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Judicial Review of the Application of Corporate Legal Veil in Malaysia and Indonesia: A Legal Comparison

Muhammad Hakeem¹, Adam Afiz², Samuel Buha Raja Nadeak³, Muhammad Fadil^{*4}, Zilmi Haridhi⁵

^{1,2}Universiti Teknologi Mara, Shah Alam, 40450, Malaysia

^{3,4,5}Universitas Sumatera Utara, Medan, 20155, Indonesia

*Corresponding Author: fadil.200200265@students.usu.ac.id

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ABSTRACT

This study aims to find a comparison of the Legal Corporate Veil between Malaysia and Indonesia. This research is a normative legal research as a literature review. It is found that in corporate law both in Malaysia and Indonesia there is a principle of limited liability between shareholders and company directors known as Separate Legal Entity. This principle essentially asserts that a person's responsibility in a company is limited to their responsibility within the company and does not extend to personal liability. In Malaysia, this regulation is governed by Section 20 of the Companies Act 2016. Meanwhile, in Indonesia, this principle is scattered in the provisions of the Limited Liability Company Act (UU PT) applicable to shareholders, directors, and commissioners. However, this principle may become inapplicable in certain cases, known as Piercing The Corporate Veil. In Malaysia, this is regulated under the Companies Act 2016 as well as several judicial decisions. In Indonesia, this principle becomes inapplicable if shareholders act in bad faith by using the company for personal gain and are involved in legal actions undertaken by the Company. One form of protection from personal liability for Directors and Commissioners is implemented based on the Business Judgement Rule principle. Personal liability does not apply if Directors and Commissioners can prove that the company's loss is not due to their negligence, they have acted in good faith, have no conflict of interest, and have taken action to prevent losses. In this study, there is also corporate responsibility outside the existing Limited Liability Company Law based on business and economic developments decided by The Constitutional Court.

Keyword: Separate Legal Entity, Piercing the Corporate Veil, Limited Liability Company Act

ABSTRAK

Penelitian ini bertujuan untuk mengetahui perbandingan Hukum Corporate Veil antara Malaysia dan Indonesia. Penelitian ini merupakan penelitian hukum normatif yang bersifat studi kepustakaan. Hasil penelitian menunjukkan bahwa dalam hukum korporasi baik di Malaysia maupun di Indonesia terdapat prinsip pertanggungjawaban terbatas antara pemegang saham dengan direksi perusahaan yang dikenal dengan istilah Separate Legal Entity. Prinsip ini pada intinya menegaskan bahwa tanggung jawab seseorang dalam suatu perusahaan hanya terbatas pada tanggung jawabnya di dalam perusahaan dan tidak meluas ke tanggung jawab pribadi. Di Malaysia, peraturan ini diatur dalam Pasal 20 Undang-Undang Perusahaan 2016. Sementara itu, di Indonesia, prinsip ini tersebar dalam ketentuan Undang-Undang Perseroan Terbatas (UU PT) yang berlaku untuk pemegang saham, direksi, dan komisaris. Namun, prinsip ini dapat menjadi tidak berlaku dalam kasus-kasus tertentu, yang dikenal sebagai Piercing The Corporate Veil di Malaysia, hal ini diatur dalam Companies Act 2016 serta



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beberapa keputusan pengadilan. Di Indonesia, prinsip ini menjadi tidak berlaku apabila pemegang saham beritikad tidak baik dengan memanfaatkan perusahaan untuk kepentingan pribadi dan terlibat dalam tindakan hukum yang dilakukan oleh perusahaan. Salah satu bentuk perlindungan dari tanggung jawab pribadi bagi Direksi dan Komisaris diterapkan berdasarkan prinsip Business Judgement Rule. Tanggung jawab pribadi tidak berlaku jika Direksi dan Komisaris dapat membuktikan bahwa kerugian perusahaan bukan karena kelalaiannya, telah bertindak dengan itikad baik, tidak memiliki benturan kepentingan, dan telah melakukan tindakan pencegahan kerugian. Dalam penelitian ini, terdapat pula pertanggungjawaban korporasi di luar Undang-Undang Perseroan Terbatas yang ada berdasarkan perkembangan bisnis dan ekonomi yang diputuskan oleh Mahkamah Konstitusi.

