

Examining Participatory-based on Share Ownership and Management in the Bank Pembangunan Daerah as Limited Liability Companies

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Abstract

The Good Corporate Governance principle of limited company is required to increase the confidence, support, and participation of stakeholders or all parties concerned with the company. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. This research is an empirical legal research in examining participatory-based on share ownership and management in Bank Pembangunan Daerah (BPD) as limited liability companies. The outcomes of the research indicate that the essence of participatory share ownership and management in the BPD is not directly owned by the shareholders. Proof of ownership for the depositor is only obtained from the Cooperative that the person concerned has a nominal share deposit in the form of a certificate containing the amount of the nominal value of the ownership. Normatively, legal protection for share ownership and management is participatory based, in principle, shares that are protected under the name of Cooperatives are classified as legal protection for minority shares, while employees who de facto as depositors of nominal shares are not well protected by law. Hence, to provide legal protection and certainty to participatory share nominal depositors, there must be binding rules between the parties as outlined in the provision of fund management (management regulation) on the terms of participation.

Keywords: *Good Corporate Governance, Limited Company, Local Government*

1. Introduction

Limited company as one of the pillars of the national economy development, therefore it needs to be managed well to encourage economic development and improving the welfare of society at large. In this regard, the business actors, both private and government as investor be part of the implementation of the national economy.¹ However, the importance of enterprises role in supporting the success of the national economic development, then the companies both private and government must be managed in accordance with the principles of *Good Corporate Governance*.² Under the provisions of Article 15 letter *a* of Act No. 25 of 2007 on Investment, stated that every investor is obliged to apply the principles of Good Corporate Governance. The investor in question is individual or business entity that invests capital, which can be either domestic or foreign investors.

From the economic point of view, each citizen has the right to decent work and livelihood for welfare, and the budget is structured as a joint effort based on the principle of family. Law Number 25 of 2007 concerning Investment and Law Number 40 of 2007 concerning Limited Companies, are the basis for the business world in developing development in the era of globalization.

In the banking sector, Regional Development Banks whose average age of establishment has exceeded fifty years, capital ownership as investment by the Regional Government in the form of shares for 26 Regional Development Banks of Rp. 32,799,787,000,000.- (Thirty-two trillion seven hundred ninety nine billion seven hundred eight seven million rupiahs) or if calculated on average per year the capital deposit made by the Regional Government is Rp. 25,230,000,000 (twenty-five billion two hundred thirty million rupiahs) in a year and if a breakdown is carried out, it is much smaller for the annual average.³

Some studies that have been done previously by several researchers, it also shows that governance in state- and

¹ Sandmo, Agnar, *The Market in Economics: Behavioural Assumptions and Value Judgments*. (April 22, 2014). NHH Dept. of Economics Discussion Paper 12/2014. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2432934>

² Tavinayati and Yulia Qamariyanti. 2009. *Hukum Pasar Modal Indonesia*, Jakarta: Sinar Grafika, p 56

³ Source: Pre-research data processed from the Financial Services Authority (OJK) website.

regional-owned enterprises, tend to be lower than in the private sector,¹ especially from the aspect of transparency or information disclosure.² Definitively, *Good Corporate Governance* represent a system to regulate and control the enterprise and create value added for all stakeholders, both *primary stakeholders* (investors, employees and managers, suppliers, business partners and the community) and *secondary stakeholders*.³ *Good Corporate Governance* (GCG) is a process used by the organs of the company to determine the policy and to increase the success of business and corporate accountability, so it can increase the added value for shareholders in the long-term, taking into account the interests of stakeholders by budget basis of the company and the legislation in force.

Inequality clearly illustrated in the data on national Earning Asset Mastery, as much as 2% (two percent) of the Indonesian population controls 56% (fifty six percent) of national productive assets. Hence, according to the National Land Agency, there are 87% (eighty seven percent) of 56% (fifty six percent) of national assets in the form of land, and most of those who control productive assets are individuals who carry out legal entity economic activities.⁴ Equity participation instruments are instruments that are more popular in the community. Shares are instruments of capital participation of a person or institution within a company. This capital is divided into three levels of status, namely basic capital, issued capital and paid up capital. These shares are issued in the framework of establishing a company, fulfilling authorized capital or increasing authorized capital.⁵

Overcoming the shortfall in paid-up capital of several Regional Development Banks Limited Companies has included third parties to participate both through the capital market and without the capital market. Particularly the participation of third parties in share ownership without going through the capital market as part of the Regional Development Bank Limited Liability Company, raises several fundamental questions such as the form of law and shareholding status, how to protect the law and the benefits of participatory shareholders, and how it is managed. both by the Bank and parties related to share ownership of the participation, as well as matters relating to the emergence of potential losses that will affect the income and capital that has been paid.

