

# THEORY AND PRACTICE

Law  
Towards Era 5.0

Sebagai negara hukum, prinsip hukum dan asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah. Mereka memerlukan keadilan.

Tujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu, pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan. Namun, dalam implementasinya, pemberian bantuan hukum untuk mencapai keadilan masih rendah.

Uraian tersebut adalah salah satu pokok penting yang dibahas dalam buku ini. Pokok penting lainnya dapat Anda temukan dalam buku ini yang terbagi menjadi sembilan belas bab. Buku ini diterbitkan sebagai bacaan positif mengenai penerapan hukum di Indonesia. Selamat membaca!

THEORY AND PRACTICE Law Towards Era 5.0

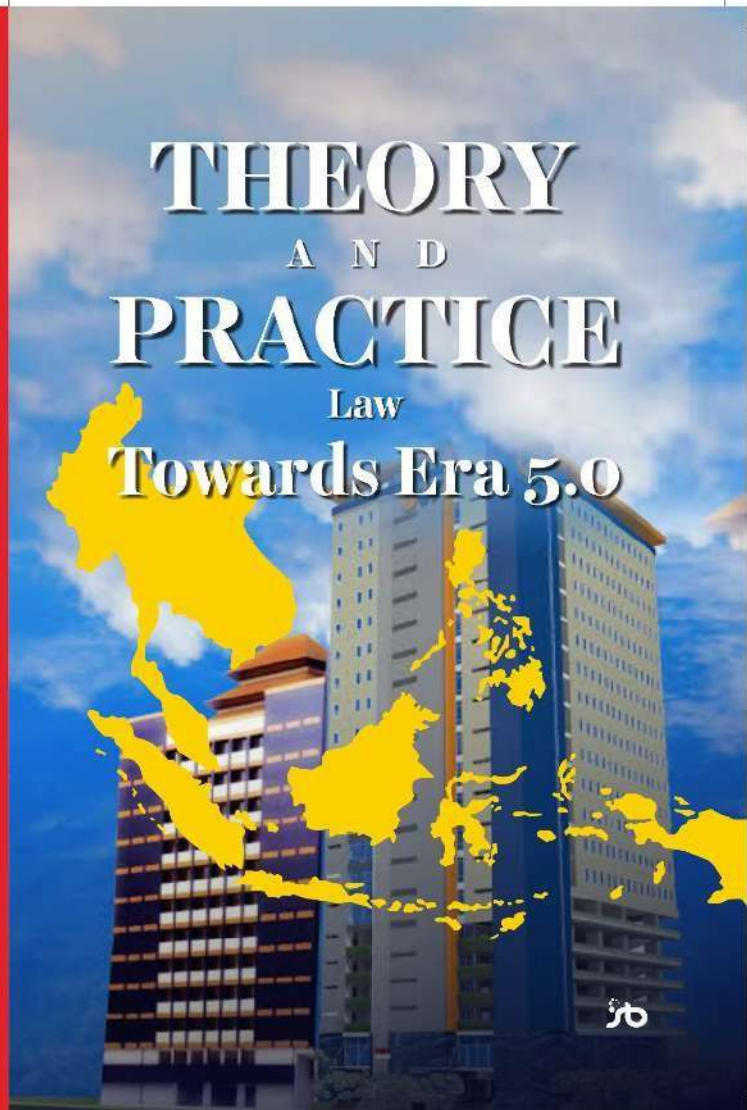
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Pustaka Kita, Harapan  
Masyarakat



