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Principle of Non-Intervention as A Pillar of Realizing Rational and Accountable Assignments to BUMN (Persero)

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ABSTRACT

This study answers two problems: (i) why a rational and accountable assignment is needed to BUMN (Persero); and (ii) how to internalize the non-intervention principle as a pillar in realizing a rational and accountable assignment to BUMN (Persero). BUMN (Persero) not only has the responsibility for public services but is also required to seek profit as a form of managing separated state assets. In the practice, BUMN (Persero) is actually burdened with various irrational and inefficient government assignments. BUMN (Persero) needs to pay attention to the continuity of its business to fulfill the public service obligations and profit orientation. Thus, the assignment from the government to BUMN (Persero) must adopt the principle of non-intervention to strengthen the relevance of the public service responsibilities with the profit interests of BUMN (Persero). This study is included in normative research by using legislation, case, comparative and conceptual approaches. The results of the study show that: (i) the argument for the need for a rational and accountable assignment to BUMN (Persero) is that the assignment has not protected the interests of the public services and the profits of BUMN (Persero) and the majority of assignments are burdensome to BUMN (Persero) without the essence of risk management; and (ii) the form of internalization of the non-intervention principle as a pillar of realizing a rational and accountable assignment to BUMN (Persero) is the injection of the non-intervention principle in formulating assignments and implementing a partnership model between the government and BUMN (Persero).

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1. INTRODUCTION

One of the implementations of the state's function in the economic field to realize the welfare of the people is to establish a State-Owned Enterprise (BUMN). Article 33 of the 1945 Constitution of the Republic of Indonesia is implicitly a source of legitimacy for the Government to run BUMN in the economic activities of Indonesia. (Riant Nugroho dan Randy R.W ;2008; 1-3) Public service is the fulfillment of the wishes and needs of the community by the state administrators. In essence, the Government in carrying out its executive functions is required to meet the needs of the community. Moenir stated that the needs of the community are not only individual needs but include actual needs that become the community expectations, such as health, education, and other needs that support the community productivity such as transportation, electricity, fuel oil, fertilizers, and plant seeds for farmers. (Muhammad Insa Ansari; 2018; 6) Donald F. Kettl stated that: How can government better connect with citizen? Public opinion polls show that public trust in government institution has declined and that many citizens believe that the government programs are unresponsive. (Donald F. Ketl: 1998: 446-462.)

Based on the law, there are two main tasks of BUMN, namely: (i) the task of providing public services by being an arm of the state to ensure the availability of community needs in the field of business; and (ii) the task of seeking profit to maintain the continuity of the business activities of BUMN. (Gisela Prisilia Rompas; 2013: 253-265.) The two tasks must complement each other and cannot be separated, considering that SOEs are required to be professional since the promulgation of Law no. 19 of 2003 concerning BUMN, relevant to the explanation, that: "taking into account the nature of the BUMN business, namely to generate profits and carry out public benefits, in this Law, BUMN is simplified into two forms, namely a Limited Liability Company (Persero) which aims to generate profits and fully complies with the provisions of Law no. 1 of 1995 concerning Limited Liability Companies."

In the practice, in fulfilling these two main tasks, BUMN (Persero) is still charged with various government assignments which actually burden the business activities of BUMN (Persero) in terms of several aspects. This is a problem since assignments without being reduced to risk management and accountability can actually hinder the business activities of BUMN (Persero). Thus, the assignment to BUMN (Persero) must be controlled with the principle of non-intervention and accountability in order to ensure a balance between the interests of the government and BUMN (Persero). In an effort to meet the balance of interests in the assignment, the government can divide BUMN into two groups. First, SOEs, which are the state budget money machines, must have healthy financial performance. Second, SOEs in charge of providing public services. The government must be careful in determining the role of BUMN which can be handed over to the private sector and which must be controlled by the state. In order to determine the classification of SOEs, the Government refers to Article 33 of the 1945 Constitution of the Republic of Indonesia and Law no. 19 of 2003 concerning SOEs since there are several sectors whose management should not be handed over to the private sector and must be fully controlled by the state. For example, SOEs that receive special assignments and PSOs, related to state security, nature conservation, and natural resource-based sectors. (Wiranta Sukarna: 2011: 776.)

In order to encourage SOEs to grow healthy, the government must provide legal instruments from every stage, starting from licensing, implementation of assignments and balanced reciprocity for the benefit of the profit-oriented SOEs assigned to them. Statistical data shows that the realization of the government's assignment to BUMN (Persero) is far from the target and the results of the FS study that has been carried out as one of the basic considerations for the government in assigning assignments to BUMN (Persero). Therefore, risk management analysis needs to conduct a more in-depth study, whether the assignment by the government to BUMN (Persero) has fulfilled the principle of non-intervention and whether the reciprocity obtained in the assignment has taken into account the interests of business continuity carried out by BUMN (Persero).

