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## Criminal Liability of State-Owned Banks on the Disbursement of Non-Performing Loans

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### Abstract

The imposition of criminal liability for the disbursement of non-performing loans by the State-Owned Bank has limitations that cause legal uncertainty. The existence of the legal uncertainty leads to the blurred nature of the scope of legal validity of State Owned Bank liability for non-performing loans that have been disbursed. The extent of the notion of state finance contained in the Corruption Eradication Act is not followed with the understanding of the state financial losses itself. The legal consequence of such enforcement is giving criminal sanction of corruption toward the bank on part/whole ownership of the shares owned by the government, for the disbursement of non-performing loans. The irony is that there is no limitative restriction in the Banking Act concerning banks as perpetrators or victims of crime, so that criminal liability can only be charged to members of the Board of Commissioners, Directors, or Bank Officers as breakers and/or originators of non-performing loans. Bank as an institution is free from the imposition of criminal sanctions, whereas institutionally, banking institution is also a legal subject. The principle of the criminal law that no action can be criminalized without any error or guilt, should be used as an effort to answer legal issues in constructing the law in order to discover the novelty of meaning and argumentation in the legislation as the material for the legal making or legal repairing of the existing legislation with the intention of establishing legal certainty in the field of national Banking Act.

**Key word** : State Owned Bank, legal subject, legal certainty

### 1. Introduction

Performing credit by bank is basically risky, because the financing given is for the future projection or forecast that cannot be ascertained to be implemented as planned.<sup>1</sup> Accountability for legal issues of non-performing loan is a dilemma, due to the provision of credit on the basis of legal relationships between the debtor and the creditor is in the private legal domain, but in fact switches to the realm of public law with legal consequences in the form of criminal sanctions. When the credit is channeled by the Bank with all or at least 51% of the shares owned by the State or called the State-Owned Bank become particular concerns.<sup>2</sup> The legal consequences that can be incurred are the sanction of corruption in the distribution of non-performing loans.

The legal consequences emerge on the basis of understanding of state finances The Act no. 17 of 2003 on State Finance (hereinafter referred to as the State Finance Act).<sup>3</sup> The State Finance Act states that the definition of state finance shall be in the form of state property / property of the region which is managed on its own or by other parties in the form of money, securities, accounts receivable, goods and other rights which can be valued with money including wealth which is separated from the state / regional companies. Based on the enforcement of such understanding, there is a legal fact in the form of Supreme Court Verdict. 1144 K / PID / 2006, in which stipulates that the non-performing loans disbursed by State-Owned Banks may be imposed sanctions in the provisions of Article 2 of The Act no. 31 of 1999 connected with The Act no. 20 of 2001 on the Eradication of Corruption (hereinafter referred to as the Eradication of Corruption Act).

One of the elements that must be realized in the provisions of Article 2 of the Corruption Eradication Act is that there are unlawful acts that cause harm to the state finances. Elucidation of Article 32 Paragraph (1) of the Corruption Eradication Act states that what is meant by "there is a real loss of state finances" is the amount of

<sup>1</sup> Syarif Arbi, *Perbankan Keuangan Pembinaan Lembaga*, (Yogyakarta: BPFE, 2013) Hlm 143.

<sup>2</sup> The term State-Owned Bank is obtained from the Act no. 17 of 1968 on Bank Negara Indonesia 1946, Act No. 20 of 1968 on State Savings Bank, Act No. 21 of 1968 on Bank Rakyat Indonesia, and Government Regulation no. 75 of 1998 on Equity Participation of the Republic of Indonesia for the Establishment of the Company (Persero) in the Field of Banking.

<sup>3</sup> The definition related to the State Finance is also regulated in the explanation of Act no. 31 of 1999 connected with no.20 of 2001 on the Eradication of Corruption, Hamold Ferry Makawimbang in his book entitled *Kerugian Keuangan Negara* [State Financial Losses], Yogyakarta: Thafa Media, 2014, p. 11, states that the use of state financial formula contained in the provisions of the State Finance Act and The Corruption Eradication Act is complementary.

losses that can be calculated based on the findings of the authorized institution or appointed public accountant. Such losses are then reinforced by the issuance of Constitutional Court Verdict Number 25/PUU-XIV/2016 by eliminating the word "*dapat* [can]" in Article 2 paragraph (1) and Article 3 of Corruption Eradication Act. The omission of words can give the sense that the element of financial losses of the state must be understood to have actually happened or real (actual loss).

Erman Rajaguguk states that the losses by State-Owned Banks are not necessarily a financial loss of the state. The basis of Erman Rajaguguk's argumentation is Article 66 of the Limited Liability Company Law which states that within six months after the fiscal year of the Company's closed, the Board of Directors shall prepare an annual report to be submitted to the General Meeting of Shareholders, containing at least, the annual calculations consisting of the balance of the end of the current financial year and the calculation of profit / loss from the relevant annual book and the explanation of the document.<sup>1</sup> Based on the argumentation opined by Erman Rajaguguk, it hinted that before the annual report is implemented then the State Owned Banks do not have any knowledge of experiencing profit or loss.

In this regard, the Supreme Court at the demand of the Minister of Finance of the Republic of Indonesia, through the Letter of the Minister of Finance of the Republic of Indonesia Number S-324/MK.01 2006 dated July 26, 2006, issued *Fatwa* Number WKMA/Yud/20/VIII/2006 dated August 16, 2006. *Fatwa* (instructions) of the Supreme Court is essentially asserting that "the provisions of Article 2 Sub-Article g of the State Finance Act are not legally binding on State-Owned Enterprises (SOEs), and thus the assets of state-owned enterprises from separated state assets are stated not as state assets. In addition to the instructions, an opinion of the Ministry of State-Owned Enterprises as stated in its letter No. S-298/S.MBU/2007 25<sup>th</sup> of June 2007, dated June 25, 2007 addressed to the Board of Directors, Commissioners and Board of Supervisors of State-Owned Enterprises concerning the relationship of the State Finance Act and State-Owned Enterprises Act which can be summarized as follows: "Based on the Financial State Law and State-Owned Enterprises Act, the State's assets in the state-owned enterprises are limited to capital/shares to be subsequently managed by corporations in accordance with the rules of corporate law, and are no longer governed by the laws of state property.

Definition of state finance basically has been filed a judicial review to the Constitutional Court. Such application shall be recorded by the Constitutional Court clerk as Case Number 48/PUU-XI /2013 dated 22 May 2013 and Case Number 62/PUU-XI/2013 dated June 17, 2013. The Constitutional Court rejected the petition for judicial review and strengthen the definition of state finances as contained in the explanation of the Corruption Eradication Act. Based on the rejection of judicial review on the explanation of the definition of state finance in the Corruption Eradication Act, it is based on the provisions of The Act no. 12 of 2011 on the formulation of the legislation annex II no 158, the legislation can only be revoked by the same or higher level of Laws and Regulations, the definition of state finance in the State Finance Act remains in force even after the Supreme Court has issued a *Fatwa*. The position of *Fatwa* of the Supreme Court according to Bagir Manan is not binding.<sup>2</sup>

Regarding to unlawful acts that are prohibited to be committed, and that there is a penal sanctions on credit disbursement, such act has been limitedly determined in the provisions of Article 49 of the Banking Act. The form of liability for unlawful acts as referred to in Article 49 of the Banking Act is the imposition of penal sanctions and fines for members of the Board of Commissioners, Board of Directors, or bank employees. Therefore, it is known that the imposition of sanctions on non-compliance of banks to the provisions of the Banking Act shall only be imposed on the members of the Board of Commissioners, Board of Directors or Bank Officers by not reducing the criminal sanctions intended, Bank Indonesia may only impose administrative sanctions. It is possible that the State-Owned Bank as a business corporation may gain benefit from the disbursement of non-performing loans, but the attachment of legal subjects to banks at the time of lending is not admitted in the Banking Act. This is contrary to the principle of "*Geen straf zonder schuld*" that criminal accountability cannot be imposed to a person for the absence of mistakes made.

Different point of view of criminal liability to State-Owned Banks as mentioned above blurred of the scope of legal enforcement of State Owned Bank liability for non-performing loans. Bruggink in his book *The Law Reflection* translated by Arief Sidharta gives an obscure meaning to the scope of the law's enforceability as its environment has unclear boundary whose scope cannot be certainly determined.<sup>3</sup>

Based on the above elaboration, there are two urgent legal issues that will be answered in this study, namely: 1.

<sup>1</sup> <http://e-dokumen.kemenag.go.id/files/yeb8k9pM1325560962.pdf> accessed on september 04, 2017 04.45 a.m.

<sup>2</sup> Bagir Manan dalam [www.hukumonline.com/klinik/detail/cl1586/sifat-Fatwa-mahkamah-agung](http://www.hukumonline.com/klinik/detail/cl1586/sifat-Fatwa-mahkamah-agung)- last downloaded on Januari 06, 2018 09.23 p.m.

<sup>3</sup> Bruggink, diterjemahkan oleh Arief Sidharta, *Refleksi Tentang Hukum*, (Bandung:PT Citra Aditya Bakti, 2011) Hlm 61

*Can the State-Owned Bank be prosecuted a criminal liability for the non-performing loans disbursed? 2. What is the form of criminal liability that can be imposed to the State-Owned Bank for the disbursement of non-performing loans?*

## 2. Research Method

The type of research used in this paper is normative legal research, i.e., a research that focuses on examining the application of rules or norms in the applicable positive law. Normative legal research type is done by examining various formal legal rules such as laws, regulations and literary works that contains theoretical concepts which are then related with the problems discussed in this study.<sup>1</sup>

The approach in this research is as follows: 1. Statue Approach. This approach is undertaken by reviewing the regulations of Banking Act and legislation of criminal law as well as regulations relating to the legal issues of research, to find consistency and appropriateness of the regulation among The Act of Banking (*UU Perbankan*), The Act of State-Owned Enterprises (*UU BUMN*), The Act of Limited Liability Company (*UU Perseroan Terbatas*), The Act of Corruption Eradication (*UU Tindak Pidana Korupsi*), The Act of State Treasury (*UU Perbendaharaan Negara*) and The Act of Financial Services Authority (*UU Otoritas Jasa Keuangan*), and other regulations such as Constitutional Court Verdict, *Fatwa* h (instruction) of the Supreme Court, Regulation of Bank Indonesia and/or Regulation of the Financial Services Authority; 2. Conceptual Approach. This approach is an exploration of the various views, doctrines, principles and theories that developed in the science of law. The understanding obtained from this conceptual approach is functionally a basis to build a legal argument in solving the issues at hand.<sup>2</sup> This concept approach is also used as justification to answer legal issues, such as Theory of Legal Certainty, Error Theory and Corporate Responsibility theory. While the concept raised in this study is the concept of state financial losses and the concept of corporate criminal liability; 3. Case approach. The main study in the case approach is *Ratio decidendi* or reasoning that is the judicial consideration to make a decision. *Ratio decidendi* or reasoning is a reference in solving legal issues.<sup>3</sup> The case approach in this research is done by examining *Ratio decidendi* or Reasoning on some final court verdicts with permanent legal force. Some of the decisions referred to are: 1. Supreme Court Verdict No1144 K/Pid.Sus/2006 with the convicted Director of Management of PT Bank Mandiri p.p. 1.Edward Cornelis William Neloe; 2. I Wayan Pugeg; 3. M. Sholeh Taspiran; 2. Supreme Court Verdict No. 1591 K/Pid.Sus/2016 with convicted Former Head of BRI Unit Sluke Branch Slembang p.p. Akbar Listyo Kusumo, ST bin Koes Diharjo; 3. Supreme Court Verdict No. 64/Pid.Sus/2015 with convicted Former Head of Bank Aceh Branch Lhokseumawe p.p. Effendi Baharuddin bin (Alm) Baharuddin.