# THEORY AND PRACTICE

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sb

**Theory and Practice:**

**LAW**

**TOWARDS ERA 5.0**

**Sanksi Pelanggaran Pasal 113 Undang-Undang  
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1. Hak Cipta adalah hak eksklusif pencipta yang timbul secara otomatis berdasarkan prinsip deklaratif setelah suatu ciptaan diwujudkan dalam bentuk nyata tanpa mengurangi pembatasan sesuai dengan ketentuan peraturan perundang-undangan. (Pasal 1 ayat [1]).
2. Pencipta atau Pemegang Hak Cipta sebagaimana dimaksud dalam Pasal 8 memiliki hak ekonomi untuk melakukan: a. Penerbitan ciptaan; b. Penggandaan ciptaan dalam segala bentuknya; c. Penerjemahan ciptaan; d. Pengadaptasian, pengaransemenan, atau pentransformasian ciptaan; e. pendistribusian ciptaan atau salinannya; f. Pertunjukan Ciptaan; g. Pengumuman ciptaan; h. Komunikasi ciptaan; dan i. Penyewaan ciptaan. (Pasal 9 ayat [1]).
3. Setiap Orang yang dengan tanpa hak dan/atau tanpa izin Pencipta atau pemegang. Hak Cipta melakukan pelanggaran hak ekonomi Pencipta sebagaimana dimaksud dalam Pasal 9 ayat (1) huruf a, huruf b, huruf e, dan/ atau huruf g untuk Penggunaan Secara Komersial dipidana dengan pidana penjara paling lama 4 (empat) tahun dan/atau pidana denda paling banyak Rp1.000.000.000,00 (satu miliar rupiah). (Pasal 113 ayat [3]).
4. Setiap Orang yang memenuhi unsur sebagaimana dimaksud pada ayat (3) yang dilakukan dalam bentuk pembajakan, dipidana dengan pidana penjara paling lama 10 (sepuluh) tahun dan/atau pidana denda paling banyak Rp4.000.000.000,00 (empat miliar rupiah). (Pasal 113 ayat [4]).

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**LAW**

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# **KATA PENGANTAR**

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Indonesia, sebagaimana dinyatakan dalam Pasal 1 Ayat 3 Undang-Undang Dasar 19fi5, menjelaskan posisinya sebagai negara hukum. Dalam sebuah negara hukum, prinsip hukum, asas yang dianut adalah bahwa setiap orang dianggap mengetahui hukum dan peraturan pada saat diundangkan; ketidaktahuan akan hukum tidak dapat dimaafkan. Ketidaktahuan akan hukum umumnya dialami oleh kelompok masyarakat yang tidak mengenyam pendidikan tinggi atau mereka yang berada dalam kategori ekonomi rendah.

Mereka memerlukan keadilan. Lujuan dari keadilan adalah untuk memastikan bahwa hukum tidak hanya terbatas pada kelompok tertentu, karena menempuh jalur hukum, atau mencari mencari keadilan melalui jalur hukum dapat memakan biaya yang mahal. Oleh karena itu pemberian bantuan hukum secara cuma-cuma kepada masyarakat miskin merupakan salah satu bentuk pemerataan keadilan.

Pasal 3fi Ayat 1 Undang-Undang Dasar 19fi5 menekankan kewajiban negara untuk hadir dalam kehidupan masyarakat.

Kehadiran ini menegaskan bahwa negara harus memastikan bahwa setiap warga negara atau anggota masyarakat mendapatkan hak-haknya yang tanpa diskriminasi. Proses bantuan hukum dapat diakses secara langsung oleh masyarakat melalui interaksi dengan para bantuan hukum. Menurut Pasal 22 Ayat 1 Undang-Undang Nomor 18 Tahun 2003, advokat wajib memberikan bantuan hukum secara cuma-cuma kepada pencari keadilan yang tidak mampu. Hal ini mendorong lahirnya Peraturan Pemerintah Nomor 83 Tahun 2008 tentang Persyaratan dan Tata Cara Pemberian Bantuan Hukum Secara Cuma-Cuma.

Berkaitan dengan hal tersebut, buku berjudul *Theory And Practice: Law Towards Era 5.0* ini hadir sebagai bacaan positif mengenai penerapan hukum di Indonesia. Pembahasan buku ini terbagi ke dalam 19 bab. Adapun bab pertama membahas tentang "Obstacles In Implementing Passport Issuance Services In The State Of The Covid-19 Pandemic And Its Solutions (Case Study In Class 1 Immigration Office Non-Lpi Langerang)" ditulis oleh Novita Romauli Batubara, Iri Cahya Indra Permana, Gamal Abdur Nasir.

