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RESEARCH ARTICLE

Shareholders Lawsuit: Fraud on Minority Law Enforcement to Invent Corrective Justice During the Covid-19

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Abstract

The purpose of this study is to analyse and provide recommendations for national law, related to law enforcement in violations against minorities (fraud on minorities) to create corrective justice during the covid-19 period. Minority Shareholders are a group that is classified as vulnerable to actions that can result in losses. For this reason, law enforcement efforts against Minority Shareholder fraud are needed, to provide legal protection and recovery of losses in order to create corrective justice. This research method is descriptive by using the type of juridical-normative research. The type of approach used is a statutory approach and a conceptual approach. The results of this study describe the rights of shareholders given by laws and regulations, which can be used to carry out legal remedies based on corrective justice when fraud is on a minority. The legal effort began with a shareholder lawsuit consisting of two mechanisms, namely derivative action and direct action from shareholders which has been accommodated in Law Number 40 of 2007 concerning Limited Liability Companies. However, this effort is commonly used and has several weaknesses, one of which is the absence of specification rules related to the procedures for implementing it. The new thing from this research is the correlation between the concept of a shareholder lawsuit

and one of Indonesia's policies, namely increasing the ease of doing business, especially after the issuance of Law Number 11 of 2020 concerning Job Creation during the Covid-19 period. In addition, it provides regulatory recommendations so that the concept of legal protection works optimally. Therefore, it is necessary to develop and enforce laws against fraud in minorities through shareholder lawsuits, to create corrective justice during the covid-19 period.

Keywords: *Corrective Justice; Fraud on Minority; Limited Liability Company; Pandemic Covid-19; Shareholders Lawsuit*

1. INTRODUCTION

Currently the whole world is in shock with the presence of a virus that has become a pandemic for all people in the world at the end of 2019. The virus is known by the scientific name Corona Virus Disease or Covid-19 (Adityo, 2020). The virus was allegedly discovered for the first time in the city of Wuhan, the capital of Hubei Province in central China. The city of Wuhan is the seventh largest province in the bamboo curtain country with a population of 11,000,000 people (Meng & et.al, 2020).

In early December 2019, a patient was diagnosed with an unusual pneumonia. The regional office of the World Health Organization (WHO) in Beijing has received information about several patients with pneumonia of unknown cause from the same city. Pneumonia is not ordinary pneumonia. But the Covid-19 super virus which is currently infecting various parts of the world (Irawan et al., 2020).

The World Health Organization (WHO) has declared the status of a global Covid-19 pandemic after this dangerous virus spread to most areas of the world. The number of infected and the death toll continues to grow

while the treatment has not been found. Mass gatherings in large numbers have been stopped to avoid the transmission process such as schools, campuses, entertainment venues, conferences, and worship activities. This is because the spread of the Covid-19 pandemic creates a high health risk for the community which has claimed many lives in all parts of the world (Sudarsa, 2020).

In Indonesia, the Covid-19 pandemic has spread so quickly throughout the archipelago and has even created fatalities. Based on data from Our World in Data and JHU CSSE Covid-19 data, Indonesia has experienced the worst transmission case on July 17, 2021, with 31,952 new cases and an average of 48,821 new cases in 1 week (Our World in Data, 2022). Then on November 27, 2021, a new, more dangerous variant named Omicron entered in Indonesia (Widyanto & Putri, 2021).

The current pandemic can significantly disrupt various kinds of human activities such as economic, social, educational, religious and cultural (Yamali & Noviyanti, 2020). This can have a major impact on national stability, especially in the aspects of the national economy and business (Hanoatubutun, 2020).