One example of a case is the government's assignment to PT KAI Persero. The assignment for the operation of Soekarno-Hatta Airport Railway Infrastructure (KA Basoetta) with an investment value of IDR 2.5 trillion in terms of study data from PT Pricewaterhouse Coopers Indonesia (PWC) in a review of the Feasibility Study of the Soekarno Hatta Airport Railway Project (Basoetta), shows that Soetta Airport train daily occupancy during the middle of 2018 only reached an average of 11% per day. This clearly does not pay attention to risk management and assignment accountability. Thus, the assignment can hamper and even threaten the business continuity of PT KAI Persero. Data shows that of the 14 SOEs that are detrimental to the state, PT KAI is one of them. (Diah Nur Fitriana; 2014: 1-10.) Referring to PT KAI's financial report dated June 30, 2020 (anaudited) that the total debt (liabilities) is Rp. 26.1 trillion and recorded a loss of Rp. 1.3 trillion (Ferry Sandria: 2021). This amount is the contribution of government assignments that are not right on target. This was followed by other identical assignments, namely to Garuda, Wijaya Karya and PLN. (Nurmayanti ; 2021) Based on the description, it is necessary to stimulate thought in the form of arguments, a rational and accountable assignment to BUMN (Persero) is needed and constructive thinking through the internalization of non-intervention principles as a pillar to realize a rational and accountable assignment to BUMN (Persero). Problem Formulation "How to internalize the non-intervention principle as a pillar in realizing a rational and accountable assignment to BUMN (Persero)"

2. METHODS

This article is classified as normative legal research and uses primary and secondary legal materials. (Steven M. Barkan; 2015.) Furthermore, it is analyzed deductively by using a statutory approach, a case approach to find out the arguments required for a rational and accountable assignment to BUMN (Persero), as well as a comparative approach and a conceptual approach to formulate a form of internalization of the non-intervention principle as a pillar of realizing a rational and accountable assignment to BUMN (Persero). The nature of the study is classified as descriptive, analytical and diagnostic by looking at the problems related to the assignment to BUMN (Persero) without risk management and accountability.

3. FINDINGS AND DISCUSSION

A. Arguments for the Need for Rational and Accountable Assignments to BUMN (Persero)

a. Assignment Has Not Protected the Interests of Public Services and Profits of BUMN (Persero)

The Government's assignment to BUMN (Persero) in the explanation of Article 65 paragraph (1) PP No. 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of BUMN, has a public benefit function, namely an assignment given by the Government in order to provide public service obligations in the form of the government's obligation to provide certain goods and services that are urgently needed by the wider community. From this explanation, the government's assignment to SOEs (Persero) in terms of fulfilling the function of public benefits, which is more appropriate is the assignment of PSO (Public Service Obligation) for subsidies in carrying out the public service activities. Thus, it is not appropriate if the assignment turns into the responsibility of BUMN (Persero) to build infrastructure for the sake of the assignment by using its own capital. Article 65 paragraph (1) to paragraph (3) PP No. 45 of 2005 concerning the Establishment, Management, Supervision, and Dissolution of BUMN:

(1) The government may give special assignments to SOEs to carry out public benefit functions while still taking into account the aims and objectives and business activities of SOEs.
(2) The special assignment plan as referred to in paragraph (1) is reviewed jointly between the BUMN concerned, the Minister, the Minister of Finance, and the Technical Minister who gave the assignment, which is coordinated by the Technical Minister who gave the assignment.
(3) If the assignment is not financially profitable, the Government must provide compensation for all costs incurred by the BUMN, including the expected margin as long as it is within a reasonable level in accordance with the assignment given.

When viewed from the substance of the regulation, the assignment must actually pay attention to the interests of BUMN (Persero). In fact, in the event that the assignment causes financial loss or is not financially profitable, the government must provide compensation for all costs arising from the assignment. The above matter should be able to be a corrective step that the assignment must pay attention to the interests of public services and profits from BUMN (Persero). Apart from this, the government needs to review the financial capacity and capacity of BUMN (Persero) in carrying out assigned assignments, such as in the realization of infrastructure projects with the BOT mechanism with a very large capital burden and without getting incentives from the APBN. (Anis Bakri ; 2009: 2-3.) This is necessary so that the implementation of the assignment in the form of the realization of infrastructure projects can be carried out professionally with regard to safety, cost, quality and time. Several examples of cases of accidents or construction failures occurred precisely in the scope of projects carried out with the BOT scheme as an assignment by the Government to BUMN (Persero). The financial health condition of BUMN (Persero) has a massive influence, especially in compliance with the technical principles and rules in carrying out assignments with the output of infrastructure or construction project realization. Thus, the argument that the government's assignment has not protected the interests of public services and the profits of BUMN (Persero) can also be seen from several BUMNs (Persero) that are currently reported to have experienced quite risky losses. Even though they were both disadvantaged due to the impact of the pandemic, it is necessary to examine that assignments are still intensive during this pandemic and this factor is a degradation of the ability of business activities of BUMN (Persero).