## 3. Results and Discussion

### 3.1 The Liability of State-Owned Banks on Non-Performing Loans

State-Owned Bank is a bank with a capital ownership of more than 51% obtained from separated state finances. State-owned capital investment in the State-Owned Banks has certain objectives, such as executors of duties and efforts to promote the prosperity of the people and the development of the national economy,<sup>4</sup> increasing the mobilization of funds from the public, especially in the form of savings to improve the people's economy and national economic development,<sup>5</sup> and as the success of the rehabilitation and restoration of production capacity in the economic sectors.<sup>6</sup> In general, the purpose of the establishment of the State-Owned Bank basically has been contained in the provisions of the State-Owned Bank Law that is to act as an agent of development.<sup>7</sup>

The purpose of the establishment of the State-owned Bank does not eliminate the function of the bank in general, that is a "business entity" whose main function is to collect funds from the public in the form of savings and distribute to the public in the form of credit and or other forms. The term business entity used in the Banking Act in defining the word bank as mentioned above, is an acknowledgment that the bank is a corporation. Andi Hamza states that the corporation is a body or business that has its own identity, wealth, which is separated from the wealth of members.<sup>8</sup>

<sup>1</sup> Peter Mahmud Marzuki, *Penelitian Hukum*. (Jakarta: Kencana Predana Media Group, 2005) Hlm 29.

<sup>2</sup> *Ibid.* Hlm 137.

<sup>3</sup> *Ibid.* Hlm 94

<sup>4</sup> See Explanation in Act No. 17 of 1968 on Bank Negara Indonesia 1946,

<sup>5</sup> See Explanation in Act No. 20 of 1968 on Bank Tabungan Negara.

<sup>6</sup> See Explanation in Act No. 21 of 1968 on Bank Rakyat Indonesia

<sup>7</sup> See Explanation of BUMN Act on the purpose of BUMN establishment.

<sup>8</sup> Mahrus Ali, *Asas-Asas Hukum Pidana Korporasi*, (Jakarta: Rajawali Pers, 2013) Hlm 1

As provision of The Act no. 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as BUMN Law) in which it states that the limited liability company, whose shares are more than 51% is owned by the Republic of Indonesia, the main objective is to gain profit. Therefore, the characteristics of the company as follows:<sup>1</sup>

- 1) The business is to foster profit in order to increase the value of the company and provide high quality and competitive goods and / or services;
- 2) In the form of a limited liability company;
- 3) The whole or part of capital belongs to the state of separated State property;
- 4) Led by a Director.

The State-Owned Bank as a Limited Liability Company is attached the definition of the Limited Liability Company itself. Limited liability company consists of 2 (two) words namely Company and Limited. The Company refers to the capital divided into shares, whereas Limited refers to the holder whose extent of liability is limited to the nominal value of all shares held.<sup>2</sup> Limited Liability Company is a legal entity that has different characteristics from other forms of business. One feature that distinguishes a Limited Liability Company from another business entity can be seen from the doctrine of separate legal personality which means that there is a separation of wealth between the owner or the shareholder and the wealth of the legal entity itself.<sup>3</sup> Therefore, the principle of separate legal personality also works that the shareholders that has no interest in the Limited Liability Company are not responsible for the debt of the limited liability company.<sup>4</sup> The principle of separate legal personality that gives rise to limited liability for shareholders raises several consequences:<sup>5</sup>

- 1) The Company as a legal material is a legal unit with the authority and capacity separated from the shareholders to control property, make contracts, sues and sued, continuing life and existence even though the shareholders changes the Board of Directors whether dismissed or replaced;
- 2) The assets, rights and interests, and responsibilities of the company are separated from the shareholders;
- 3) Furthermore, the shareholders, according to the law in accordance with the provisions of Article 3 paragraph (1) of the Limited Liability Company Law, have immunity from the obligations and responsibilities of the company, because there are distinctions and separation of legal personality between shareholders and the company.

In the contrary, there is legal validity out of the separate legal personality principle within a State-Owned Bank in the form of Limited Liability Company. The enforcement is related to the definition of state finances in the provisions of the State Finance Act. One of the definitions given to state finances is in the form of state assets / regional property which are managed by themselves or by other parties in the form of money, securities, accounts receivable, goods and other rights which can be assessed by money, including wealth separated from state enterprises / regional companies. Based on the definition of state finance provided by the State Finance Act, it can be identified that the existing finance in the State-Owned Bank is the State Finance.

Erman Raja Gukguk states that the state finances are separated from the State Owned Enterprise (SOE) finances, the separated wealth is in the form of shares owned by the state, not the assets of state-owned enterprises. Therefore, the finance of SOEs is not State finance. Some of the laws underlying Erman Rajagukguk's opinion are:<sup>6</sup>

- 1) The legal provisions contained in Article 11 of the SOEs Law mention that

For companies (*persero*), any provisions and principles applicable to a limited liability company shall also be applied as regulated in the Law Number 1 of 1995 concerning Limited Liability Company

Erman Raja Gukguk defined the provision as giving authority to the Limited Liability Company Law to regulate SOEs in the form of Limited Liability Company. The Limited Liability Company's assets are separated from the assets of the Board of Directors, the Commissioner (as supervisor), and the Shareholder (as the owner). Therefore, accordingly, the assets which

<sup>1</sup> Achmad Ichsan, *Dunia Usaha Indonesia*, (Jakarta: PT. Pradnya Paramita, 2000) Hlm 467

<sup>2</sup> Zainal Asikin dan Wira Pria Suhartana, *Pengantar Hukum Perusahaan* (Jakarta: Prenadamedia, 2016) Hlm 51

<sup>3</sup> Ahmad Yani dan Widjaya Gunawan, *Seri Hukum Bisnis*, (PT. Raja rafindo Persada: Jakarta, 2000) Hlm 7

<sup>4</sup> I.G. Widjaja, *Hukum Perusahaan*, (Jakarta: Mega Poin, 2003) Hlm. 6

<sup>5</sup> Sutan Remy Sjahdeni, *Tanggung Jawab Pribadi Direksi dan Komisaris*, (Jurnal Hukum Bisnis Vol. 14, 2001) Hlm 108

<sup>6</sup> <http://e-dokumen.kemenag.go.id/files/yeb8k9pM1325560962.pdf> last accessed on Agustus 26, 2017 09.23 p.m.

are in the possession of a Limited Liability Company in the form of SOEs are no longer State Properties, since they have been separated legally.

- 2) Based on the understanding of the provisions of the Limited Liability Company Law, then the separated state property is defined as shares owned by the government invested to the Limited Liability Company.

In relation to the existence of contradictory laws between one and the other, the demand for judicial review by the Constitutional Court clerk as the case filed by the clerk of the Constitutional Court has been made as Case Number 48/PUU-XI/2013 dated May 22, 2013 and Case Number 62/PUU-XI/2013 dated June 17, 2013. But, the Constitutional Court rejected the petition for judicial review and strengthened the definition of state finance as contained in the explanation of the Corruption Eradication Act.

Therefore, in 2006, the Supreme Court At the demand of the Minister of Finance of the Republic of Indonesia, through the Letter of the Minister of Finance No. S-324/MK.01/2006 dated July 26, 2006, issued *Fatwa* WKMA /Yud/20/VIII/2006 dated August 16, 2006. This *Fatwa* essentially confirms that "the provisions of Article 2 Sub-Article g of the State Finance Act are not legally binding to SOEs, and thus the assets of state-owned enterprises (SOEs) sourced from separated state assets are stated not as state assets. In addition to the *Fatwa*, an opinion from the Ministry of State-Owned Enterprises as stated in its letter No. S-298/S.MBU/2007 25<sup>th</sup> of June 2007, dated June 25, 2007 addressed to the Board of Directors, Commissioners and Board of Supervisors of State-Owned Enterprises concerning the relationship between the State Finance Act and State-Owned Enterprises Act (BUMN Act) which can be summarized as follows: "According to the Financial State Act and State-Owned Enterprises Act, the State's assets in the state-owned companies are limited to capital/shares, subsequently managed by corporations in accordance with the rules of corporate law, and are no longer governed by The Act of state property.

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Related to the legal relationship of State-Owned Bank as a business corporation and the state, it refers to the relationship that exists because the state has included state finances that have been separated in the capital of the State-Owned Bank. Regarding the state finances that have been incorporated into the capital of the State-Owned Bank, in this case the State-Owned Bank calls it the stock. Based on Central Government Financial Statement in 2012, it states that the government still admitted the state capital as a form of permanent investment in the SOEs while the conception given by SOEs to the finance has been made as private right (divided into shares).<sup>2</sup> Referring to the Indonesian Language Dictionary, Investment has the meaning of investing money or capital in a company or project for the purpose of obtaining profit<sup>3</sup> While the stock is defined as proof of ownership of the share capital of a limited liability company that entitles dividends and others according to the amount of deposited capital.<sup>4</sup>

Salim HS and Budi Sutrisno in his book entitled *Hukum Investasi Indonesia* [Indonesian Investment Law], divide Investment type based on capital or wealth aspects into two types:<sup>5</sup>

- 1) Real assets: is a tangible investment such as buildings, vehicles and so on;
- 2) Financial asset: is a document (letters) of indirect claims of holder toward the real activities of parties that issue those securities.

Related to the definition of investment, it is regulated in the provisions of attachment of Government Regulation Number 71 of 2010 regarding Government Accounting Standard, describing long-term investment as follows

A Long-term investment is an investment intended to obtain economic benefits and social

<sup>1</sup> Bagir Manan dalam [www.hukumonline.com/klinik/detail/cl1586/sifat-Fatwa-mahkamah-agung](http://www.hukumonline.com/klinik/detail/cl1586/sifat-Fatwa-mahkamah-agung) last downloaded on Januari 06, 2018 09.23 p.m.

<sup>2</sup> Ronny Sautma Hotma Bako dalam Jur Udin Silalahi, *Op.Cit*, Hlm 18-19

<sup>3</sup> <https://kbbi.web.id/investasi>, last accessed on Januari 3, 2018 11.12 p.m.