Indonesia has experienced an economic recession with the lowest position. Based on the Central Bureau of Statistics of the Republic of Indonesia (BPS RI) which launched Indonesia's economic growth reaching 2.97% (Year on Year) in the first quarter of 2020. This growth became one of the lowest economic growths since 2001 (F. F. Fitriani, 2022). That economic growth or Gross Domestic Product (GDP) in the first quarter of 2020 was the lowest quarterly growth since the fourth quarter of 2020. Meanwhile, according to data from the Organization for Economic Co-operation and Development (OECD), Indonesia at that time only grew 2.88% (Year on Year) (Pusat Kajian Anggaran DPR RI, 2020).

The preamble to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) provides an overview of the goals of the state. Which is to "...promote the general welfare

and educate the nation's life...". This state goal is certainly a legal ideal (rechtsidee) that must be realized, as an effort of the state's commitment to guarantee the fulfillment of the rights of citizens (Latumeten, 2017).

To advance the general welfare, it is necessary to have a sustainable national economic development based on the philosophy of economic democracy which is the economic foundation of the Indonesian state (Dewantara, 2020). Article 33 Paragraph (4) of the 1945 Constitution of the Republic of Indonesia stipulates that the national economy must be run on the basis of economic democracy crystallized in the principles of togetherness, efficiency with justice, sustainability, environmental insight, independence and maintaining a balance of progress and national economic unity.

One form to accelerate the realization of state goals in accordance with the philosophy and principles regulated in the constitution of the republic of Indonesia. Limited Liability Company which is a special purpose vehicle to encourage the improvement of the country's economy and provide broad public participation in conducting business activities (Benjamin & Theobald, 2020). The Company as a legal entity has the skills (*recht bekwaam*) and authority (*recht bevogheid*) independently in carrying out legal actions in business activities (Syahrani, 2013).

One of the efforts made by the Indonesian state during the pandemic to increase economic growth is to create a good business climate (Husnulwati & Yanuarsi, 2021). This effort is carried out to increase the Ease of Doing Business (Sinaga, 2017) Index in order to give confidence to entrepreneurs to increase economic growth . The implementation of the ease of doing business policy is manifested by the issuance of Law Number 11 of 2020 concerning Job Creation (Job Creation Law).

This regulation, known as the Omnibus Law, has 11 clusters of statutory regulations, including (Nurhaliza, 2022):

1) Licensing and Sector Business Activities;
2) Cooperatives and Micro, Small and Medium Enterprises (UMKM) and Village Owned Enterprises (BUMDes);
3) Investment;
4) Employment;
5) Fiscal Facilities;
6) Spatial Planning;
7) Land and Land Rights;
8) Environment;
9) Construction and Housing;
10) Economic Zones;
11) Government Goods and Services

Based on the results of a World Bank survey of 190 countries in the world through the 2020 Ease of Doing Business (EoDB), Indonesia is still ranked 73rd with a score of 69.2. Meanwhile, in the ASEAN region, Indonesia is in the 5th lowest rank. As for several countries in ASEAN, only 3 countries are included in the 25th EoDB ranking, such as: Singapore ranked 2nd with a score of 86.2; Malaysia is ranked 12th with a score of 81.5; and Thailand in rank 21 with a score of 80.1 (Jayani, 2019).

The results of this assessment are also based on 10 schemes parameters include (World Bank, 2022):

1) Starting a Business;
2) Dealing with Construction Permit;
3) Registering Property;
4) Paying Taxes;
5) Getting Credit;
6) Enforcing Contracts;
7) Getting Electricity;
8) Trading Across Borders;
9) Resolving Insolvency;
10) Protecting Minority Investors/Shareholders;

One aspect that escapes regulation and optimization of law enforcement is Protecting Minority Investors/ Shareholders. Whereas this aspect is an effort to protect investors/shareholders who have invested in Indonesia.

For this reason, it is necessary to optimize legal protection efforts for investors or shareholders to protect their assets and improve the EoDB assessment in Indonesia. In addition, this legal protection effort can create corrective justice for the Company and/or shareholders who are harmed due to unhealthy management (Sudiro, 2012).