2. Method of the Research

The type of study is an empirical legal research in examining participatory-based on share ownership and management in Bank Pembangunan Daerah (BPD) as limited liability companies. The populations of this study are directors, shareholders, commissioner, consumers in the form of a limited company. The samples are part of population and it determined by purposive technique. Furthermore, analysis of legal material was carried out using qualitative analysis with content analysis method.

3. Participatory Share Ownership and Management

Share ownership of regional companies is not only solely owned by local governments but provides opportunities to Indonesian citizens both individually and through legal entities established with shareholders of Indonesian citizens. The assertion should be an obligation for the Company to involve citizens to participate in share ownership in the Regional Development Bank. Such conditions are experiences from the beginning of independence which show that Indonesian businessmen, especially those from bureaucrats, do not have a basic philosophy of capitalism, the risk is to be borne by the Government, meaning to the people as well.⁶

The banking industry in carrying out its business activities requires sufficient capital, therefore Bank Indonesia / the Financial Services Authority as the regulator has required Banks to develop a mid-term strategic plan and short-term planning known as the Bank Business Plan.⁷ In the Core Plan and Business Plan, the Bank must develop strategic steps, one of which is how to increase and maintain a capital position within safe limits in accordance with Bank Indonesia regulations.

The practice of community participation in share ownership in companies owned by the government or known as

¹ KPK, *Studi Implementasi Good Corporate Governance di Sektor Swasta, BUMN dan BUMD*. KPK, Direktorat Penelitian dan Pengembangan, Jakarta, 2007. Pages, 16-17

² Erwin Fajrin Hadat, *Informasi: Kebutuhan yang Terabaikan*, Buletin BUMN, 65(4): 28.

³ Sutan Remi Sjahdeini, *Good Governance: Antara Idealisme dan Kenyataan*, Citra Aditya Bakti: Bandung, 2003. Page 3

⁴ See: Kompas, 25 April 2012 edition.

⁵ Bisman Nasution. "Prinsip Keterbukaan Dalam Good Corporate Governance", *Jurnal Hukum Bisnis*, Vol. 22 No. 6, 2003.

⁶ I. Wangsa Widjaya, Mutia F. Swasono (ed). *Muhammad Hatta: Kumpulan Pidato II*, PT. Toko Gunung Agung Tbk. Jakarta 2002, p, 128

⁷ Article 2 paragraph (3) BI Regulation Number: 15/12/PBI/2013 concerning the Minimum Capital Requirement for Commercial Banks.

privatization has been going on for a long time.¹ The basic concept of community participation in share ownership in companies owned by the government is expected to reduce the burden on the government both financially and administratively in the management of Regional Owned Enterprises. Financially, with the entry of the community as shareholders, it is expected that the company's capital growth will accelerate. This can be seen from regional development banks which include the public or third parties in their capital ownership such as the Regional Development Bank of West Java and Banten, the East Java Regional Development Bank. While administratively with the entry of the community as a significant number of shareholders, it is expected that it will be more transparent in its governance.

With the entry of a third party to own shares in a bank, the percentage of ownership is no longer dominant, this is also confirmed in the consideration of the letter (d) of Bank Indonesia Regulation Number 14/18/PBI/2012 concerning Commercial Bank Share Ownership which states that structuring the bank ownership structure carried out through the application of the maximum limit of share ownership so as to reduce the dominance of ownership which could negatively impact the operations of banks Table 1 and Table 2.

Table 1. List of Shareholders of PT. BPD Jawa Barat Banten

No.	Shareholders	Nominal Stock	Shares	Percentage (%)
1	Provincial Government of Jawa Barat	3.709.994.733.000,00	37.099.947,330	38,26
2	Local Governments in Jawa Barat	2.289.405.071.000,00	22.894.050.710	23,61
3	Provincial Government of Banten	520.580.856.000,00	5.205.808.560	7,76
4	Local Governments in Banten	752.328.406,00	7.523.285	0,22
	Total A (1 – 4)	7.272.218.666.000,00	72.722.186.660	75,00
	Society	2.424.072.500.000,00	24.240.725.000	25,00
	Total	9.696.291.1666.000,00	96.962.911.660	100,00

Source: Data is processed from the Annual Report of PT. BPD Jawa Barat Banten in 2017 (Published).