<sup>4</sup> <https://kbbi.web.id/saham>, last accessed on Januari 3, 2018 11.14 p.m.

<sup>5</sup> Salim HS dan Budi Sutrisno, *Hukum Investasi di Indonesia*, (Jakarta: PT Raja grafindo Perasada, 2008) Hlm 37

benefits within a period of more than one accounting period. It includes non-permanent and permanent investments. Non-permanent investments include investments in Sovereign Bonds, Equity Participation in development projects, and other non-permanent investments. Permanent investments include the participation of government's capital and other permanent investments.

Based on this explanation, the existing shares in the State-Owned Bank are included in the type of permanent long-term investment. However, although the notion of investment and shares basically refers to the same understanding, it can be seen that there is no common use of the term to mention of state finances in the State-Owned Bank. Basically the notion of banking on state finances incorporated into the capital of the State-Owned Bank is specific i.e., in the form of shares, while the state's definition of state finances that have been incorporated into State-Owned Bank capital is more general, namely investment.

The State relationship as shareholder in the State-Owned Bank, under the provisions of Article 52 Paragraph (1) of the Limited Liability Company Law has consequences in the form of the right accepted by the State in the form of:

- 1) Attending and voting in the Stakeholder General Meeting;
- 2) Receiving dividend payments and residual proceeds of liquidation proceeds;
- 3) Executing other rights under this law.

Government Regulation no. 72 of 2016 on Amendment of Government Regulation no. 44 of 2005 on the Procedures of Participation and Administration of State Capital at State-Owned Enterprises and Limited Liability Companies mentioned in Article 2a that state equity participation in SOEs, the state has a privilege. Thus, in the elucidation of Article 2a it is stated that the privilege is the right of:

- 1) Appointment of members of the Board of Directors and members of the Board of Commissioners;
- 2) Amendment of the articles of association;
- 3) Changes of the share ownership structure;
- 4) Merger, consolidation, separation, and dissolution, as well as acquisitions of companies by other companies.

On the basis of the privileges granted to the State due to the majority of shares it holds, it is intended that the State shall control through the State-Owned Enterprise, in this case the State-Owned Bank.

Regardless of the difference in the use of the term investment and shares invested in a State-Owned Bank, that regarding the difference emerges a privilege owned by the state, it does not provide a basis for the state to participate in the management of the business corporation. It refers to the provisions of Article 11 of the BUMN Law, that any provisions and principles applicable to a limited liability company are applicable to company (*persero*) as regulated in the Limited Liability Company Law. The Limited Liability Company has separated assets from the assets of the Board of Directors, the Commissioner (as supervisor), and the Shareholder (as the owner).<sup>1</sup>

To obtain profit, Loan disbursement will not be separated from business risks on the disbursement of credit to customers. As mentioned earlier that crediting by bank is basically risky, because the financing given is for the future projection or forecast that cannot be ascertained to be implemented as planned.<sup>2</sup> The risks of unpaid loans disbursed essentially affect the losses carried by the Bank. Jopie Jusuf mentioned that if the loans disbursed by banks are problematic, the bank will "suffer greatly"; interest income decreased, profits decreased, disturbed bank liquidity, bank reputation damaged, human resource allocation, and time allocation.<sup>3</sup> Kasmir mentioned that crediting contains a risk of congestion. As a result the credit that cannot be collected causes losses carried by the bank and resulted in decreased corporate profits.<sup>4</sup>

The losses incurred on non-performing loans may be widespread based on the legal consequences of the circumstances. The legal consequences of risks that cause harm to a State-Owned Bank as a business corporation in the form of a banking system shall be construed as a result of the law to an act perpetrated by a legal subject.<sup>5</sup> The Financial Services Authority (OJK) conducted supervision on performance of banking through The Act no. 21 of 2011 Concerning the Financial Services Authority (hereinafter referred to as the Act). OJK supervision is a preventive measure that aims to overcome the problems of banks as early as possible, so business continuity of

<sup>1</sup> <http://e-dokumen.kemenag.go.id/files/yeb8k9pM1325560962.pdf> last accessed on september 20, 2017 07.22 p.m.

<sup>2</sup> Syarif Arbi, *Perbankan Keuangan Pembinaan Lembaga*, (Yogyakarta: BPF, 2013) Hlm 143.

<sup>3</sup> Jopie Jusuf, *Analisis Kredit untuk credit (Account) Officer*, (Jakarta: PT. Gramedia Pustaka Utama, 2014) .Hlm 317

<sup>4</sup> Kasmir, *Buku Manajemen Perbankan*, (Jakarta: Rajawali Pers, 2014) Hlm 148

<sup>5</sup> Achmad Ali dalam <http://e-journal.uajy.ac.id/6563/3/MIH202044.pdf> last accessed on February 10, 2018 09.21 p.m.

the bank and financial system stability will not be disrupted.

The Regulation of the Financial Services Authority (OJK) Number 15/POJK.03/2017 on the Determination of the Status and Follow-up of Commercial Banks Supervision gives different treatment to the supervision given to the Commercial Bank. These differences are classified into two, i.e., banks have systemic impacts and banks do not have systemic impact. The systemic impacts of bank are described in the following regulation;

The network or transaction complexity of banking services; and the linkage with other financial sectors may result in the failure of some or all other Banks or financial services sectors, whether operationally or financially, if the Bank is impaired or fails.

The regulation then states that the supervision conducted by OJK consists of 3 stages, namely;

- 1) Normal supervision;
- 2) Intensive supervision;
- 3) Special supervision.

In the case of nonperforming loans, when the Non Performing Loan / NPL Net or Non Performing Financing (NPF net) ratio is more than 5% (five percent) of total credit or total financing, the supervision is performed by OJK to the Bank concerned is in the form of intensive supervision.

Regarding to systemic Banks with intensive supervisory status, OJK may give orders in the form of;

- 1) Removing credit or financing or disbursements of funds classified as loss and taking into account losses of bank except Systemic Bank with Bank capital except Systemic Bank;
- 2) Limiting remuneration payments or other similar forms to members of the Board of Directors, Board of Commissioners, and/or Sharia Supervisory Board, or compensation to related parties;
- 3) Not repaying additional capital instruments or complementary capital instruments;
- 4) Not performing or delaying the distribution of profits;
- 5) Strengthening or supplementing the capital of Bank except Systemic Banks including through capital payments;
- 6) Not making certain transactions with related parties and/or other parties stipulated by OJK;
- 7) Restricting the implementation of product publishing plans and/or implementation of new activities;
- 8) Not undertaking or limiting the growth of assets, inclusion, and /or provision of new funds;
- 9) Selling any or all of the Bank's assets and/or liabilities except the Systemic Bank to the bank and/or other parties;
- 10) Not expanding office network;
- 11) Not conducting certain business activities; Closing the Bank office network except the Systemic Bank;
- 12) Not making interbank transaction;
- 13) Merging or consolidating with other banks;
- 14) Replacing the Board of Directors and or Board of Commissioners of Banks except the Systemic Bank;
- 15) Handing the management of all or some of the Bank's activities except the Systemic Bank to other parties;
- 16) Selling except the Systemic Bank to buyer who is willing to take over all obligations of the Bank except Systemic Bank;
- 17) Placing statute manager; and/or other supervision.

In addition to the above mentioned, Bank under intensive supervision is obliged to:

- 1) Implement a recovery plan to overcome financial problems; and/or
- 2) Delivering action plan to overcome problems other than financial problems.

The Bank under intensive supervision as stipulated by OJK shall be conducted within a period of 1 (one) year from the date of OJK notice letter. The period of intensive supervision can be extended by OJK at most 1 (one) time and no later than 1 (one) year. The Bank shall be declared under special surveillance if the Bank designated under intensive supervision or a Bank under normal supervision find difficulties that endanger its business continuity.

Thus, the consequences that must be received by the State-Owned Bank (BUMN) as business actors on the disbursement of non-performing loans widely caused State-Owned Banks suffered losses. These losses occur when the net non-performing loan ratio (NPL net) or net troubled financing ratio (NPF net) has reached more than 5%. The disadvantage in mentioned is that in addition to the Bank, should also receive supervising sanction from OJK, financially, the Bank suffers losses caused by the unpaid credits.

In addition to the above-mentioned consequences, the State-Owned Bank is responsible for non-performing loans that have been disbursed. It has a complexity that must be separated from its enforceability to avoid mistake in the enforcement of the law. Based on legislation related to credit disbursement by State Owned Banks, the accountability can be grouped into 4 elements namely;

- 1) Accountability of State Owned Bank (BUMN) as share manager;
- 2) Accountability of State Owned Bank (BUMN) as creditor;
- 3) Accountability of State Owned Bank (BUMN) as a business entity that manages public funds;
- 4) Accountability of State Owned Bank (BUMN) for Corruption

The liability will be explained as follows;

#### **1) Accountability of State Owned Bank (BUMN) as share manager**

The concept of shares management liability emerged under the authority given by the State Owned Bank as a company to the Board of Directors as the manager of the Company (*Persero*). The arrangement shall be conducted with the intent and purpose of the Company. The Board of Directors has the authority to represent the Company, both inside and outside the court based on the provisions of the articles of association. The Limited Liability Company Law states that each member of the board of directors is personally liable for the loss of the company if the person is negligent in performing the duties. If some incorrectness and/or misleading found in the financial statements provided, the members of the Board of Directors and members of the Board of Commissioners liable to the injured party. Exceptions to such matter contain in the provisions of Article 97 paragraph (1) of the Law of Limited Liability Company which contains good faith principles with the spirit of the Business Judgment Rule doctrine (the doctrine that protects the Directors from personal responsibility for taking care of the company).<sup>31</sup> The Board of Directors cannot be blamed for the decision throughout these matters:

1. The loss is not due to his errors or omissions;
2. The Board of Directors have good faith in managing the company in accordance with the purposes and objectives of the Company;
3. Not having any direct or indirect conflicts of interest resulting in a loss;
4. Have taken action to prevent the occurrence or continuation of such losses.

Furthermore, Article 138 of the Limited Liability Company Law mentions that more than 10% of shareholders may apply to the court in written of allegations of unlawful acts committed by the company, board of directors and board of commissioners. Beside, if it can be proved that the company, the Board of Directors and the Board of Commissioners have committed unlawful acts that cause losses to shareholders, in this case the State as the owner of capital more than 51%, it can be processed further on the situation. Furthermore, Article 155 of the Company Law stipulates that the responsibilities of the Board of Directors and/or the Board of Commissioners for the errors and omissions regulated in the provisions of the Limited Liability Company Law do not reduce the provisions stipulated in the Criminal Law.

