt.Pst dated June 10<sup>th</sup>, 2019, which was requested for the appeal, among other things that were said by the appeal panel as reported on the website of Jakarta High Court. The panel of judges at the High Court of the Special Capital Region of Jakarta consisted of Ester Siregar as chairman and James Butar Butar and Purnomo Rijadi as members agreed with the First Level Panel of Judges who stated that the Defendant who was the former President Director of PT. Pertamina was legally and convincingly proven guilty of committing corruption together. Because it had been considered properly and correctly according to the law, the above considerations can be approved by the Panel of Judges at the Appeal Level.<sup>24</sup> The appeal panel also added a number of other considerations. First, PT Pertamina as a State Enterprise was obliged to carry out good corporate governance according to the principles of good corporate governance. The requirement to follow good corporate governance was also regulated in the Decree of the Minister of State-owned Enterprises Number 117/M- MBU/2002 dated July 31<sup>th</sup>, 2002 o the Implementation of Good Corporate Governance Practices in State-owned Enterprises, which was updated by Regulation of the Minister of State-owned Enterprises for SOEs No. PER-01/MBU/2011 dated August 1<sup>st</sup>, 2011 in conjunction with Regulation of the Minister of State-owned Enterprises for SOEs No. PER-09/MBU/2012 dated July 6<sup>th</sup>, 2012 on the Implementation of Good Corporate Governance in State-owned Enterprises.

According to the High Court of Appeals (second level), the defendant as the Board of Commissioners of PT Pertamina Hulu and the President Director of PT Pertamina had the duties and responsibilities in

<sup>22</sup>Aji Prasetyo (2019) *Ibid*.

<sup>23</sup>Aji Prasetyo (2019) *Ibid*.

<sup>24</sup>Aji Prasetyo (2019) Appeal of ex Pertamina CEO is Rejected, What is the Fate of the Business Judgment Rule? Pertamina must follow good corporate governance.

controlling and monitoring acquisition activities, as well as analyzing and evaluating the company's acquisition plan in the upstream environment without ignoring the results of the Due Diligence Report conducted by the External Team of PT Deloitte Konsultan Indonesia (DKI) as the Financial Advisor in Project Diamond. Yang stated that it would be very risky if PT Pertamina acquired 10% Participating Interest (PI). In addition, Baker McKenzie Sydney said that the incomplete data was included in the high risk category. The abuse of power over the rules outlined in the PT Pertamina resulted in state losses and benefited Anzon Australia as a subsidiary of ROC Oil Company (ROC Oil) by Rp586.066 billion.<sup>25</sup> Based on the reasons mentioned above, the Panel of Judges at the Appeal Level (second level) agreed with the legal and criminal considerations imposed by the Panel of Judges at the First Level.

In contrast to the first stage which was characterized by dissenting opinions, this decision was taken unanimously. It was known that the ad hoc judge at the Corruption Court, Jakarta had a different opinion by stating that the actions of the former President Director of PT Pertamina were not legally proven and were convincingly guilty of committing corruption as in the primary and subsidiary Indictments. The reason was that the act was carried out solely for business interests, not for personal gain so that it was not cause loss to the state and did not enrich or benefit oneself. Anwar agreed with the argument about the business judgment rule.

In a study of constitutional law, based on the decision of the above institution, there was a conflict in the law enforcement between the state institutions of Corruption Court at the first level and the Supreme Court of the Republic of Indonesia, which decided the corruption allegation on the behalf of the former President Director of PT. Pertamina. The defendant was sentenced to be free from prosecution, so that she needed to be released from detention. The decision to release the Corruption Prisoner was taken by five Supreme Court judges who were Suhadi as chairman of the panel, Krisna Harahap, Abdul Latif, Mohammad Askin and Sofyan Sitompul as members. The Supreme Court judges agreed with the decision that what the former President Director of PT. Pertamina did was a business risk, so it was not a criminal act. This verdict itself was unanimous, in which not a single Supreme

Court judge expressed any disagreement on Monday, 9 March 2020.