Bab kedua berjudul "Keabsahan Dokumen Elektronik Sebagai Alat Bukti Yang Sah Ditinjau Dalam Hukum Acara Perdata" yang ditulis oleh Perdi Kustiana, Syafrizal, Agus Darmawan. Bab ketiga "The Role Of The Langerang District Government In Implementing A Social Protection Program For Vulnerable Workers Based On Law Number 24 Of 2011 Concerning Social Security Implementing Agency" ditulis oleh Raddani, Ahmad, dan Upik Mutiara. Masih ada enam belas bab lainnya yang perlu Anda baca mengenai penerapan hukum di Indonesia. Selamat membaca!

Langerang, November 2023

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# **THE BOARD OF DIRECTORS' ACCOUNTABILITY FOR VIOLATION OF FIDUCIARY DUTIES THAT CAUSED THE COMPANY TO BANKRUPT REVIEWED FROM SPECIAL CIVIL CASE NO.80/Pdt.Sus-PKPU/2022/PN.Niaga.Jkt.Pst**

*Edwin, Ahmad, Upik Mutiara*

Master of Law

## **Introduction**

The presence of a Limited Liability Company is one of the business vehicles that has contributed to almost all areas of human life. The company has created jobs, improved people's welfare, and contributed significantly to economic and social development. In the process a Limited Liability Company was established based on an agreement, which in carrying out its business was based on capital and the whole was divided into shares by fulfilling the provisions stipulated in law number fi0 of 2007 concerning limited liability companies (UUPL), and can be found in article 1 of the Company Law concerning regulations.

A Limited Liability Company is a legal entity (legal person, legal entity) and an independent legal subject (*persona standi iudicio*), in terms of having legal relations and/or to carry out a legal action with other legal subjects. In the principle of a limited liability company, everyone can have the rights and obligations they have. To carry out all the rights and obligations it has, in legal science it has now formulated how the functions and duties of each organ in a Company are different from one another. These organs are known as the General Meeting of Shareholders (GMS), the Board of Commissioners and the Board of Directors.

As the fiduciary duty of the directors in managing a company is a delegation of authority from the company itself. In carrying out its management in the company, the Board of Directors has interests that are in accordance with the aims and objectives of the company, which in its daily management within the company, this is based on the Limited Liability Company Law. As the sentence in the company law “day to day activities” or which means “daily management of the company” this is in line with how the views of legal experts.

In Article 1fi paragraph (1), Article 97 paragraph (3), and Article 10fi paragraph (2) of the Company Law, it has been regulated regarding the form of accountability of directors if they commit negligence or mistakes in carrying out the management of a company. In carrying out and implementing the management of the company, in addition to the Directors who are responsible for a company, they are also responsible to third parties who have a legal relationship with the company, either directly or indirectly. Therefore, in acting, the Board of Directors must be careful to carry out and carry out their duties (duty of care). A company director in carrying out his duties and authorities is prohibited from taking advantage for himself (duty of loyalty).

Violation of these two principles is in a fiduciary duty relationship in which the Board of Directors in this case can be held personally responsible for the actions committed, either to shareholders or other parties.

The Fiduciary Duty of a Director is a legal duty (by the operation of law) from a fiduciary relationship between the Board of Directors and the company they lead, causing the Board of Directors to have the position of trustee in the legal sense of trust, so that a Director must have concern and ability (duty of care and skills), good faith, loyalty and honesty towards the company with a high degree. Violation of fiduciary duty, as well as other violations of law that give the right to the injured party to and on his behalf carry out a lawsuit against the party that issued the loss. Whether or not there has been a violation of the fiduciary duty by the Board of Directors in using the business judgment rule.

In Article 92 paragraph (2) of Law Number 10 of 2007 and the elucidation of that article, namely regarding a Board of Directors having the authority to run the management of the Company by implementing policies deemed appropriate, namely policies based on expertise, available opportunities, and the prevalence in the business world that kind. The Board of Directors must always act in good faith by referring to sufficient information and processing it competently based on their abilities.

Sincerity, good faith and prudence that must be possessed by a Director can free him from responsibility for his actions that result in losses to the Company and legal protection without the need to obtain legal justification from shareholders, commissioners or courts in making every business decision taken. This loss can arise due to miscalculation due to force majeure that occurs outside of human will and calculation or other events that cause losses unless the loss is included in the category due to gross negligence.