#### **2) Accountability of State Owned Bank (BUMN) as creditor**

The liability for the legal consequences of the relationship between the creditor, in this case the State-Owned Bank, and the Customer as the debtor, emerged from an engagement. Article 1234 of the Civil Code (KUHP) states that Engagement means "intended to give something, to do something, or to do nothing". Creditor has an obligation to provide money or bills or what equivalent to it, while the debtor has an obligation to repay the loan together with the interest loan in accordance with the terms of the agreement. The Civil Code describes the legal consequences of the existence of *wanprestasi* by the debtor<sup>1</sup>, are:

1. In the contract of giving something, the risk changes to the debtor since the occurrence of *wanprestasi* (Article 1237 Civil Code);
2. Debtor is required to pay the loss suffered by the creditor (Article 1243 Civil Code);
3. If the agreement is a mutual agreement, the creditor may demand the calculation or cancellation of the agreement through a judge (Article 1266 Civil Code);
4. The Debtor is obliged to fulfill the agreement or cancellation along with the payment of compensation (Article 1267 Civil Code).

On the basis of *wanprestasi* (negligent) of the debtor in executing the credit agreement made, the State-Owned Bank has the right as regulated in the provisions of Article 12A of the Banking Act. The right is to purchase part or all of the collateral, either through auctions or outside auctions on the basis of voluntary submission by the

<sup>1</sup> According to Yahya Harahap, *wanprestasi* is the state where debtors are not able to perform the responsibility or the absence of achievement, performing accountability out of the agreed period, performing responsibility which is not in accordance with the agreement, and debtors deny the agreements.

owner of the collateral or by the power to sell outside the auction.

Basically there are some efforts that can be done before the sale of collateral is done. Siswanto Sutojo mentioned that the effort of State Owned Bank's responsibility as a business corporation to minimize the loss of non-performing loans can be done through:<sup>1</sup>

1. Internal Bank Organization: it is conducted through the formation of special team in handling non-performing loans.
2. Through the Court Process and Out of Court process: it is conducted through a court process if deception by debtor is found or if the settlement process outside the court cannot be executed properly. The out-of-court process is performed when the party has an expectation that the debtor is able to pay off both the debt and the interest. The Out of court process is done by:
  - a. Rescheduling credit payment, by giving an extra time of loan repayment period.
  - b. Reviewing the contents of credit agreements (reconditioning),

Based on Bank Indonesia Circular Letter no. 26/4/BPPP dated May 29, 1993 which principally regulates the rescue of non-performing loans before settling through legal institutions require alternative way to resolve the issue. Ismail mentions that, the efforts meant can be done as follows;

1. Rescheduling: to handle non-performing loans, the Bank can do rescheduling. The rescheduling effort is adjusted to the company's cash flow, in order to success and customers may run smoothly. Some alternative rescheduling that can be done are:
  - a. Extra time of credit payment period.
  - b. The monthly installment schedule is changed to quarterly
  - c. Minimize the main installment and give an extra time
2. Reconditioning: The bank's effort in saving non-performing loans is to change all or part of the agreements that have been made with the customer where the changes should be in accordance with the problems faced by the customer. Some reconditioning alternatives that can be done are:
  - a. Decreasing the Interest Rates
  - b. Partial or total interest rate exemption
  - c. Capitalization of interest, i.e., interest arrears collected with the loan
  - d. Dispensation payment of interest until the customer is considered capable to pay.
3. Restructuring: The bank's effort in rescuing non-performing loans is to change the financing structure underlying credit payment. For example, at the lending time, the financing structure is in the form of investment, then added working capital financing.

Thus, it can be seen that the accountability of the State Owned Bank as a creditor should be viewed as an accountability to eliminate or minimize the losses arising from non-performing loans. Accountability of a State-Owned Bank as a creditor is within the scope of the private law. The accountability is done to maintain the validity of credit quality that is by credit refunding done by selling collateral. Another way that can be done by the State-Owned Bank as a creditor is by improving credit quality as mandated in Bank Indonesia Circular Letter no. 26/4/BPPP related to the settlement of non-performing loans.

### 3) Accountability of State-Owned Bank as a Business Entity that Manages Community Funds

Banking is a business corporation that the main objective is to gain profit. Thus, the restriction is given to the objectives in the fulfillment of the provisions as in the Article 2 of the Banking Act, which is based on the economic democracy by implementing prudential banking principle. Rachmadi Usman mentioned that Prudential Banking Principle is a principle that the bank in carrying out its functions and business activities must be careful in order to protect the public funds deposited.<sup>2</sup> Furthermore, Rachmadi Usman mentioned the enforcement of prudential principle generally aimed that the bank are able to run its business in accordance with the prevailing legal provisions and norms so that the community may trust the bank, while the specific purpose is to maintain the interests of the community well, and beneficial for the development of national economy.<sup>3</sup> Therefore, in providing non-performing loans that the disbursement is not done properly, it can be subjected to criminal sanctions therein as mentioned in the provisions of Article 49 of the Banking Act.<sup>4</sup>

Based on the provisions of Article 49 of the Banking Act, it is known that criminal sanctions for unlawful acts of loan disbursement are charged to members of the Board of Commissioners, Board of Directors, or bank employees. The sanctions are imprisonment and fines. In addition, on the basis of authority given by OJK,

<sup>1</sup> Siswanto Sutoyo, *The Management of Commercial Bank*, (Jakarta: Damar Mulia Pustaka 2007)

<sup>2</sup> Rachmadi Usman, *Aspek aspek Hukum perbankan Indonesia*, (Jakarta: PT Gramedia Pustaka Utara, 2005) Hlm 18

<sup>3</sup> *Ibid*

<sup>4</sup> See the Provision of Article 49 on Banking Act

sanctions can be given to banks. According to the provisions of Article 52 of the Banking Act, administrative sanction is optional, that is applicable without reducing the criminal sanctions contained in the provisions of Article 49 of the Banking Act.

#### 4) Accountability of State Owned Bank (BUMN) for Corruption

One element charged corruption criminal accountability is an unlawful act that causes state financial losses. Based on the provisions of Article 32 of the Banking Act, the financial losses of the state that occur can be calculated based on the findings of the authorized institution or the appointed public accountant. Under this provision, the provision of Article 66 of the Limited Liability Company Law which states that the profit or loss of limited liability company identified from the annual report made by the Board of Directors, cannot be classified in the calculation of the state financial loss. This is due to the annual report that may contain the profit or loss of the company is calculated by the board of directors as the manager of the company, while the state losses can only be calculated by the authorized institution or appointed public accountant. It is explained in Sema no. 4 of 2016 of the Criminal Chamber as follows:

The authorized institution that may declares whether or not financial loss of the State exists is the Audit Board (BPK) having constitutional authority, while other institutions such as the Financial and Development Supervisory Board (BPKP) / Inspectorate / Regional Government Agency (SKPD) shall still be authorized to audit the State's financial management, but is not authorized to declare the state financial losses. At certain cases, the Judge may, on the basis of the fact of the trial, judge the existence of the State's losses and the amount of the State's losses

Under these provisions, losses incurred by the State Owned Bank and the losses suffered by the State over the disbursement of nonperforming loans cannot be equated, because the calculation of the profitability of the State-Owned Bank is conducted by the Board of Directors through annual report, while the state financial loss can only be done by the Audit Board (BPK), while other institutions such as the Financial and Development Supervisory Board / Inspectorate / Regional Government Agency (KPD) are authorized to audit the State's financial management, but not to declare the state financial losses.

Furthermore, the state's loss due to non-performing loans disbursement should be taken into account. The Verdict of the Constitutional Court Number 25/PUU-XIV/2016 on the omission of the word "*dapat* [may]" in Article 2 paragraph (1) and Article 3 of the Corruption Eradication Act, affirms that the element of the state financial losses must be understood to have actually happened or real (actual loss). Thus, it can be found in the provisions of The Act no. 1 of 2004 on the State Treasury (hereinafter referred to as the State Treasury Law). The law defines the state loss as "the lack of money, securities, and goods, as a result of unlawful acts either intentionally or negligently." Based on Indonesian Dictionary the word "loss" means less than the capital.<sup>1</sup> Therefore, the state financial loss is known as lack of capital, state property, on the basis of lack of money, securities, and goods as a result of unlawfulness. Thus, it cannot be concluded that the state suffers losses due to non-performing loans if there is no lack of capital, state property, on the basis of lack of money, securities, and real and definite goods as a result of the unlawfulness of non-performing loans disbursement.

Regarding the analysis of the unlawful act (*wederrechtelijkheid*), the distribution of non-performing loans by the State-Owned Bank may contain these following elements;

1. That the credit disbursement done by fulfilling the element of unlawful act;
2. The transaction of non-performing loans has caused loss of state financial deficit from the capital invested to the State Owned Bank;
3. The calculation has been done by the authorized institution.

On the contrary, there are exceptions to the enforceability of legal relationships established between the State and State-Owned Banks. The banks appointed to implement the government program, which is distributing funds either in the form of subsidies or other programs, serves to improve the welfare of the community. One of the examples is the distribution of Credit with interest subsidy from the government or known as the People Business Credit Program (hereinafter referred to as KUR). KUR is defined as a government program in the form of credit/working capital financing distribution and/or investment to productive and viable business debtors but has not had additional collateral or not enough additional collateral. The purpose of KUR distribution is to improve the empowerment of micro, small and medium enterprises.

Related to the implementation of KUR distribution, it is regulated in the Regulation of the Coordinating

<sup>1</sup> <https://kbbi.web.id/rugi>. last accessed on January 02, 2018 09.33 p.m.

Minister for Economic Affairs no. 8 of 2015 Concerning Guidelines for the Implementation of People's Business Credit Program (hereinafter referred to as *Peraturan Menteri Koordinator Bidang Perekonomian Tentang Pedoman Pelaksanaan Kredit Usaha Rakyat* [Regulation of the Coordinating Minister for Economic Affairs on Guidelines for the Implementation of People's Business Credit Program]).<sup>1</sup> Article 6 Regulation of the Coordinating Minister for Economic Affairs concerning Guidelines for the Implementation of People's Business Credit Program states that funding of KUR distribution sourced from KUR agency's funds, the Government only provides interest subsidy equal to the difference between the interest rate received by KUR agency by charging interest to KUR recipients. Interest Subsidy is allocated in the State Budget (APBN) with the mechanisms mentioned in the Regulation of the Minister of Finance of the Republic of Indonesia No. 20/PMK.05/ 2015 concerning Procedures for the Implementation of Interest Subsidy for People's Business Credit Program as follows

Article 8

- (1) The calculation of interest subsidy shall be based on the formula of interest subsidy rate multiplied by KUR outstanding multiplied by the day of interest divided by 360 (three hundred and sixty) days
- (2) The interest subsidy as referred to in paragraph (1) shall be paid monthly to the KUR provider.
- (3) The day of interest referred to in paragraph (1) shall be the number of days in one period of Interest Subsidy claim in which the outstanding of the main loan is unchanged.