2. METHOD

This research is descriptive with the type of normative juridical research. The type of approach used is the statutory approach and the conceptual approach (Marzuki, 2009). The statutory approach is an approach that refers to the provisions of laws and regulations such as Law Number 11 of 2020 concerning Job Creation (Job Creation Law), Law Number 40 of 2007 concerning Limited Liability Companies (Company Law), as well as other regulations. related to. The conceptual approach is the approach used to understand the theories and concepts that can be used as the basis for this research. The data used in this study is secondary data which is divided into primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data was obtained through library research collection techniques, which then analysed the data qualitatively (Marzuki, 2009).

3. RESULT AND DISCUSSION

A. Shareholders Lawsuit Regulation in Indonesia

The existence of independence owned by the Company provides an opportunity to create a good business climate and accelerate national economic growth. However, the Company is an artificial legal entity (kumstmatig) (Harahap, 2011). Requires management or competent people to carry out business activities within the Company. For this reason, Law Number 40 of 2007 concerning Limited Liability Companies (Company Law) provides for the distribution of power/authority over the Company's regime through the General Meeting of Shareholders (GMS), the

Board of Directors (BoD), and the Board of Commissioners (BoC), which are called Company Organs (Rambing, 2013).

These Company organs have their respective duties and functions, including:

1) GMS
   The GMS is the organ in charge of making decisions/determinations on legal actions or corporate actions required by the Company Law and the Company's Articles of Association (AD). The GMS is considered the de facto highest organ in the Company's Organs because it is the founder or owner consisting of Shareholders.
2) BoD
   BoD is an organ that is responsible for carrying out and carrying out the management functions of the Company in accordance with the aims and objectives of the Company. In addition, the Board of Directors is also tasked with representing the Company both inside and outside the court based on the provisions of the AD.
3) BoC
   BoC is an organ in charge of supervising the management of the Board of Directors by providing advice on the performance of business activities carried out by the Board of Directors of the Company. Provide certain approvals required by AD for the actions of certain Directors.

The existence of various kinds of authority that has been given by law or AD provides an obligation to carry out each mandate optimally. However, in practice it is very possible for disputes or disputes between the Company's organs to occur (Syarief, 2020).

Disputes between the Company's organs can be caused by an act of error or negligence that results in significant losses to the Company. Of course, this becomes a problem related to the dispute settlement mechanism (dispute settlement) to overcome losses and restore the situation (recovery and remedies) (R. Fitriani, 2011).

One example of a real case that occurred in Indonesia, in 2009 there was a case experienced by PT. Danamon Indonesia, tbk which is now PT. Bank Danamon Indonesia,

tbk and is engaged in the banking and financial industry. The dispute between the Company's organs began when the Board of Directors and the Board of Commissioners had made a binding decision on the Company in carrying out derivative transactions or foreign exchange transactions with counterparts.

According to the Shareholders, the actions taken by the Commissioners and Directors are actions that are outside the scope of the Company's activities. At the same time, it does not ask for the approval of the GMS before carrying out the binding as stated in the Company's AD. In addition, according to the Shareholders, the foreign exchange transaction is a contractual transaction that is speculative in nature. This is where the Company risks the potential profits and losses that will occur. After estimating the real loss experienced by the Company is Rp. 328,000,000.00 with a potential loss of Rp. 3,498,000.00. This also poses a threat of bankruptcy of the Company, in which the paid-up capital of the Company is only limited to Rp.200,000,000.00 which is less than the number of potential losses that can occur.

The losses and the threat of bankruptcy that occurred certainly became a dark shadow for the Company (Yusro et al., 2020). On the other hand, the actions that have been carried out by the BoD and BoC are acts that renege on the mandate of the Company's AD and are contrary to the Law on PT. Of course, this is an act that should not be done and can threaten the course of good business activities.