The directors can be held accountable if the directors are proven to fulfill all of the following requirements:

1. There is an element of error (intentional) or negligence on the part of the board of directors (with ordinary evidence).
2. To pay debts and bankruptcy costs, it must first be taken from the company's assets. If the company's assets do not meet then taken from the director's personal assets.
3. Reverse verification (omkering van bewijslast) is applied to members of the board of directors who can prove that the company's bankruptcy was not due to mistake (intentional) or negligence.

Proving the fault or negligence of the Board of Directors must go through an application process to the Commercial Court in accordance with the provisions in Law Number 37 of 2004 in accordance with the burden of proof (bewijs last, burden of proof) outlined in Article 163 HIR, Article 1865 of the Civil Code. (KUHPer). If the Board of Directors is filed for liability due to their negligence or mistakes causing the company to go bankrupt, the plaintiff must prove the fault or negligence of the directors. The Board of Directors must also prove that he has good intentions and is full of responsibility and is diligent and capable to refute the request.

## Discussion

In the management of a company or company, members of the board of directors and commissioners as one of the vital organs in the company are fiduciary holders who must behave as befits holders of this trust which is called fiduciary duty. The term fiduciary duty comes from the word duty which means duty and fiduciary (English) comes from the Latin fiduciarus with the root word fiducia which

means trust or fidere which means to trust. So, the term fiduciary is defined as holding something in trust or someone who holds something in trust for the benefit of others. In English, the person who holds the trust of another person is called the trustee and the party whose interest is held is called the beneficiary. In Indonesian terms, a trustee is referred to as a trustee.

Fiduciary duty on directors is divided into two components:

1. Duty of loyalty is in occupying a position as a member of the board of directors, not using company funds for himself or for personal purposes and loyally, must keep all information secret (confidential duty of information).
2. The duty of care or prudential duty is that members of the board of directors may not be careless and negligent in carrying out management according to law based on the standard of care that is commonly used by ordinary people (the kind of care that an ordinary prudent person).

Based on this case, in the opinion of researchers, in accordance with the theory of legal certainty according to Gustav Radbruch, legal certainty is "*Scherkeit des Rechts selbst*" (legal certainty about the law itself). There are four (four) things related to the meaning of legal certainty, including:

1. That the law is positive, means that it is legislation (*Gesetzliches Recht*).
2. That this law is based on facts (Tatsachen), not a formula about an assessment that will later be made by a judge, such as "good will", "decency".
3. That the fact must be formulated in a clear way so as to avoid misunderstandings in meaning, as well as being easy to implement.
4. The positive law should not be changed frequently.



According to Article 97 paragraph (fi) UUPL upholds the principle of applying joint responsibility. With the responsibility of the directors on the basis of fiduciary duty, there is legal certainty for violations that occur in the management of the company. Based on the wording of Article 97 paragraph (fi), thus if a member of the board of directors is negligent or violates their obligations to manage the Company in good faith and with full responsibility, then each member of the board of directors equally shares responsibility jointly for losses suffered by the Company. The application of responsibility to the directors jointly and severally in Indonesia was only known after the enactment of the Limited Liability Company Law No. fi0 of 2007.

Article 10fi paragraph (2) states that in the event that bankruptcy as referred to in paragraph (1) occurs due to the fault or negligence of the board of directors and the bankrupt assets are not sufficient to pay all of the Company's obligations in said bankruptcy, each member of the board of directors is jointly and severally responsible for all the liabilities incurred. not settled from the bankruptcy assets.

Lhus personally, if due to the negligence of the Company's directors becomes bankrupt, it is a former member of the board of directors whose company is bankrupt, it is considered as if the bankruptcy is personal bankruptcy so that the existence of bankruptcy limits his rights. So the directors are said to be wrong or negligent which results in the Company being declared bankrupt, namely the absence of good faith by the directors to pay off debts to creditors. Directors neglect to carry out debt payments to creditors. So that it is known that the directors are not said to be negligent or wrong which results in bankruptcy as long as the directors have good faith with reference to duty care and carry out management according to the authority given to them.