The legal consideration of the panel of judges of the Supreme Court of the Republic of Indonesia was; the action committed by the Defendant, the former President Director of PT. Pertamina was a Business Judgment Rule (BJR) and it was not a criminal act. In a company activity, it cannot be contested by anyone, although in the end the decision was a financial loss for the company, including state-owned enterprises. In this case, the funds used in state finances are still considered a business risk. It includes business characteristics that are unpredictable and cannot be determined with certainty.<sup>26</sup> The acquisition step of BMG Block was also considered an implementation of the doctrine or principles of Business Judgment Rule (BJR) in the Limited Liability Company Law. This principle is a reflection of the independence and discretion of the company's directors in making business decisions which are also a protection for the directors in carrying out their duties. The principle can be seen in Article 92 and Article 97 of Law no. 40 of 2007 on Limited Liability Companies.<sup>27</sup> In relation to BJR, it basically regulates that the board of directors cannot be held responsible just because of wrong reasons such as in decision making (mere error of judgment) or company losses. It means that even if the company's directors are in a quo case, according to the Limited Liability Company Law which adheres to the principles of BJR, the board of directors cannot be held accountable. In short, such actions are considered common even in a state-owned enterprise like PT Pertamina.

The justification of the legal parameters regarding the BJR itself can be seen in Article 97 paragraph (5) and Article 114 paragraph (5) of the Limited Liability Company Law which regulates certain limitations regarding when directors and commissioners cannot be held accountable for the risk of decisions or supervisory actions they have taken. Based on this provision, members of the board of directors cannot be held responsible for losses if they can prove three things. First, the loss arises not because of their negligence. Second, they manage the company in

<sup>25</sup> Aji Prasetyo (2019) Appeal of ex Pertamina CEO is Rejected. *Ibid.*

<sup>26</sup> Aji Prasetyo (2020) Business Judgment Rule, The Reason behind the Release of Former Pertamina President Director at Cassation Level, the judges unanimously decided the actions committed by Karen were not a crime, <https://www.hukumonline.com/berita/baca/lt5e69546a7fe7c/ibusines-judgment-rule-i--alasan-di-balik-lepasnya-eks-dirut-pertamina-di-tingkat-kasasi/>

<sup>27</sup> Aji Prasetyo (2020) Business Judgment Rule, *Ibid.*

good faith and prudence for the interests and in accordance with the company's goals. Third, they do not have a conflict of interest, either directly or indirectly, over management actions that result in loss (loyalty). Fourth, they have taken steps to prevent the loss from arising or continuing.<sup>28</sup> Specifically for Public Companies, the Financial Services Authority also accommodates the BJR concept through POJK No. 33/POJK.04/2014 on the Board of Directors and Board of Commissioners of Issuers or Public Companies. Article 13 paragraph (2) of POJK on a quo also stipulates that members of the Board of Directors cannot be held accountable for losses of the Issuer or Public Company if they are able to prove it.

Similar with the content of BJR principles which are regulated by Indonesia, Professor of Law at the University of Indonesia, Hikmahanto Juwana, in a Workshop on Business Judgment Rules: Application of Legal Protection to the Company Organs in Corporate Business Activities), mentions that the characteristics of BJR in several countries including the fulfillment of basic principles. These principles include good faith, decision making that takes into account the interests of the company (fiduciary duty), action based on adequate knowledge/data (informed basis), action is not carried out to waste (duty of care), and action is not based on personal interests (loyalty). The amount of discretionary power that the Board of Directors have, in one hand, justifies the Board of Directors' actions in making decisions for the company interests. However, Hikmahanto says that the problem is the fact that the phrase of company interests can be very flexible. So in order to avoid serious problems in the future, the Board of Directors, the legal team and related divisions need to really define "at the beginning" whether the decisions taken are based on the company's interests.<sup>29</sup> To ensure that the board of directors have attempted to collect and consider adequate knowledge/data/information, it is crucial for the board of directors to seek direction from various company functions from the start, particularly the function of the business unit that will carry out the decision, legal function, financial function and other functions concerned. These measures should be done so that the joint decision can be used as a basis for the Board of Directors to be prudent, act in good faith, based on due of care and an informed basis in signing a policy. If all these principles

have been carried out, it means that BJR is already in effect.