Table 2. List of Shareholders of PT BPD Jawa Timur

No.	Shareholders	Nominal Stock	Shares	Percentage (%)
1	Provincial Government of Jawa Timur	1.919.228.412.000	1.345.901,00	51,460
2	Local Governments in Jawa Timur	1.064.308.583.500	1.215.872,00	28,00
	Total A (1 – 4)	2.983.536.995.500	-	85,71
	Society	745.884.250.000	-	14,29
	Total	3.729.421.245.500	4.968.599,00	100,00

Source: Data is processed from the Annual Report of PT. BPD Jawa Timur in 2017 (Published).

To conclude, it can be seen that at PT. BPD Jawa Barat Banten, community participation in share ownership in PT. BPD Jawa Barat Banten has been seen and the percentage is basically quite large. The participation of the community as a shareholder in a company owned by the Government with a Regional Owned Enterprise either through the purchase of shares in a company that has been running or the initial process at the time of establishment, has a goal to be achieved namely: Another thing that can be achieved can be seen from several aspects, namely: the political aspect of how to try to carry out the process of economic transformation. From a social perspective, it is looking for several forms of capital distribution through the distribution of shares to the public and from an economic perspective to strengthen the market through business competition in economic activities.²

The privatization carried out by several countries can be used as an example in seeing the development of public participation in share ownership in government-owned companies, for example, France's experience in conducting privatization is aimed at increasing company efficiency and performance and leveling the company's

¹ Floquet, M., Guery, L., Guillot-Soulez, C., Laroche, P., & Stévenot, A. (2016). The relationship between profit-sharing schemes and wages: Evidence from French firms. *Management revue*, 27(4), 219-233.

² Ira W. Lieberman, et. al. *Mass Privatization in Central and Eastern Europe and the Former Soviet Union*; A. Comparative Analysis, the word bank, Washiton DC, 1995 p. 3. Privatization is intended as a means of transformation or transfer of burden from the state sector to the private sector whose purpose is to minimize the risks and responsibilities of managing the company. See: M. Irsyad Nasarudin and Indra Surya. *Aspek Hukum Pasar Modal Indonesia*, Jakarta: Kencana Pradana Media Group, 2007, p. 188

share ownership by encouraging the ownership base among the public. including employees are given priority to own the company's shares between a maximum of 20-30% of the company's shares. From the privatization, there is a political interest of the government, namely how the privatization of the government can get sympathy from the public and expand the ownership base of state enterprises.¹

As a comparison, Singapore's experience in privatization is intended to improve company performance and anticipate the era of globalization, and specifically in Singapore can group companies into two: First companies that have the status of government linked companies (GLCs), which are limited liability companies. where the government as shareholders and are required to obtain profits, both Statutory boards, namely companies that have social and commercial functions. In addition, privatization is intended to develop capital markets, both primary and secondary markets, and to expand competition. Privatization in Indonesia was carried out initially not targeted by a plan that was mature in a clear legal framework and intensive study to find out the advantages and disadvantages that would occur if done, but privatization was carried out because of pressure from donor countries (IMF) to see it as one way best to overcome the monetary crisis that occurred in Indonesia.²

Management of shares by cooperative employees, if there are employees who want to transfer the nominal value of the ownership of shares can be done directly by the person concerned with fellow members of the cooperative, determine the amount of the sale price agreed by both parties. In the case of employees who are willing to sell their shares and want to be done quickly, a temporary transfer transaction can be carried out to the cooperative with a selling value equal to the value of the book or the total value paid. The process of determining the sale and purchase by calculating the nominal value of the stock as a maximum benchmark should need to be properly regulated with certain standards such as paying attention to the nominal value of shares, company financial performance and proportional accumulation of general reserve value formed by the company as a capital component. These criteria then the "fairness principle" can be achieved in the process of buying and selling, and it becomes the responsibility of the cooperative as the manager of the shares of the employees.