In contrast to the regulations on credit disbursements under the Banking Act and the Regulations issued by Bank Indonesia, the provisions KUR disbursement is under the enforcement of the Coordinating Minister for Economic Affairs Regulations on the Guidelines for the Implementation of People's Business Credit Program. There are several provisions that must be considered in providing KUR;

1. KUR Recipients shall be individuals or legal entities conducting productive activities that have been determined in a limitative way in the form of:
  - a. Micro, small and Medium Enterprises;
  - b. Candidate of Indonesian Workers who will to work overseas;
  - c. Family members of employees/workers having incomes or worked as Indonesian Migrant Workers;
  - d. Indonesian Migrant Workers who are retired working overseas; and
  - e. Workers affected by Termination of Employment.
2. The productive business meant must have been running for at least 6 month
3. Owning business certificate issued at least by the local government
4. KUR distributors are required to check the SID (Debtor Information System)

Further, it is stipulated in the Regulation of the Minister of Finance No. 20/PMK./05/2015 concerning Procedures for the Implementation of Interest Subsidy for People's Business Credit Program, stating that the main collateral of KUR is the business or object financed by KUR, it is different from the credit in general that is the fulfillment of the Collateral element covers the principal and interest of the loan.

Based on the above mentioned laws and regulations, there are 2 criminal liabilities that can be imposed on the distribution of non-performing loans. Such liability is based on the criminal act as contained in the provisions of the Banking Act, and the criminal act as contained in the provisions of the Corruption Eradication Act. Moeljato stated that the criminal act only refers to threatened and prohibited criminal act, while in relation to criminal detention can only be imposed whenever mistakes or errors made. Thus, it is important to analyze the effectiveness of the Error Theory in order to impose responsibility on State-Owned Banks on the distribution of non-performing loans. The legal theory has the overall meaning of interrelated statements concerning the conceptual system of legal rules and legal decisions, for which an important part of the system derives positive law.<sup>2</sup> Based on the causal relationship, it is important to put element or error into a law or legal theory.

The elements of error will not be separated from the validity of the principle *Geen straf zonder schuld or Actus*

<sup>1</sup> Regulation of the Coordinating Minister for Economic Affairs No. 8 of 2015 on Guidelines for the Implementation of People's Business Credit Program (KUR) conducted under the mandate of the Presidential Decree No. 19 of 2015 Kebijakan Financing Policy Committee for Micro, Small and Medium Enterprises, related to implementation guideline of KUR credit distribution. In the Presidential Decree, it is explained that the Program of KUR is implemented and obey the regulations issued by the Coordinating Minister for Economic Affairs as the Chair of the Policy Committee.

<sup>2</sup> Bruggink, *Op.Cit.* Hlm 4

*non facit reum nisi mens sist re*. It means that there any action can be punished without any error.<sup>1</sup> The Act no. 48 of 2009 on Judiciary Power, in Article 6 paragraph (2) states that:

No one shall be criminally liable, unless the court, due to lawful evidence, believes that a person may have been guilty of an act accused on him.

Then the explanation of Article 8 of the same law, regarding the severity of the sentence, the judge shall pay attention to the good or evil nature of the defendant so that the sentence is fair. Thus, it can be understood that criminal sentence is not only imposed on a person who has violated the provisions of the law as an unlawful act, but he needs to have the ability to be responsible. Sudarto mentions elements of error as follows:<sup>2</sup>

First, the ability to be responsible (*schuldafahigkkeit*), meaning the state of the doer's soul must be normal. Second, the inner connection between the maker and his deeds that are deliberate (*dolus*) or negligence (*culpa*) is called the forms of error, the absence of reason eliminating errors or no forgiving reasons.

The approach that can be made to errors is the psychological and juridical aspects. Psychological aspect is the basis to faultfinding and juridical aspect is the second basis to charged accountability to a person. The basic or error that should be found in the physical of the person is by investigating the relation of the inner connection and the action.<sup>3</sup> The error done has a causal relationship that eventually raises a result matching the formulation of the articles contained in the law. On the basis of the causal relationship, accountability can be charged to the person making mistakes or errors.<sup>4</sup> Moeljatno defines the elements of criminal acts as follows:<sup>5</sup>

1. The existence of deeds;
2. The circumstances that motivate the deed;
3. Additional incriminating circumstances;
4. Objective Unlawful act elements;
5. Subjective Unlawful act elements;

P.A.F Lamintang defines the objective element as an element or circumstances that must be done by the perpetrator, while the subjective is everything attached to him including the intention of the perpetrator<sup>6</sup>

The elements of criminal as mentioned by Moelyatno applied in the provisions of Article 49 of the Banking Act can be explained as follows:

1. Subjective element: a deliberate mistake. Moeljatno divides the deliberateness (*dolus delicten*) in 3 forms:<sup>7</sup>
  - a. Deliberateness of a certain purpose: Perpetrators certainly expect to achieve a result which is the main reason for the imposition of punishment.
  - b. Deliberateness of Intentional instinct of certainty: The perpetrator, by his actions, does not aim to achieve the underlying consequences of the offense, but he knows well that the consequences will surely follow that act.
  - c. A deliberate insistence of possibility: This deliberateness which is not followed by certainty of consequences.
2. Objective element: the state of the quality of the perpetrator as Board of Commissioners, Board of Directors and Employees of the Bank
3. The existence of deeds which are determined in a limitatively as follows:
  - a. Create or cause false record in the bookkeeping or in the reporting process, as well as in documents or reports of business activities, transaction reports or bank accounts;
  - b. Eliminates or excludes or causes the absence of records in the books or in reports, nor in documents or reports of business activities, transactions and bank accounts;
  - c. Changing, obscuring, hiding, deleting, or omitting any record in the bookkeeping or in reports, nor in documents or reports of business activities, transactions or bank accounts, or intentionally altering, obscuring, removing, concealing or destroying such records
  - d. Request or accept, permit or agree to receive any remuneration, commission, additional money, service, money or valuables, for his personal gain or for the benefit of his family, in order to obtain or seek for others to receive dawn payment, bank guarantee, or credit facility from a bank, or in

<sup>1</sup> Moelyatno, *Asas-Asas Hukum pidana, Loc.Cit*, Hlm 165

<sup>2</sup> Sudarto, *Hukum Pidana 1*, (Semarang:Badan Penyediaan Bahan Kuliah, Fakultas Diponegoro, 1987). Hlm 91

<sup>3</sup> Bambang Poernomo, *Asas-Asas Hukum Pidana*, (Jakarta:Ghalia Indonesi,1985) Hlm 145.

<sup>4</sup> Moeljatno, *Asas-Asas Hukum pidana, Op.Cit*, Hlm 95-97

<sup>5</sup> *Ibid*, Hlm 69

<sup>6</sup> P.A.F Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, (Bandung:Sinar Baru, 1990) Hlm. 184

<sup>7</sup> Moeljatno, *Perbuatan Pidana dan Pertanggung jawaban Dalam Hukum Pidana*, (Jakarta:Bina Aksara, 1993) Hlm. 46

the course of purchasing or discounting by the bank on notes, promissory notes, checks and trade papers or other evidence of liability, or in order to give consent to others to withdraw funds exceeding the credit limit of the bank ;

- e. Not implementing the necessary steps to ensure bank compliance with the provisions of this Law and other provisions applicable to the bank. Regarding to this case, it refers to the provisions of Article 2 of the Banking Act stating that in conducting its business, bank runs in accordance with the principles of prudence known as 5c, those are Character, Capacity, Capital, Condition of economy, Collateral.<sup>1</sup> In addition, there are several factors in providing credits (3R of Credit) namely: 1.Return (Results obtained) that is based on experience, ability, marketing and other aspects; 2.Repayment Capacity. Assessment ability/ability to return bank credit. It is seen from the perspective of cash flow, the benefits and the character of the customers; 3.Risk Bearing Ability. Assessment of the ability to cover risks that may arise if the credit stuck. In addition to the principles of lending above, the Bank must obtain information of potential debtors, such as tracking customer's identity, transaction instrument, transaction date and number and denomination of transaction.
4. The circumstances that attached action and additional circumstances of crime: It does not receive any limitative requirements in the provisions of Article 49 of the Banking Act, however, it can be proven through the trial process.

Error attachment in the Banking Act is basically charged to human beings, namely Board of Commissioners, Directors and Employees of banks. The Banking Act does not attach legal subjects to Banks in distributing credit. The absence of a corporation as the subject of criminal law in the Banking Act is known as the Doctrine of *universitas delinquere non potest*. This theory states that corporations are unlikely to commit a criminal offence, since corporations, in criminal offences, are merely fictional laws without mind. Thus, it does not have a moral value to be criminally blamed because there is no error in it. Crime requires a mistake (*mens rea*) or known as *actus non facit reum, nisi mens sit rea*. In addition, rejection of corporation validity used as the subject of law, known as fiction theory proposed by Von Savigny. Fiction Theory mentions that personality surely only exist in humans. Corporations cannot be subject to rights and individuals, but are treated as if they are human.<sup>2</sup>

Criminal elements of State-Owned Bank liability for corruption committed, it refers to the provisions of Article 2 of the Corruption Eradication Act. There is an element of error done with some provisions as follows:

1. The Subjective element: the guilt of the unlawful act. The Verdict of Constitutional Court Number 25/PUU-XIV/2016 states that the element of financial losses of the state must be understood to have actually happened or real (actual loss). Therefore an unlawful act resists material law. P.A.F. Lamintang mentions that the material unlawful acts defined as offense that is proven by resulting prohibited outcome and is threatened with punishment.<sup>3</sup>
2. Objective Elements: the circumstances of the offender, under the provisions of this Article, are not determined in limitatively. It means that any person may be liable for this responsibility, whether human (Natuurlijk Person) or a legal body (Rech Person), as long as it meets the elements in the provisions of that article.
3. The existence of the deed: The act is not mentioned limitatively. It means that the act can be done actively or passively. Active crime (positive), or also called active deeds. Material deeds happened by the movement of the doer's body. Passive crime or referred to as pure crime is a criminal offense committed by not doing any deed but it contains forbidden elements.<sup>4</sup> The act must be the act that enriches the other person or the corporation. Enriching is making the poor to be rich, and the rich becomes richer. Enriching is done in the unlawful acts. Therefore, it deliberately harms the state.
4. Additional incriminating circumstances; these circumstances are set out of Article 2 of the Eradication Law.