The actions of the BoD and BoC which are considered to deviate from the Company's AD have violated their fiduciary duty, especially in carrying out their obligations based on prudent principles or contrary to the principles of good corporate governance (Supriatna & Edmond, 2019). Of course, this has implications for the Company's management system which should be in accordance with the laws and regulations, AD, and good corporate governance.

The existence of management irregularities that occur will certainly have an economic loss impact on the Company or Shareholders. One of the legal remedies that can be taken to seek compensation for the BoD and BoC who have been negligent or abused their power is through the Shareholders' Lawsuit. Shareholders' Lawsuit is the right of Shareholders granted by law to sue the BoD and/or BoC when they are personally detrimental to or against the Company.

Shareholder Lawsuit arrangements are divided into two types as follows:

TABLE 1.
Lawsuit Model as comparison

Lawsuit Model	Regulation	Meaning
Derivative Action	Article 97 Paragraph (6) of UU PT	**On behalf of the Company**, shareholders who represent at least 1/10 (one tenth) of the total shares with voting rights may file a lawsuit through a district court against a member of the **Board of Directors** who due to his/her **fault or negligence has caused losses to the Company**
	Article 114 Paragraph (6) UU PT	**On behalf of the Company**, shareholders who represent at least 1/10 (one tenth) of the total shares with voting rights may sue a member of the **Board of Commissioners** who due to his/her **fault** or **negligence caused losses to the Company to the district court.**
Shareholder Direct Action	Article 61 Paragraph (1) UU PT	Each **Shareholder** has the right to file a lawsuit **against the Company** to the district court if he is harmed by the Company's actions which are considered **unfair and without reasonable reasons** as a **result of the decisions of the GMS, the Board of Directors, and/or the Board of Commissioners**

There are two different qualifications in the Shareholders' Lawsuit, namely between Derivative Action and Shareholders direct action. The derivative action focuses on the Company's representatives who are represented by a minimum of 1/10 of the total shares with voting rights. This is the result of the negligence or mistake

of the BoD and/or the BoC which must cause losses to the Company. It is clear that the Company is the central focus of the resulting outcomes. So that the Company becomes the object of legal protection.

Meanwhile, when compared to shareholders direct action, it is a lawsuit filed by the Shareholders without any minimum requirements for share ownership with voting rights for filing a lawsuit to the court. This means that regardless of the amount and whatever the status (Majority or Minority Shareholder), it is allowed to file a lawsuit. This lawsuit focuses on individual (personal) shareholder losses.

Which is caused by a loss by the Company which is considered unfair and without reasonable reason to the decision of the GMS, the BoD, and/or the BoC as the object of the lawsuit. Of course, this model gives more exclusivity to the Shareholders' right to file a lawsuit without prerequisites with the provisions of the qualifications for action and the object of the lawsuit that has been determined by representing themselves.

The existence of a Shareholder Lawsuit provides an opportunity for Shareholders, especially minorities, to protect the Company and/or themselves against fraud or abuse that occurs. This lawsuit is intended to stop the act that was committed and the loss that occurred so that there is a recovery and correction of the act committed. This is what is known as corrective justice.

However, one of the weaknesses of the Shareholders' Lawsuit arrangement is that there is no technical arrangement related to the mechanism or procedure for applying it in court. For this reason, it is necessary to have supporting regulations to optimize the Shareholders' Lawsuit as an effort to protect against Fraud on Minority. However, one of the weaknesses of the Shareholders' Lawsuit arrangement is that there are no technical arrangements regarding the mechanism or procedures for applying it in court. For this reason, it is necessary to have supporting regulations to optimize the Shareholders'

Lawsuit as an effort to protect against Fraud on Minority.

B. Fraud on Minority Law Enforcement to Invent Corrective Justice During Covid-19

Until today, there is no definite and authoritative definition of Fraud on Minority. Margaret Chew argues that "there is no definitive exposition of the phrase fraud on minority that may be considered authoritative, conclusive, or exhaustive. It is no limited in common law fraud of the Derry v Peek variety where an element of dishonestly has to be present. Fraud includes suitable wrongs, such as a breach of duty or an abuse of power" (Qadir, 2017). It can be concluded that the definition and qualification of fraud on minority is needed.