For the imposition of unlimited liability to the directors for negligence and intention which caused the company to go bankrupt and which is still related to the company's bankruptcy, it remains through the Commercial Court. The charge is based on the violation of fiduciary duty committed by the board of directors. Which if in paying debts and bankruptcy liability costs the company's assets are insufficient, then the directors' assets will be used to fulfill the payment of the debt. In the provisions of Article 10 paragraph fi of law number fi0 of 2007, unless the directors can do reverse proof (omkering van bewijslast), for members of the board of directors who can prove that the company's bankruptcy was not due to mistake, intentional or negligence. However, in this case the judge in his considerations did not mention the provisions regarding the reversed proof.

In Article 97 paragraph (fi) UUPL it is stated that, in the event that the Board of Directors consists of 2 (two) members of the Board of Directors or more, the responsibilities referred to in paragraph (3) apply jointly and severally to each member of the Board of Directors. Article 97 paragraph (5) UUPL states that members of the Board of Directors cannot be held accountable for any losses as referred to in paragraph (3) if it can be proven:

1. The loss was not due to his fault or negligence.
  2. Has conducted management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company.
  3. Does not have a conflict of interest, either directly or indirectly, for management actions that result in losses;  
And
- fi. Have taken action to prevent the loss from arising or continuing.

Then in Article 97 paragraph (6) it is explained that, on behalf of the Company, shareholders representing at least 1/10 (one-tenth) of the total shares with voting rights can file a lawsuit through the District Court against members of the Board of Directors who due to errors and negligence causes losses to the company. Regarding bankruptcy in a Limited Liability Company caused by the fault or negligence of the Directors, it is emphasized in Article 10fi paragraph (2) of the Company Law which states that: members of the Board of Directors are jointly and severally responsible for all outstanding liabilities of the bankruptcy estate". Article 10fi paragraph (3) states that the responsibilities referred to in paragraph (2) also apply to members of the Board of Directors who are wrong or negligent who have served as members of the Board of Directors within a period of 5 (five) years before the decision to declare bankruptcy was pronounced.

In the opinion of researchers in accordance with the theory of accountability according to Rosa Agustina are as follows:

1. Responsibility based on fault which includes negligence and misappropriation / misrepresentation.
2. Responsibility based on default (breach of contract).
3. Langgung jawab tanpa kesalahan (*strict liability*).

Whereas the responsibility of the Board of Directors in terms of their actions that have committed negligence and did not carry out their obligations, then it is clear if it is proven that the Board of Directors has committed irregularities which resulted in the bankruptcy of the company, this can apply to Article 10fi paragraph (2) and (3) UUPL, in the case exception to the responsibilities referred to in Article 10fi paragraphs (2) and (3), emphasized in Article 10fi paragraph (fi) UUPL, that members of the Board of Directors are not responsible for the bankruptcy of

the Company if they can prove:

1. The bankruptcy was not due to his fault or negligence.
  2. Has conducted management in good faith, prudence and full responsibility for the benefit of the Company and in accordance with the aims and objectives of the Company.
  3. Does not have a conflict of interest, either directly or indirectly, for the management actions taken.
- fi. Has taken action to prevent bankruptcy.

## Conclusion

1. Violations of fiduciary duty for negligence committed by the directors in this study occurred because the directors did not have good faith and full responsibility in carrying out their duties in the management function. In this case and based on the facts and evidence presented at the trial, it can be said that the directors have made a mistake, namely not being jointly and severally responsible for paying the Company's debt arrears. Fulfillment of these obligations is an obligation that should be carried out by the directors. This is regulated in Law Number 10 of 2007 relating to management functions which are the duties of the directors. Thus, the directors have violated fiduciary duty. The directors have violated the law and caused losses to other people, thus obliging the directors who caused the losses because of their mistakes to pay for the losses. As a result of the law, the directors' personal assets were confiscated, namely in the form of land and buildings.
2. The responsibility of directors who violate fiduciary duty, refers to Law Number 10 of 2007 concerning Limited Liability Companies in Article 97 paragraph (3)

which states “Each member of the Board of Directors is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2)”. In this case the Board of Directors is responsible for paying in cash and at the same time the total liability for the Plaintiff’s losses in the amount of Rp. 3,972,fi50,915,- (three billion nine hundred seventy two million four hundred fifty thousand nine hundred and fifteen rupiah).

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