### 3.2 Criminal Liability of State-Owned Bank on Non-performing Loans

Criminal Responsibility or Criminal Liability is applied to determine whether a suspect or a defendant may be subjected to a criminal or penal sanction, and whether the errors or mistakes made are deliberateness or

<sup>1</sup> Syarif Arbi, *Op.Cit*, Hlm 127-130

<sup>2</sup> Mahrus Ali, *Op.Cit.*, hlm. 64-65

<sup>3</sup> Lamintang, *Dasar Dasar Hukum Pidana Indonesia*, (Bandung: Sinar Baru, 1984) Hlm. 202

<sup>4</sup> Andi Hamzah, *Bunga Rampai Hukum Pidana dan Acara Pidana*, (Jakarta:Ghalia Indonesia, 2001) Hlm. 25-27

negligence.<sup>54</sup> Criminal liability which may be imposed on the disbursement of non-performing loans, under the provisions of Article 49 of the Corruption Eradication Act, may be imposed on the Board of Commissioners, Board of Directors and Bank Officers. In addition to such criminal provisions, OJK may impose administrative sanctions on banks that do not fulfill their responsibility as referred to in Article 49 of the Banking Act as follows;

- 1) Money fining;
- 2) Written reprimands;
- 3) Decline in bank soundness;
- 4) Prohibition to participate in Bank clearance activities;
- 5) Freezing certain business activities, both certain branch offices or banks as a whole;
- 6) The dismissal of the bank administrator and subsequently appointing and promoting a temporary substitute until the General Meeting of Shareholders or Meeting of Cooperative Members appoints a new administrator with the approval of Bank Indonesia;
- 7) Inclusion of members, officers, bank employees, shareholders in the list of despicable persons in the field of Banking.

The administrative sanction passed by OJK is optional by not reducing the criminal sanction that should be imposed. A deliberate action against the provision of Article 49 of the Banking Act, under the provision of Article 51 of the Banking Act, is categorized as “Crime”. Andi Hamza defines crime as a prohibited act with severe penalties by the Law.<sup>1</sup> The provision of Article 49 is classified as a crime because banking crime involves public funds, therefore it is detrimental to the interests of various parties, whether the bank itself as a business entity as well as depositors, banking systems, banking authorities, governments and the wider community.

There is a functional difference to the liabilities that can be charged to the Banking, in this case the State Owned Bank in collecting and distributing public funds in the form of credit disbursement. Based on the provisions of Article 46 of the Banking Act, it is known that on the process of collecting public funds, the Legal Entity, whether in the form of Limited Liability Companies, Unions, Foundation or Cooperatives may be subjected to direct prosecution through the courts toward a banking legal entity or its management. In the process of credit disbursement, based on the provision of Article 49 of Banking Act, sanction may be imposed on the Board of Commissioners, Directors, or Bank Officers. Other sanction that might be imposed is administrative sanctions by Bank Indonesia through its supervisory authority. Therefore, the process of collecting Banking funds is recognized as a legal subject, while the disbursement of funds (credit) is not recognized as a legal subject. The legal subject is defined as anything that basically has rights and obligations in the legal traffic.<sup>2</sup> Anwar in Arif Amrullah explained as follows<sup>3</sup>

The term “criminal offense” in the field of banking is an effort to accommodate all types of unlawful acts related to all banking business activities. The intent of introducing this notion is due to the absence of criminal law regulation specifically designed to threaten and punish any unlawful acts in running a bank business.

Based on the above description, although these various crimes can be done by the corporation (bank), however, because the corporate Criminal Code is not a subject of criminal law, definitely the corporation cannot be accounted criminally. Especially if the bank serves as the target of crime, it leads to white-collar crime rather than corporate crime. Under such construction, normatively there is no economic crime victim in the banking sector, which means, as a corporation, the bank commits a crime that can perpetuate the victim.

According to Arief Amrullah, there are several crimes committed by banks that are not regulated in the provisions of the Banking Act namely;<sup>4</sup>

- 1) Crimes related to providing improper information to the public or potential customers;
- 2) Crimes concerning bank practices in banks;
- 3) Relating to violation of provisions concerning The Legal Lending Limit (BMPK);
- 4) Any action contains elements of corruption.

Not providing the correct information to the debtor related to the credit agreement causes the credit problematic. It is categorized as crime committed by Bank /corporation. The information, for example, relates to the interest

<sup>1</sup> Andi Hamzah, *Terminologi Hukum Pidana*, (Jakarta: Sinar Grafika, 2009). Hlm 81

<sup>2</sup> A. Ridwan Halim, *Hukum Perdata Dalam Tanya Jawab*. (Jakarta: Ghalia Indonesia, 1985) Hlm 40

<sup>3</sup> Arif Amrullah, Politik Hukum Pidana dalam Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan dalam <https://media.neliti.com/media/publications/81386-ID-politik-hukum-pidana-dalam-perlindungan.pdf> Hlm 31, last accessed on April 24, 2018 06.21p.m.

<sup>4</sup> *Ibid*

rate/imposition of the interest rate causing the debtor to misunderstand the amount of credit payments that affect on the inability of the debtor to make the payment. In addition, for example, the bank does not inform penalty (fines) of advanced repayment, causing the debtor to be stuck in credit, in which in the debtor's is no longer able to pay. On the other hand, the implementation of principles of credit disbursement may minimize the possibility of non-performing loans. Violation of the principle has no sanction imposed on the business corporation, banking. The principles are<sup>1</sup>

- 1) Banks are not allowed to provide credit without a written agreement;
- 2) Banks are not allowed to provide credit to unhealthy businesses and that may cause losses;
- 3) Banks are not allowed to provide credit for the purchase of shares and working capital in the sale and purchase of shares;
- 4) Banks are not allowed to extend credit beyond the legal lending limit.

Related to the criminal punishment concept, Barda Nawawi Arif mentioned that it must be based on the balance between two main goals, namely the protection of society and the protection of individuals.<sup>2</sup> Muladi in Arif Amrullah mentions that the criminal law as part of a wider system cannot escape from the development of the larger system. He mentions that the involvement of criminal law in addition can be autonomous, can also be complementary to other laws, e.g., administrative law. If it is linked to the Banking Act, the criminal law is a legal supporter of administrative law. However, the criminal law is functional rather than subsidiary, in regard that the law protected is the nation's economic system.<sup>3</sup>

David O Friedrichs defines the crime perpetrated by the Corporation as a criminal act committed by the corporate administrator for the benefit of the corporation, or the crime committed by the corporation itself.<sup>4</sup> Suprato in Setiyono argues that corporations can be accused when mistakes and omissions attached to the people. The error is collective because the corporation receives profits. Based on Suprato's opinion, then Setiyono mentioned that it is in line with the Aggregation Theory, which states that the cumulative actions done by some people that cause losses, and if the elements of psychological elements are collected, it will become *mens rea* (an inner act) crime, so that corporations can be accounted for the act. The error in this case is a collective error, and is not an individual of the people as the instrument of the corporation.<sup>5</sup>

Theory of identification mentions that the actions and inner core of a senior in a corporate structure or corporation are identified or equalized as the actions and inner value of the corporation. Corporate responsibility is immediate, not as if representing the corporation. Corporations are responsible for criminal offenses committed by senior officials as long as it performs within the scope of its authority or in corporate business transactions.<sup>6</sup> There are two basic teachings on corporate responsibility regarding factors of error, namely *the doctrine of strict liability* and *the doctrine of vicarious liability*. *The doctrine of strict liability* states that a person has been accountable for a certain crime even though the absence of error in him (*means rea*). *The doctrine of vicarious liability* is defined even though a person does not commit a crime on his own and does not have any mistake, he is still accountable.<sup>7</sup>

Agustino Pohan mentions that determining the element of error in the corporation can be done through two approaches, those are:<sup>8</sup>

- 1) Derivative Approach: an attempt to find corporate fault directly, it can be done through the implementation of corporate decisions, e.g., the results of directors meeting;
- 2) The Directive Approach: This approach is basically not an attempt to find corporate fault directly, but an attempt to find an indicator of errors in the corridor, e.g., *Crimmingenic Culture* in the corporation or the absence of legal compliance program by the corporation.

Furthermore, Agustini Pohan mentions determining the element of deliberateness or negligence over the action done by the corporation is different from determining the element of deliberateness or negligence made by humans (*Naturlijk Person*). Deliberateness or negligence is only required by material actors. That is, the person

<sup>1</sup> See Explanation on Banking Act

<sup>2</sup> Barda Nawawi Arif, *Bunga Rampai (Kebijakan Hukum Pidana)*, (Bandung, Citra Aditya Bakti, 1998) Hlm 98

<sup>3</sup> Muladi, "Proyeksi Hukum Pidana Materiil Indonesia di masa Datang". Dalam <https://media.neliti.com/media/publications/81386-ID-politik-hukum-pidana-dalam-perlindungan.pdf> last accessed on April 24, 2018 06.21 p.m.

<sup>4</sup> Mahrus Ali, *Op.Cit.* Hlm 9

<sup>5</sup> Setiyono, *Op.Cit.* Hlm 32

<sup>6</sup> *Ibid*, Hlm 32

<sup>7</sup> Barda Nawawi Arief I, *Ibid*, Hlm 111

<sup>8</sup> Agustinus Pohan, *Unsur Kesalahan dalam Pertanggungjawaban Korporasi yang disampaikan dalam Public Seminar on Corporate Criminal Liability*, Jakarta 21 Februari 2017, Hlm 8 (On.Line) dalam <https://acch.kpk.go.id/images/ragam/makalah/pdf/pidana-korporasi/Unsur-kesalahan-dalam-pertanggungjawaban-pidana-korporasi-agustinus.pdf> last accessed on May 5, 2018 01.05 a.m.

who works on the corporation, because the corporation is not a sole perpetrator or a crime.<sup>1</sup> Errors in the corporation are not only done on the behavior that guide the occurrence of a crime, but can also be a corporation behavior after the criminal event<sup>2</sup>

Article 4 Paragraph 2 of Perma no. 13 of 2016 on Procedures for Handling Criminal Cases by Corporations on the imposition of criminal toward Corporation, the Judge may judge the mistakes of Corporations on the basis of:

- 1) The corporation may gain benefit from the offense or the offense is committed for the benefit of the Corporation;
- 2) The corporation allows the commission of a crime;
- 3) The Corporation does not take the necessary steps to prevent it, to prevent greater impact, and to ensure compliance on applicable legal provisions to avoid the occurrence of criminal offenses

Mardjono Reksodiputro proposed the model of corporate criminal liability applicable in Indonesia as follows:<sup>3</sup>

- 1) Corporate management as responsible corporate makers and officers;
- 2) Corporations as responsible makers and managers;
- 3) Corporations as makers and responsible corporations.

Regarding the concept of corporation, M Arief Amrullah quotes Uthrech saying that a legal entity is a body which, by law, is authorized to be a proponent of rights, or any unlied rights supporter.<sup>4</sup> In line with this opinion, Yusuf Shofie in Mahrus Ali mentions that the concept of corporation cannot be explained by logic and has no factual reality. Corporations are fictional situations adopted with the intention of generating rights and duties that the abilities cannot be concluded or equaled with the character of humans.<sup>5</sup> David O Friedrichs defines corporate crime as an offense committed by corporate officials for their corporation or the offences of the corporation itself.<sup>6</sup> The crime committed in corporate crime is an omissions crime. The omission offense is a violation of the command, i.e., not performing what is commanded.<sup>7</sup> Wayne and Austi in Mahrus Ali mention that there are 7 (Seven) circumstances a person may be subjected to omission offense namely:<sup>8</sup>

- 1) Not performing obligations based on trust relationships;
- 2) Not performing obligations under the law;
- 3) Not performing obligations under contract;
- 4) Not performing obligations based on the assumption of voluntary guarding;
- 5) Not performing the duty to save others over created dangers;
- 6) Not performing an obligation to oversee the actions of others;
- 7) Not performing obligations as a landowner.