The sale of shares that have occurred is done by selling to other shareholders with the price of the book recorded without taking into account the company's financial value and performance at the time of sale, meaning that sales must be based on the company's financial performance, if financial performance is good in the book it can be said to be unfair because it will harm the seller, on the contrary if the financial performance is less good then it can be said to be less fair because it will also harm the buyer. To overcome these things, there needs to be rules and mechanisms or criteria that become references so that the process can be carried out as agreed upon. This also happens if the cooperative members want to sell shares that have been paid to fellow members of the cooperative or to the Cooperative itself, pricing is only done by the parties, and do not yet have criteria and mechanisms that become a reference to get a fair price.

4. Legal Protection on Share Ownership and Management in Bank Pembangunan Daerah

Minority shareholders are one of the stakeholders besides the majority shareholders, Directors, Board of Commissioners, Employees and Creditors. Moreover, together with the majority shareholders, minority shareholders are also parties that carry the coffers for the company (*bagholders*). Therefore, it cannot be said that the minority shareholders to a certain extent should be protected by law.³

Another reason why minority shareholders need to be protected is because of the nature of decisions by the majority in a General Meeting of Shareholders (GMS) that are not always fair for minority shareholders, even though the majority decision making method is considered the most democratic. Because, with the majority decision system, it could be that someone who has financed the company up to 48% (forty eight percent) by holding a share of 48% (forty eight percent) has the same position in voting with only 1% (one percent) shares, and will be very different from shareholders 51% (fifty one percent).⁴ This is unfair, therefore, to maintain justice for every shareholder, whether he is the majority shareholder or minority shareholder, then the principle arises called "Majority Power with the Protection of Minorities" (majority rule minority protection).

The interests of majority shareholders with minority shareholders in a limited liability company often conflict with each other, so that the element of justice is fulfilled, a balance is needed so that the majority shareholders can enjoy their rights as the majority, including regulating the company. On the other hand, minority shareholders need to pay attention to their interests and cannot just ignore their rights. To safeguard interests on

¹ Aminuddin Ilmar. 2012. *Hak Menguasi Negara Dalam Privatisasi BUMN*. Kencana Group: Jakarta, p. 134 -135.

² *Ibid.*

³ Munir Fuady, *Perlindungan Pemegang Saham Minoritas*, Bandung: CV Utomo, 2005, p. 1

⁴ *Ibid.*, p. 55

both sides, the company is known as the "Majority Rule Minority Protection" principle in law. According to this principle, the ruler in the company remains the majority, but the authority of the majority party must be carried out by always protecting minority parties.

Given the existence of conflicting interests of the majority shareholders with the minority shareholders, the failure to achieve fairness as a condition for the realization of the Good Corporate Governance principle is also due to the power held by majority shareholders to monopolize the running of the company's business. The purpose of giving certain rights to minority shareholders is to maintain the principle of majority rule minority protection as an embodiment of the fairness principle of Good Corporate Governance practices. Therefore, these rights must be carried out without disturbing the interests of the majority shareholders, as well as the interests of other stakeholders.¹

Minority shareholders have other rights such as the right to give dissenting opinions, namely the right to disagree, including not to approve certain actions carried out by directors, such as mergers, acquisitions and others. Therefore, for the ordinary actions of the directors, there is no right to give such dissenting opinions. After giving the dissenting opinion and the majority shareholders at their establishment in the sense that they still disagree with minority shareholders, the minority shareholders can use appraisal rights, or what is often referred to as dissenters right, which is the right to leave the company with an obligation on the part of the company or other shareholders to buy the shares of the outgoing shareholders with appraised shares at a reasonable price.

Theoretically, the use of dissenting rights by minority shareholders can be done with cause or without cause. The point is that when minority shareholders refuse certain actions by requesting that the shares be bought by the company, the minority shareholders can state the reason such as the negligence of the directors or the actions he did not agree to harm the company. Even theoretically, he can reject it without mentioning a reason without a cause. However, the Limited Liability Company Law very narrowly acknowledges this dissenting opinion, which is recognized only if there is a reason that has been determined (with cause) and why it is only if the action is detrimental to the shareholders or the company.