b. The majority of assignments are burdensome for BUMN (Persero) without the essence of risk management

Risk management is needed as a reference for assignments that able to protect the interests of the government and the interests of BUMN (Persero). Based on several statistics on the loss of BUMN (Persero), it can be concluded that the assignment carried out by the government without regard to risk management can lead to losses. Profit statistics with company financial parameters to be used as indicators of whether the assignment is profitable and meets the profit-oriented scheme for BUMN (Persero) or is actually burdensome. This can be seen in the case of the government's assignment of several BUMN (Persero) such as PLN and PT KAI, which actually gave a new burden in the form of acting as a facilitator as well as an operator in the implementation of public infrastructure. This creates an imbalance in fulfilling the demands for obligations addressed to BUMN (Persero). Things that are considered burdensome and do not protect the interests of BUMN (Persero) as a company or a public company competing with private competitors accompanied by the burden of facilitators as well as operators are as follows: (i) There is a dualism in the role of BUMN (Persero) as a BUMN that has the main obligation of public service and is still required to be profit oriented as described in Article 1 number 2 of Law no. 19 of 2003 concerning BUMN. This is a burden for BUMN (Persero) in order to face competitors from private operators which are also starting to be opened by the government; (ii) The government assignment model for the administration of public infrastructure does not fully protect the interests of BUMN (Persero), based on data obtained from statistics showing an unfavorable risk management position. Thus, this factor has the potential to cause difficulties for BUMN (Persero) to compete with private operators. This condition can be seen in the average Altman Z-score of BUMN (Persero) in the October 2019 period when calculated without assignment is 2.88 while the Altman Z-score of BUMN (Persero) when calculated with assignment burden becomes 1.96 where the classification point is as follow: (Edward I. Altman, Małgorzata Iwanicz-Drozdowska; 2017; 131-171)

The regulatory function is preventive in character. It includes environmental-quality standards, planning instruments, environmental approvals, waste-management policies, and producer obligations. The supervisory function requires inspection, monitoring of leachate and emissions, verification of waste-handling practices, and institutional follow-up when non-compliance is identified. The enforcement function gives legal consequences to violations through administrative measures, civil actions, or criminal prosecution. In this structure, a local government that knows of persistent illegal dumping or contamination but fails to act may be criticized not merely for poor service delivery but for failing to perform a legal protective function attached to environmental rights (Arifardhani, 2020, pp. 112-115).

Private corporations also occupy a central position. Modern waste governance rejects the idea that a producer's responsibility ends when a product is sold. The original paper highlights Extended Producer Responsibility (EPR), under which producers are expected to consider the post-consumer phase of product life cycles and to reduce the environmental burden of packaging and other residual materials. In legal-policy terms, EPR internalizes part of the waste-management cost into the production and distribution system rather than leaving municipalities and affected communities to bear the full externality.

The normative basis of corporate responsibility is strengthened by the polluter-pays principle. The principle requires the actor responsible for pollution to bear the cost of prevention, compensation, and environmental restoration rather than shifting those costs to public budgets or victims. Enterprise-risk reasoning similarly treats the party that creates and benefits from a hazardous activity as the party best positioned to distribute or insure against the associated risk. These ideas are particularly important where waste streams contain hazardous substances, where operational control is concentrated in a company, or where communities lack access to technical information needed to prove fault (Silalahi, 2001, pp. 210-215; Wibisana, 2017, pp. 64-72).

1	< 1,1	Prone to Bankruptcy/Liquidity Difficulty
2	1,1 – 2,6	Need Special Attention
3	>2,6	Secure

When looking at statistics with reference to the Altman Z-score value of 1.96. Thus, it means that BUMN (Persero) finances need to get special attention or handling. Therefore, special policies or strategies are needed both within the company's internal environment, such as absorption of Capex in order to increase revenue or cost efficiency, increase financing, and effectively manage liquidity, as well as policies from shareholders in this case the government. (Sanobar Anjum; 2012: 212-219.) Infrastructure development with the assignment scheme to BUMN (Persero) is actually carried out with in-depth considerations and studies, especially in the study of risk management related to the sustainability of the financial performance of BUMN (Persero).