Suparman Marzuki in Mahrus Ali explains the dimensions of corporate crime as follows:<sup>9</sup>

- 1) Defrauding stockholders fraud against shareholders;
- 2) Defrauding the public fraud against the public;
- 3) Defrauding the government fraud against the government;
- 4) Endangering the public welfare of corporate crimes that endanger general welfare;
- 5) Endangering Employee crimes against workers;
- 6) Illegal intervention in the political process, interventions to violates the law against the political process, especially against government policy.

Corporate crime often results in abstract casualties, because the numbers are abstract and are difficult to identify. Muladi in Mahrus Ali identifies the victims of corporate crime as follows:<sup>10</sup>

- 1) Rival companies (competitors) as industrial espionage crimes
- 2) State such as false information against agencies, corruption, subversive crime, economic crime, etc.
- 3) Employees such as unhealthy work environment, restraint of labor rights, not giving minimum standard wages
- 4) Consumers as a result of misleading advertisement creating fake and dangerous products

<sup>1</sup> *Ibid*, Hlm 10

<sup>2</sup> *Ibid* Hlm 11

<sup>3</sup> Mardjono Reksodiputro, *Pertanggungjawaban Pidana Korporasi dalam Tindak Pidana Korporasi*, (Semarang: FH UNDIP, 1989), Hlm. 9

<sup>4</sup> M Arief Amrullah, *Kejahatan Korporasi* (Malang: Banyumedia Publishing, 2006), Hlm 202

<sup>5</sup> Mahrus Ali, *Op.Cit*, Hlm 5

<sup>6</sup> *Ibid*, Hlm 9

<sup>7</sup> *Ibid*, Hlm 57

<sup>8</sup> *Ibid*, Hlm 59

<sup>9</sup> *Ibid*, Hlm 14

<sup>10</sup> *Ibid*, Hlm 21

- 5) Society (public) environmental destruction, embezzlement, and tax evasion
- 6) Shareholders / investors as a result of data adulteration and accounting fraud.

Sellin and Wolfgang in Mahrus Ali classify the victims of corporate crime as follows:<sup>1</sup>

- 1) Primary Victimization. An individual victim
- 2) Secondary Victimization. A group victim, e.g., legal entity
- 3) Tertiary Victimization. Victim of the wider community
- 4) No. Victimization. Unknown victim, for example the victim who was deceived due to particular product use.

According to the UN declaration in the declaration of basic principles of justice for victim or crime and abuse of power 1985, the victim is defined as<sup>2</sup>

Victim means person who, individually or collective, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental right, through act or omission of criminal laws operative within member state, including those laws proscribing criminal abuse of power

Mochtar Kusumaatmadja, should no longer see the "mistake" in accountability is irrelevant to be questioned, whether in reality exists or not. It is described as follows:<sup>3</sup>

"The main purpose of applying the principle of responsibility in the legal system to primitive societies is to maintain harmony among individuals by settlement that can prevent retaliation. But in this modern time, the basic philosophy and the main purpose of applying absolute responsibility is the consideration of values and sense of social justice widely, both in terms of morals and social life. Those who engage in an activity or attempt to earn a profit for themselves is reasonable if he has to bear the risk of his activities"

R.Soesilo mentions that in its development, the opinion that corporations cannot serve as legal subjects becomes increasingly faded because most corporations get benefits from the crimes committed by their managers, likewise the losses suffered by the community caused by the actions of corporate officers.<sup>4</sup> Unfortunately, the Banking Act does not regulate corporations as legal subjects, which results in a void of rules to hold corporations accountability for legal acts committed. Related to the legal vacuum, Jimly Asidique mentions the following

The authority to impose a sanction that is not determined by an existing legal norm is often given indirectly, through a fiction. This fiction is that the rule of law has gaps, meaning that the applicable law cannot be applied in concrete cases because there is no general norm in accordance with this case. Logically, this idea means it is impossible to apply existing valid law to concrete cases in the absence of the premise required.

But the rule of law is unlikely to have vacuity. If a Judge is authorized to decide a dispute as a legislator in the case of the rule of law does not contain the general norms that obligate a defendant as claimed by the claimant, the Judge does not fill the legal void, but adds to the valid law an individual norm unrelated to the general norm. Existing valid laws may be applied to concrete cases by denying the indictments. Judges, however, are authorized to change the law for concrete cases. He has the power to legally bind individuals who were previously legally free. But when the judge should refuse the lawsuit, and to make a new norm depends on the fact that the validity of the existing law is in accordance with the opinion of the Judge, both legally and politically.<sup>5</sup>

Jimly Asidique mentioned that the Judge has the authority related to legal vacuum to the fact of the implementation of valid law. Basically it is in accordance with the theory of responsibility *Functioneel Daderschaps Theorie*. Wolter in Setiyono opines that functional validity is the interpretation of judges. Functional interpretation is interpreted as a free interpretation. This is because this interpretation does not bind itself completely to the sentence and the words of the rule (*legit litera*). This interpretation tries to understand the

<sup>1</sup> *Ibid*, Hlm 20

<sup>2</sup> *Ibid*, Hlm 19

<sup>3</sup> Ansorie Sabuan, Syafruddin Pettanase dan Ruben Achmad, *Hukum Acara Pidana*, (Bandung: Angkasa). Hlm. 64

<sup>4</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana Serta Komentar-Komentar Lengkap Pasal Demi Pasal*, (Bogor: Penerbit Politeia, 1985) 65-66

<sup>5</sup> Jimly asidique, Ali safa'at, *Teori Hukum Hans Kelsen*, (Jakarta: Sekretariat Jedral & Kepaniteraan Mahkamah Konstitusi RI, 2006), Hlm 130-131

true meaning of a rule by using other sources considered to provide more satisfactory clarity.<sup>1</sup> Jan Rammelink in Setiyono mentions that the theory of *Functioneel danderschaps theori* is a criminal act committed by the corporation related to functional crimes. The behavior of the corporation will always be a functional action. In this case the offender will act in a series of cooperation among through particular organization. Therefore, the perpetrator are responsible for the consequences arise.<sup>2</sup>

According to Gery A. Ferguson there are two groups of this issue: First, the view of law and economic that states that companies are founded to generate profits for their owners and company officials motivated almost solely by the desire to increase profits. A company will commit criminal acts only when its officers conclude that doing the activity is more likely to gain profit than not committing any violation. Therefore the most appropriate way to block corporate crime is to ensure that all social costs that flow from infringement, including the cost of detection and prosecution, are handled by the offending company. Therefore, since companies are motivated by financial gain, the most effective form of sanction is financial punishment, usually monetary fines. Second, the sociological view that recognizes profit-making is a corporate goal, and can often be a dominant goal, but claims that profit is not the only goal. The company as a social organization, often avoid the company's individuals goes against the company's objectives. Often, to fulfill their interests (dignity, power, personal gain) officials will commit acts that violate the company's regulations including criminal offenses. Therefore, the most effective prevention and solution is non-financial sanctions.<sup>3</sup>

Regarding the rules on the application of prudential principles in the credit distribution, it is necessary to have internal control to minimize the risk of non-performing loans. According to Mulyadi internal control including organizational structure, methods, and measures are coordinated to maintain the wealth of the organization, to check the accuracy and reliability of accounting data, and to encourage efficiency and encourage compliance with management policies.<sup>4</sup> Boynton mentioned that the internal control has the following limitations:<sup>5</sup>

- 1) Errors in consideration: Management and other personnel may make poor judgment in making business decisions or in performing routine tasks due to insufficient information, time constraints, or other procedures.
- 2) Congestion in controlling activities can occur when personnel misunderstand instructions or make mistakes due to carelessness, confusion, or fatigue.
- 3) Individual collusion acting together: such an employee doing an important control in conjunction working with other employee, consumer or supplier, can, at the same time, cover the fraud so that it cannot be detected by internal control
- 4) Management's refusal: Management may override written policies or procedures for illegitimate purposes such as personal gain or presentation regarding the financial condition of an upgraded entity or the status of compliance. It be illustrated by making deliberate incorrect reports to auditors and others such as issuing fictitious sales transactions report.
- 5) Cost versus benefits of the internal control costs of an entity should not exceed the expected benefits to be gained. Because proper measurement, both costs and benefits, is usually impossible, management should make both quantitative and qualitative estimations in evaluating the relationship between cost and benefits.

These limitations have an impact on the legal risks that must be borne by the party granted the authority to initiate the termination of the credit. Boynton explains that internal control can only provide reasonable assurance in achieving the control objectives of an entity.<sup>6</sup>

Thus, the criminal liability should be applicable for the distribution of non-performing loans disbursed by the State-Owned Bank.

Therefore, for the sake of legal certainty there should be a legal policy related to corporate governance as a legal subject. Formulation Law policy is a legal reform effort to prevent or eliminate any crime. Barda Nawawi Arief mentioned that based on the perspective of policy approach, the reform of criminal law means;<sup>7</sup>

- 1) As part of social policy. To overcome social problems in order to achieve national goals, one of which realizing the welfare of society;

<sup>1</sup> Satjipto Rahardjo, Ilmu Hukum, (Bandung: PT Citra Aditya Bakti, 2006), Hlm. 95

<sup>2</sup> Jan Rammelink dalam Setiyono, *Op. Cit*, Hlm 114

<sup>3</sup> Sholehuddin, *Sistem Saksi Dalam Hukum Pidana* (Ide Dasar DoubleTrack System dan Implementasinya), Jakarta: PT Raja Grafindo Persada, 2003, hlm. 151-153

<sup>4</sup> Mulyadi. *Sistem Akuntansi*. (Jakarta: Penerbit Salemba Empat, 2008) Hlm 163

<sup>5</sup> Boynton, Johnson, Kell, *Modern Auditing. Edisi etujuh. Jilid Satu*. Jakarta: Erlangga, 2002 dalam <http://repository.unhas.ac.id/bitstream/handle/123456789/8387/SKRIPSI.pdf?sequence=1> last downloaded on March 21, 2018 09.22 p.m.

<sup>6</sup> *Ibid*

<sup>7</sup> Barda Nawawi Arief dalam <http://eprints.undip.ac.id/23758/1/Ridwan.pdf> last accessed on september 02, 02.13 a.m.

- 2) As part of a criminal policy. The renewal of criminal law is essentially part of the protection of the community (especially crime prevention);
- 3) As part of law enforcement policy. The renewal of the criminal law is essentially part of the effort to renew legal substance to make the law enforcement more effective.