However, Taqiyuddin Qadir argues that there are several points that can be used as parameters for fraud on minority as follows (Qadir, 2017):

1) Acts that contain fraud;
2) Acts that abuse authority;
3) Dishonest acts.

Such acts must be directed against minority groups or in this case Minority Shareholders. Minority Shareholders are a vulnerable group to be cheated of their rights and have no control over the Company. Black's Law Dictionary provides a definition that "Minority Shareholders. Those Shareholders of a corporation who hold so few shares in relation to the total outstanding that they are unable to control the management of the corporation or to elect director". So that the status and position of Minority Shareholders is very vulnerable to being cheated.

The solution to this problem is in accordance with the opinion of Aristotle who created the concept of justice at a philosophical level. Aristotle's contribution is formulated on 3 types of concepts of justice (Suteki & Taufani, 2021):

1) Distributive Justice

   Justice that gives everyone based on the quality of his profession or service. The distribution of goods and

honors is adjusted to their status in society. Distributive Justice requires people to have the same position before the law (equality before the law).

2) Commutative Justice
   Justice that gives rights to a person based on his status as a human being (basic rights).
3) Corrective Justice
   Justice that establishes the criteria in applying the law to have a common standard for redressing the consequences of actions people take in relation to one another.

The concept of Corrective Justice is the focus of the implementation of the Shareholders' Lawsuit. Because the Shareholder Law Suit seeks to provide legal remedies for the protection of rights due to adverse actions. In essence, the function of Corrective Justice is to guarantee, supervise and maintain the distribution of justice against illegal acts that have the potential to violate and can cause harm.

Furthermore, John Rawls asserts that justice is basically a principle of rational policy which is applied to the conception of the sum of the welfare of all groups in society. To achieve this justice, it is rational if someone imposes the fulfillment of his desires in accordance with the principle of usefulness, because it is done to increase the net benefits of satisfaction that will be obtained by members of the community (Rawls, 1971).

Practically corrective justice is applied in the judicial lawsuit procedure where in principle the judge brings the two parties together and stabilizes the status quo. In which the judge will try to mediate to provide justice by restoring the rights of the victim concerned or by providing compensation as a result of his actions. From the concept of Corrective Justice, this became the philosophy for the invention of the principle of civil liability (Mertokusumo, 2010).

The correlation between Shareholders' Law Suit and Corrective Justice is complementary. Which Corrective

Justice is the philosophy and purpose of the Shareholders' Law Suit which seeks to provide protection for the rights of Minority Shareholders. Minority Shareholders who already have the right to Distributive Justice certainly deserve to be protected so that they are not violated and suffer economic losses (Tanya et al., 2017).

4. CONCLUSION

Based on the description above, it is very clear that the Covid-19 pandemic threatens economic growth and business continuity in Indonesia. For this reason, efforts are needed to provide a stimulus to the threat to the national economy. The government made efforts through the issuance of Law Number 11 of 2020 concerning Job Creation as an effort to increase the Ease of Doing Business (EoDB) Index. However, one aspect that is missing from this regulation is related to the protection of minority investors/shareholders. Whereas Minority Shareholders/ Investors are a vulnerable group for Fraud on Minority. For this reason, there is one of the legal protections for Shareholders and/or the Company in Law Number 40 of 2007 concerning Limited Liability Companies which is referred to as the Shareholders Lawsuit. Such legal remedies are in accordance with Corrective Justice which aims to provide correction or accountability for detrimental actions. However, it is necessary to add technical regulations so that protection measures are more effective and provide legal certainty.

5. DECLARATION OF CONFLICTING INTERESTS

None

6. ACKNOWLEDGEMENT

None

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