B. The Form of Internalization of Non-Intervention Principles as a Pillar for Realizing Rational and Accountable Assignments to BUMN (Persero)

a. Injection of Non-Intervention Principles in Formulating Assignments

The public company management model in developed countries prioritizes the partnership relationship between the state and the public company. Therefore, what was previously possible in the form of cooperation, has now been able to create a smooth monopoly in the cartel management pattern. The attitude of the state towards this aspect shows a strong pattern of regulations and policies, there are at least two externalizations of government policies.

Therefore, the state must position itself as an injection to BUMN (Persero) through its profitable policies. In this case, it is not justified to intervene through government policies that can disrupt the performance of BUMN (Persero). In some cases, BUMN (Persero) must pay attention to the composition of its interests. This is relevant to the systematic interpretation of Article 1 point 2 of Law no. 19 of 2003 concerning BUMN, namely: "Company, hereinafter referred to as Persero, is a BUMN in the form of a limited liability company whose capital is divided into shares of which all or at least 51% (fifty one percent) of the shares are owned by the Republic of Indonesia whose main purpose is pursuit of profit." Then, it is emphasized by Article 2 paragraph (1) letter b in the law, namely: "The purpose and objectives of establishing a BUMN are: ...b. pursuit of profit…"

government that protects the interests of BUMN (Persero) as a profit-oriented company as well as a public company with a public service orientation is actually a manifestation of the form of BUMN (Persero). Thus, the relevant composition is that the principle of state non-intervention must be accommodated in the substance of the cooperation agreement. Non-intervention is needed as a guarantee that the state does not interfere through doctrinalization or pressures or negative political will including various spoil systems against the interests of BUMN (Persero) as a company that has the right to seek profits for the continuity of its business activities and as a BUMN (Persero) that obliged to carry out and provide public service functions to the community. In terms of guaranteeing and providing a legal basis, that the government's actions (bestuurhendeling) as an act that is legal (legitimate and justified), can be justified (accountable and responsible) and responsible (liable), then every government action must be based on fair law, dignified and democratic. (Jonathan R. Macey ; 1995: 435.) The use of the principle of non-intervention as a pillar of assignment between the The Company is an independent legal entity that has its own rights and obligations, including rights to assets that are separate from the personal assets of the founders and administrators. The Company received recognition for "have the capacity in its own name to acquire and hold property, to enter into contracts, to sue and be sued, and to have an existence with duration independent of the persons comprising its shareholders." (Philip I Blumberg; 1983.) Based on such a conception, it is clear that every Limited Liability Company must obtain legal recognition for its independence status as a legal entity.

The existence of BUMN (Persero) as an independent legal entity (separate legal entity) has received recognition in Law Number 19 of 2003 concerning BUMN. Such acknowledgment resulted in the application of the entire principle of independence of the Limited Liability Company into the state-owned enterprise (BUMN) Persero. However, the disharmony of regulations related to BUMN (Persero) institutions in the laws and regulations has resulted in legal ambiguity at the normative and implementation levels. This disharmony, among others, can be seen in Law no. 19 of 2003 concerning BUMN, Law no. 17 of 2003 concerning State Finance and Law no. 40 of 2007 concerning Limited Liability Companies. (Inda Rahadian ; 2013: 624-640).

The BUMN Law has explicitly emphasized the application of all company provisions and principles as stipulated in the Limited Liability Company Law for BUMN (Persero) institutions. Such arrangement means that all principles of PT independence by law apply to BUMN (Persero).

The principle of non-intervention leads to the independence of BUMN (Persero) in a legal entity position which resulted in the birth of the concept of separation between ownership and control, namely a concept of separation between ownership and control of BUMN (Persero). Thus, the management of BUMN (Persero) must be independent, professional and free from the intervention of shareholders including the state as well as controller. State control does not necessarily loose, since BUMN (Persero) also has a public service goal. BUMN (Persero) was historically born due to the limitations of the state in providing guarantees for the needs of the people. Therefore, aside from being profit oriented, BUMN (Persero) is also still controlled by the state, especially in the implementation of public services. (Aminuddin Ilmar; 2012, 115.)

b. The Implementation of the Partnership Model between the Government and BUMN (Persero)

Lazer offers three models of interdependence regulation, namely: (i) competitive model; (ii) coordinating model; and (iii) coordinative hegemony model. (David Lazer; 2006: 455-468) The main assumption of the interdependence competition regulation model is that policy performance is determined by the intersection of interests between companies. The government then makes this meeting point the basis for regulations that are generally accepted by the community

1) Competitive Model

The state is finally involved in the competition that occurs between private and state-owned companies. In the classic business tradition, the way to overcome unfair competition is to create a good pattern of cooperation. However, in the modern era, the model of cooperation is increasingly unused in modern business, some of the businessmen have instead chosen to develop production and market cartels. Thus, what was previously possible in the form of cooperation, has now been subtly monopolized in the cartel management pattern. (David Lazer dan Mayer-Schoenberger; 2002: 819-851.)