Regarding the form of State Owned Bank's liability for Corruption committed based on Corruption Eradication Act, the sanction is not only charged to people (*naturlijk person*) but also to the legal entity (*rech person*). It is enforced because the Law on Corruption Eradication admits the legal entity (*rech person*) as a legal subject. The regulation of legal entity (*rech person*) as legal subject can be seen through the formulation of several articles which impose sanction of crime against corporation committing unlawful acts so that, it fulfills the element of article in Corruption Eradication Act. It is contrary to the provisions of the Banking Act that do not consider corporations as legal subjects.

Non-performing loans of government program disbursement through People's Credit Program (KUR) are born for unlawful acts (*wederrechtelijkheid*) toward the provisions contained in every KUR credit disbursement rules issued by Coordinating Minister for Economic Affairs Regulation. Such actions cause state finances losses. It is based on interest subsidies that are distributed by the government to credit provider or banks, in which the interest subsidy shall be paid monthly to KUR Distributors.<sup>1</sup> Thus, when a business corporation, the State-owned Bank, disbursed non-performing loans, the State-Owned Bank has received interest or profit subsidies from unlawful acts committed. R. Soesilo mentions that one of corporate crime is when the corporation gains profits from the proceeds of crime committed by its management. Likewise the losses suffered by the community caused by the actions of corporate executives.<sup>2</sup>

Under such provision, sanctions may be imposed on the State-Owned Bank due to its unlawful act for credit disbursement, in which the Corruption Eradication Act has recognized the Corporation as a legal subject.

Similarly, the accountability of the State-Owned Bank's corporation over the supervision of OJK, that the calculation of non-performing loans derives from the ratio of non-performing loans to the total financing made by the Bank concerned. It should be charged to accountability on the basis of state finances included in the crediting process. Sanctions to the banks conducted under internal supervision previously conducted by the bank. Based on the Regulation of the Coordinating Minister for Economic Affairs on Guidelines for the Implementation of People's Business Credit Program (KUR), sanctions imposed on Banks if banks have NPLs of 5% for 6 (six) consecutive months. Thus Government and Credit provider agreement will be terminated. The difference between accountability on the basis of public funds management and on the basis of state finances included in the crediting process is the imposition of sanctions. The Banking Act is applicable to the accountability on the basis of public funds management, while the Corruption Eradication Act is applicable to the accountability on the basis of state finances included in the crediting process.

The legal facts of criminal sanctions imposition of non-performing loans disbursement will be presented in the form of tabulation as follows;

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<sup>1</sup> See the Regulation of Minister of Finance of the Republic of Indonesia No. 20/PMK.05/2015 on Procedures for the Implementation of Interest Subsidies.

<sup>2</sup> R. Soesilo, *Op.Cit.*, Hlm 65-66

**Table 1**  
**Comparison of Accountability under the Court Decree**

No	Source	Legal Basis	Person in Charge
1	2	3	4
1	Decree No. 1144 K/PID/2006	Article 2 paragraph (1) connected with Article 18 of the Corruption Eradication Act connected with Article 55 paragraph (1) of the Criminal Code (KUHP)	Risk Management Director of PT.Bank Mandiri p.p. 1.Edward Cornelis William Neloe; 2. I Wayan Pugeg; 3. M. Sholeh Taspiran.
2	Decree No.	Article 49 paragraph (1) sub-paragraph a of the Banking Act	Former Head of Unit BRI Sluke Slembang Branch
No	Source	Legal Basis	Person in Charge
1	2	3	4
	1591/Pid.Sus/2016		p.p. Akbar Listyo Kusumo, ST bin Koes Diharjo
3	Decree No. 64/Pid.Sus/2015	Article 49 paragraph (2) sub-paragraph b of the Banking Act	Former Head of Bank Aceh Branch Lhokseumawe p.p. Effendi Baharuddin bin (Alm) Baharuddin

Regarding the Supreme Court Decree No. 1144 K/PID/2006, the legal basis imposed on the Director of Risk Management of PT. Bank Mandiri p.p. 1.Edward Cornelis William Neloe; 2. I Wayan Pugeg; 3. M. Sholeh Taspiran through Supreme Court Decree No. 1144 K/PID/2006 is Article 2 paragraph (1) connected with article 18 of the Corruption Eradication Act connected with Article 55 paragraph (1) of the Criminal Code (KUHP). The Judges' consideration in the verdict was that the defendants did not ensure that credit issuers had been based on honest, objective, accurate and thorough assessments, and regardless of the influence of the parties concerned, so that the defendants' judgment caused the state financial losses. The Panel of Judges uses the interpretation of state losses as contained in the provisions of the State Treasury Law. As for this case, the three Directors of Risk Management of PT. Bank Mandiri do not ensure these following matters;

- 1) Ensuring guarantees in accordance with the estimated prices;
  - 2) Ensuring the disbursement of funds in accordance with the scheduling as contained in the credit agreement.
- The three Directors of Risk Management of PT. Bank Mandiri as the credit broker gave approval to provide Bridging Loan credit to PT Citra Graha Nusantara for Rp. 160,000,000,000 (one hundred and sixty billion rupiahs) by not meeting the general norms of the banking system, and is not in accordance with the principles of credit as the credit policy issued by Bank Mandiri (KPBM). Bridging Loan's provisions and refinancing payment are arranged after the three defendants approve the Bridging Loan of Rp. 160,000,000,000, - (one hundred and sixty billion rupiah) to PT Citra Graha Nusantara. The Panel of Judges included elements of the state financial losses in the Decree No. 1144 K/PID/2006. The harm caused by the three Directors of Risk Management of PT. Bank Mandiri is related to their decision on granting credit to PT Citra Graha Nusantara.

Regarding the Supreme Court's Decree No. 1144 K/PID/2006, the Judge has correctly interpreted the state financial losses based on the provisions contained in the State Treasury Law. The calculation of state losses in Supreme Court decree No. 1144 K/PID/2006 is equal to the calculation of losses suffered by State-Owned Bank, in this case Bank Mandiri. It is contrary to the provisions of Article 32 of the Banking Act which is then reinforced by Sema No. 4 of 2016 Chamber of Commerce. It refers to the party given the authority to perform the calculation of the state financial loss in which the losses do exist.

In regard to such decree, there are failure elements of Risk Management Directors of Bank Mandiri of not implementing credit disbursement as mandated in the Banking Act. This is regulated in the provisions of Article 49 paragraph (2) of the Banking Act. In comparison, the Supreme Court Decree No. 64/Pid.Sus/2015 charged to Former Head of Bank Aceh Branch Lhokseumawe p.p. Effendi Baharuddin bin (Alm) Baharuddin by not applying credit distribution as mandated in the Banking Act. The penal sanction imposed on the defendant is the provision of Article 49 paragraph (2) letter b of the Banking Act.

The unlawful acts committed by Former Head of Bank Aceh Branch Lhokseumawe p.p. Effendi Baharuddin bin (Alm) Baharuddin is to have given the Working Capital credit of the construction sector to PT. Ilham Teguh.

According to Bank Indonesia Circular Letter No. 30/2/UK dated July 7, 1997, it is not allowed to be used for land acquisition. In addition, the former head of Bank Aceh Branch Lhokseumawe p.p. Effendi Baharuddin bin (Alm) Baharuddin has violated the Letter of the Board of Directors of Bank Aceh Number: 11385 / DKR 01/XII/2007 dated December 12, 2007 regarding Follow up of Credit Request by PT. Ilham Teguh that shall complete the requirements of credit, those are:

- 1) Not giving IMB requirement to Bank
- 2) The absence of correspondence in the recording of debtor's business progress done by Bank Aceh Lhokseumawe Branch, i.e., in the agreement, the credit can only be disbursed that the project has been running 35%. However, in reality the construction is still 6.03%, but Effendi Baharuddin bin (Alm) Baharuddin has disbursed the credit.

It shows the same reason that violating the efforts of credit disbursement as mandated in the Banking Act may be subjected to different liability. There is a vagueness of meaning causing uncertainty of application of the law.

The imposition of criminal responsibility in the Supreme Court Decree No. 1144 K/PID/2006 and Decree No. 64/Pid.Sus/2015, are charged not to the credit officer, but to the Account Officer. It is in line with the theory of Vicarious Liability Theory which states that a person can be accountable for the actions and mistakes of others. This theory is called respondent superior theory. It means that an employer is responsible to his subordinates as long as it is within the scope of his work.<sup>1</sup> The benefits of both non-performing loans are not enjoyed by the defendants, but are accepted by the State-Owned Bank as a business corporation.

In comparison to the above two decision, the Decree of the Supreme Court No. 1591 K/Pid.Sus/2016, Legal Basis charged to Former Head of Unit BRI Sluke Branch Slembang p.p. Akbar Sulityo, ST bin Koes Diharjo in the Supreme Court Decree No. 1591 K/Pid.Sus/2016 is Article 49 paragraph (1) sub-paragraph a of the Banking Act. The consideration of Judges in the Decree that the Former Head of BRI Unit Sluke Branch Slembang p.p. Akbar Sulityo, ST bin Koes Diharjo has committed an unlawful act of deliberately creating or causing false records in the bookkeeping or in reports, nor in documents or reports of business activities, transaction reports or bank accounts. Former Head of Unit BRI Sluke Branch Slembang p.p. Akbar Sulityo, ST bin Koes Diharjo has made loans that are not in accordance with the use, credit distribution by using some credit funds for credit purposes, deferment of customer deposits, not listed customer deposits. Thus, it should be considered that the Bank has been harmed by the defendant's actions, so the criminal sanction granted to the former Head of BRI Unit Sluke Branch of Slembang p.p. Akbar Sulityo, ST bin Koes Diharjo as the perpetrators of crime is correct.

#### 4. Conclusions

Based on the analysis of this study, it is concluded that:

- 1) State-owned Banks as an institution may be liable for non-performing loans disbursement, particularly those relating to the distribution of credit for funds sourced from the public and state finances. The responsibility is a form of legal protection implicated in the form of criminal liability.
- 2) The criminal liability imposed on the distribution of non-performing loans is in the form of criminal sanctions which are not only directed to members of the Board of Commissioners, Board of Directors, or Bank Officers as credit breakers and/or initiators, but also to banks as institutions.

#### 5. Recommendations

Based on the above conclusions, the recommended prescriptions are as follows:

- 1) To build legal certainty, it is a fundamental to do separation of criminals in the legislation that is bank as an object of crime and bank as perpetrator of crime. By clear arrangements concerning the separation of perpetrators of crime in the banking sector, the imposition of criminal liability regarding the distribution of non-performing loans can be understood concretely.
- 2) To reinforce the legal subject as the perpetrator that may be charged criminal liability for the distribution of non-performing loans, normative recognition is required that puts bank institutionally as a legal subject. It is done for the effectiveness and efficiency of monitoring system which not only becomes the main duty and function of OJK but also by internal banking. Such system needs to be accommodated in the legal system in Indonesia which is known as the "double track system of supervision" as outlined in the law.

<sup>1</sup> Setiyono, *Op.Cit*, Hlm 75

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