The application of good corporate governance principles to companies whose entire or most share ownership begins with the issuance of the Decree of the Minister of State-Owned Enterprises Number KEP-117/MBU/2002 concerning the Implementation of Good Corporate Governance in the Agency State-Owned Enterprises. Corporate governance as a system used to direct and control the company's business activities, gives meaning to the regulation of the division of tasks and responsibilities among parties or key players who participate and have different interests in the company. The parties concerned with the direction and control of the company include the Directors, Managers, Shareholders and other stakeholders. Therefore, governance can also be interpreted as a set of relationships between the Board of Commissioners, the Board of Directors or the board of executive directors, stakeholders and shareholders of a company.²

Furthermore, the provision set forth in Act 40 of 2007 has not been implemented properly. Under these provisions is determined that the information should be published by the company include corporate activities, information about assets and investments as well as capital. Thus, it can be understood that the application of the principle of disclosure in the limited company still needs to be further enhanced. Relating to the information material as presented by the company, it can generally be viewed from two aspects of information material and recipient. The more complete material presented and the wider range of information recipient disclosed by the company, the level of disclosure is also higher.

The results showed that although the company stated that the information the company is always available to stakeholders and can be accessed at any time, but there is no section or department of company to handle its work specifically the availability of information for the parties concerned. In addition, the company also has not been present the entire company information and its management analysis on the Internet or other mass media which is easily accessible by the public. This suggests that the dominant of company information can only be accessed by the company's internal stakeholders like shareholders, commissioners, directors and employees.

For a public company or open company are required to maintain objectivity in conducting its business activities by providing relevant information material to the shareholders and other stakeholders. The company must also ensure the availability of information that is timely, appropriate, clear, accurate, and easily accessible. Delivering various routine reports that become a necessity for the public company include interim financial statements, semester financial statements, audit annual financial statements, annual reports, and incidental reports which included matters related to the corporation action, affiliate transaction, or material transaction. All in the form of public exposure and mass media. In addition, the company must provide the official website as one of the means

¹ Wahyono Darmabrata, *et. al.*, 2003, "Good Corporate Governance dalam Menyikapi Bentuk-Bentuk Penyimpangan Fiduciary Duty Direksi dan Komisaris Perseroan Terbatas", *Jurnal Hukum Bisnis*, Vol. 22 No. 6.

² Masyhud Ali, *Manajemen Risiko*, Jakarta: PT Raja Grafindo Persada, 2006, p. 334

that can be accessed by general public to obtain information about the annual report of the company. Information disclosure about material facts are accurately and fully for the open company is expected to realize the purpose of the principle of transparency and anticipate misleading statement for investors or other interested parties.

The company also has internal auditor and has audited also by an independent auditor. This indicates that the information disclosed by the company has been objective and can be accounted for in accordance with auditing standards applicable to the company. Therefore, it becomes necessity for the company to be audited by both internal and external auditors. This meant that the public trust for the company can be more assured.

Above all, the implementation of the main principles of governance in practice, banks are required to compile a corporate manual (BPP) that contains governance structure, governance process and governance outcomes into 11 (eleven) aspects that will be used as guidelines for evaluating the implementation of Governance, which is carried out through valuation methods self-assessment periodically every semester. The assessment guidelines contained in detail what must be done include questions that are assessment guides, but the fact cannot be applied properly, and the results of assessments conducted by the Financial Services Authority still find a number of weaknesses that must be addressed immediately if the composite Implementation Procedure The management wants to get composite good or very good.

5. Conclusion

The essence of participatory share ownership and management in the Regional Development Bank (BPD) is not directly owned by the shareholders, because of its ownership through cooperatives, so that the shares are issued in the name of the cooperative. Proof of ownership for the depositor is only obtained from the Cooperative that the person concerned has a nominal share deposit in the form of a certificate containing the amount of the nominal value of the ownership, or in the form of a stock savings account created and managed by the Cooperative which can be accessed offline (Savings book) or online with the application built by the Cooperative.

Legal protection for share ownership and management is participatory based, in principle, shares that are protected under the name of Cooperatives are classified as legal protection for minority shares, while employees who de facto as depositors of nominal shares are not well protected by law. In addition, the benefits of Participatory-based Share Ownership and management are to obtain dividends and other benefits received from cooperatives such as being a consecutive credit guarantee. Hence, to provide legal protection and certainty to participatory share nominal depositors, there must be binding rules between the parties as outlined in the provision of fund management (management regulation) on the terms of participation.

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