The state's attitude towards this aspect shows a strong administrative side, there are two externalizations of government policies. Second, through the results of the first point, the Government creates conditions that allow small competitors who do not have the power to reap quality rights. This section occurs a lot in the realm of Intellectual Property Rights such as trademark administration, copyrights and patents. (David Lazer dan A. Friedman; 2005.)

2) Coordinative ModelThe way to reduce competition is to cooperate. Literally, co-ordinating is not the same as co-operating, but the two have something in common in some special meanings. For example, cooperation is a form of both parties perfecting each other to obtain their respective benefits. In this relationship, each party reduces its capacity on the basis of mutual agreement. While in the coordinating, one party as the administrative power over the other. When a businessman from country A carries out commodity export activities to country B, the exporter must adjust to all the administrative attributes that exist in country B. Thus, the country that is the importer makes administrative standards for certain specifications in the commodity. (David Lazer; 2005)
3) Coordinative Hegemony Model
A large country has a greater opportunity to form a hegemony against a small country. Big and small in this case is a matter of resource advantage (positive ideal point), not the size of the area. When colonialism is removed, hegemony has a different meaning from colonialism. Hegemony is the dominating power that one social group has over another. The terms hegemony in business and trade are relatively different, when viewed from a social and cultural point of view. (W. Friedman ; 1971 ; 324) Hegemony in business and trade positions countries or parties with low ideal points to gain opportunities when they are under countries or groups that have high ideal points. Since the last five years, China's hegemony over Indonesia has been very strong, this is because China has a high ideal point. But at the same time, Indonesia seeks to benefit from China's hegemony. This context seems contradictory when compared to the concept of coordinating administration. In the hegemonic administration approach, coordinative administration tends to be violated, by means that countries with high ideal points have a stronger chance of intervening in countries with low ideal points. If this study is deepened, it can also enter strategic and defense administration, because economic hegemonization is the entrance to political hegemony which leads to new colonianism.. (Vegitya R. Putri ; 2013, : 14)

Cassese views the recent rapid developments in France, Belgium and Germany. The state and its governing function (bestuurhandeling) are slowly tending to lose their main characteristics due to the influence of globalization, constitutionalization, destatization, privatization, and decentralization. (Sabino Cassese; 2004-2005: 1022-1041) The domination of the state is decreasing, when the private sector has a bigger role in determining legal politics in government. In such situations, the Government acts as a promoter, facilitator, risk regulator and caretaker in the interests of the economy and society.

The effect of modernization is marked by the strengthening of private interaction in a global network that extends beyond national boundaries. It is necessary to identify private groups to concretize administrative subjects. These changes also give rise to global private communities that have a significant influence on relations between countries. Therefore, Sabino suggested that a more interdisciplinary formulation of modern administration or even postmodernism is needed. In line with that, Otto Mayor argues that modernization has now formed a new characteristic, namely a dynamic constitution with a fixed administration (verfassungsrecht vergehtverwaltungsrecht besteht). Thus, the partnership model between the government and BUMN (Persero) must be implemented with the aim of protecting the interests of BUMN (Persero) as a company as well as a public company so that a balance of public and private elements can be created which prioritizes the welfare of the people through guaranteeing the soundness of business activities from BUMN (Persero) that support the function of public services and profit oriented.

4. CONCLUSION

The arguments for the need for a rational and accountable assignment to BUMN (Persero) are: (i) the assignment has not protected the interests of public services and the profits of BUMN (Persero); and (ii) the majority of assignments are burdensome for BUMN (Persero) without the essence of risk management. First, revise and review the ongoing assignments to BUMN (Persero) to be able to ensure the continuity of public services and profits. The forms of internalization of non-intervention principles as pillars of realizing rational and accountable assignments to BUMN (Persero) are: (i) injection of non-intervention principles in formulating assignments; and (ii) implementation of the partnership model between the government and BUMN (Persero). Second, internalize the principle of non-intervention through a partnership model in the assignment by the government to BUMN (Persero).

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