Business judgment rule (BJR) was conducted by the former Upstream Director and President Director of PT. Pertamina. The public policy in the form of a decision to acquire the Basker Manta Gummy (BMG) Block in Australia was a business decision that had been approved by other directors so that it was collective collegial, and there had been approval from the Board of Commissioners through a memorandum. However, a board of commissioners did not allow the acquisition proposed based on the memorandum because the operation of BMG block was not optimal, would not be profitable, and would not increase Indonesia's oil reserves.

Making decisions based on authority amid differences of opinion is not an act against the law. The defendant as the former President Director of PT. Pertamina had the power and authority to make public policies with the right decisions to solve problems. So the difference in opinion cannot be said as an act against the law or an abuse of power and authority in a state-owned enterprise because those who have the right to make decision are the board of directors, not the commissioners. Regarding the state loss on investment amounting to Rp568 billion as alleged by the prosecutors, it was not necessarily considered a state financial loss. The reason was that the money was purely used to acquire the BMG Block with the payment method according to the applicable regulations, which was through a bank in Australia.

"Therefore, this action could not be counted as a state financial loss because it was committed by the defendant and other board of directors in the context of doing business or Pertamina's business. In business, there are risk and loss that are called a business risk, and this risk does not necessarily become a state loss," he concluded. In connection with this state loss, the researcher received information that the former Director of PT Pertamina filed a lawsuit against the public accounting firm that conducted the audit and stated that there was a state loss.

#### 4. CONCLUSION

Based on the existing state institutional law, the abuse of power or authority committed by the former President Director of PT Pertamina as a state business entity, where she carelessly made a policy, would result in state losses. The researcher's analysis was

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<sup>28</sup>Law of the Republic of Indonesia Number 40 of 2007 on Limited Liability Companies.

<sup>29</sup>Aji Prasetyo (2020) Business Judgment Rule, *op.cit.*



based on legal regulations that conflicts occurred in the law enforcement among the three state institutions acting as the basis of constitutional law, namely; Jakarta Corruption Court; High Court of Appeals for the Special Capital Region of Jakarta; and Supreme Court of the Republic of Indonesia. There were several possibilities in the conflict of law enforcement on the abuse of power committed by the former Director of PT. Pertamina in three Judicial State Institutions. It was suspected that there were white-collar crime actors who acted as law enforcement in one or both of these state institutions. In fact, the law enforcement actors at the Jakarta Corruption Court and the High Court of Appeal for the Special Capital Region of Jakarta, said that the former Director of PT. Pertamina was guilty of abuse of power resulting in state losses. However, in the appeal level at Supreme Court of the Republic of Indonesia, the former director was released from 8 (eight)-year prison sentence.

The results of the research show real evidence, the application of law, abuse of power and authority in state-owned enterprises, which was carried out by the former President Director of PT Pertamina so that the state suffered losses. At the Corruption Crime Court and the Jakarta High Court apply the Corruption Crime Law, but the Supreme Court of the Republic of Indonesia applies business law. In terms of this significant difference, it has resulted in constitutional law academics assessing decisions that do not reflect a sense of justice. The researcher's suggestion is that the panel of judges in a state institution should have no differences in taking legal considerations on abuse of power and authority that harm the state.

## REFERENCE

- Creswell W John. (2003). *Research Design Qualitative-Quantitative and Mixed Methods Approach*. London: Sage Publication.
- Efendi *et al.* (2020) Conflict of Law Regarding Natural Resource Management in Indonesia, *International Journal of Criminology and Sociology*, Vol 9.
- Golubovskii Vladimir *et al.* (2020) The Current State of Transnational Organized Crime, *International Journal of Criminology and Sociology* Vol. 9  
<https://doi.org/10.6000/1929-4409.2020.09.75>
- Hermanto Bambang Asep *et al.* (2020) Constitutional Law on The Discretionary of Prosecutor's Power Against Abuse of Power Implications of Corruption Culture in The Prosecutor's Office

- Republic of Indonesia, *International Journal of Criminology and Sociology* Vol. 9.  
<https://doi.org/10.6000/1929-4409.2020.09.71>
- Huisman Wim and Walle Vande Gudrun (2006). *Theoretical Perspectives on Corruption*, God Cases, Verlag Barbara Budrich. <http://www.jstor.com/stable/j.ctvbj7k5p.12>
- Indonesia of Republic of Constitution of 1945
- Indonesia of Republik of Law Number 31 of 1999 on Corruption Eradication
- Indoensia of Republic of the Law of Number 40 of 2007 on Limited Liability Companies.
- Kali Ampy (2013) *Discourse on Sexuality*, Ledalero Yogyakarta.
- Marzuki Mahmud Peter, (2014) *Legal Research*, Revised Edition, Kencana Prenada Media Group, Jakarta.
- Moleong J Lexy (2006) *Qualitative Research Methodology*, Bandung: PT Remaja Rosdakarya.
- Nganro Samsan Andi (2020) Former President Director of PT. Pertamina was released by the Supreme Court. <https://www.cnnindonesia.com/nasional/20200309202923-12-481918/eks-dirut-pertamina-karen-agustiawan-divonis-lepas-ma>
- Prasetyo Aji (2019) The Jakarta Corruption Court Says the Former Director of Pertamina is Proven Guilty for Corruption and Sentenced to 8 years in prison, the former director and her legal advisor immediately appealed. <https://www.hukumonline.com/berita/baca/lt5cfe3fb497ba2/pengadilan-tipikor-jakarta-nyatakan-mantan-dirut-pertamina-terbukti-korupsi>
- Prasetyo Aji (2019) Appeal of ex Pertamina CEO is Rejected, What is the Fate of the Business Judgment Rule? Pertamina must follow good corporate governance.
- Prasetyo Aji (2020) Business Judgment Rule, The Reason behind the Release of Former Pertamina President Director at Cassation Level, the judges unanimously decided the actions committed by Karen were not a crime, <https://www.hukumonline.com/berita/baca/lt5e69546a7fe7c/ibusiness-judgment-rule-i--alasan-di-balik-lepasnya-eks-dirut-pertamina-di-tingkat-kasasi/>
- Riyadi Slamet Bambang *et al.* (2020) Corruption Culture on Managing Natural Resources: The Case Political Crime "Papa asking Stock of PT. Freeport Indonesia", *International Journal of Criminology and Sociology* Vol. 9.
- Riyadi Slamet Bambang. (2020) Culture of Corruption Politicians' Behavior in Parliament and State Official During Reform Government Indonesia (Genealogical Study), *International Journal of Criminology and Sociology*, Vol. 9.
- Riyadi Slamet Bambang. (2020). Culture of Abuse of Power Due to Conflict of Interest to Corruption for Too Long on The Management form Resources of Oil and Gas in Indonesia, *International Journal of Criminology and Sociology* Vol. 9.
- Riyadi Slamet Bambang (2020). Culture of Abuse of Power in Indonesia from the Perspective of Criminology and Law, *International Journal of Criminology and Sociology* Vol. 9.
- Soekanto Soerjono (2014) *Introduction to Legal Research*, UI Press, Jakarta.
- Wibowo Ari Susilo (2019). Karen Agustiawan Case: The former President Director of Pertamina is appealing the eight-year prison sentence and other facts <https://www.bbc.com/indonesia/indonesia-48590781>
- Zimring E Franklin and Johnson T David (2005), *On The Comparative Study of Corruption*, The British Journal of Criminology, Oxford University Press, Vol. 45 No.6  
<https://doi.org/10.1093/bjc/azi042>

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