Kata Kunci: *Badan Hukum Terpisah, Piercing The Corporate Veil, Undang-Undang Perseroan Terbatas*

1. Introduction

The concept of corporate legal veil, a cornerstone principle in company law, serves as a protective barrier delineating the legal entity of a corporation from the personal liabilities of its shareholders and directors. This legal construct embodies the fundamental premise that a corporation possesses its own distinct legal personality, separate and apart from those who own or manage it. By establishing this separation, the corporate veil shields stakeholders from being personally liable for the debts, obligations, and legal liabilities incurred by the company.

However, the application of the corporate legal veil is not absolute and may be subject to judicial scrutiny and review under certain circumstances. Courts have the authority to pierce the corporate veil, effectively disregarding the legal fiction of corporate personality, and hold shareholders or directors personally liable for the company's actions. This judicial intervention typically occurs when there is evidence of fraud, improper conduct, or an abuse of the corporate form to perpetrate injustice or evade legal obligations.

The Malaysian and Indonesian legal systems provide compelling case studies for examining the judicial review of the application of corporate legal veil. As vibrant economies with burgeoning corporate sectors, both countries have developed robust legal frameworks governing corporate entities. However, the interpretation and application of corporate law principles, including the doctrine of piercing the corporate veil, may vary between jurisdictions due to differences in legal traditions, cultural norms, and judicial precedents.

This paper endeavors to undertake a comprehensive analysis and comparison of the judicial review of the application of corporate legal veil in Malaysia and Indonesia. By delving into relevant statutory provisions, landmark court decisions, and scholarly commentary, this study aims to elucidate the similarities and distinctions in the judicial approaches adopted by Malaysian and Indonesian courts when confronted with issues related to piercing the corporate veil.

Understanding the nuances of judicial review in Malaysia and Indonesia is imperative for legal practitioners, policymakers, and scholars seeking to navigate the complexities of corporate law in these jurisdictions. Insights gleaned from this comparative analysis can inform corporate governance practices, mitigate legal risks, and contribute to the ongoing evolution of company law in both countries. Furthermore, a deeper understanding of the judicial review process can foster cross-border collaboration and facilitate the harmonization of legal principles, thereby promoting a more cohesive legal framework for corporate entities operating in the Southeast Asian region.

2. Method

The research conducted in this writing is normative legal research. Ediwarmarman in his book “Monograf Metode Penelitian Hukum” states that normative legal research is library research, which involves conducting research by examining secondary source materials¹. This type of research is inherent to legal issues that are the focus of the study, emphasizing analysis of law and applicable legislation. The data sources used in this research are secondary data, which are derived from library studies aimed at obtaining theories or concepts that can be used

¹ Ediwarmarman. (2016). Monograf Metode Penelitian Hukum. Yogyakarta: Genta Publishing, hal. 21.

in the research composition. The data used in the preparation of this research are legal journals, legal books, legal decisions, and some legal writings on several official internet pages.²

3. Results and Discussions

3.1 Corporate Legal Veil Doctrine Overview in Malaysia

Generally, when a company has been formed and registered, the corporate veil will drop to separate the company from its members and officers. The veil will act to protect all its members and officers from any debts or liabilities of the company (*Salomon's* case and section 20 of Companies Act 2016). In this situation members and officers cannot be sued or be made liable for any debts for or liabilities of the company. However, there are situations or exceptions in which the veil may be lifted, pierced or penetrated. When the veil is lifted, the company is no longer a separate body. The company and members including the officers now become a single body. The effect of this is that the members and the officers can be made liable on the company's debts or liabilities. This is important to avoid any misused of the separate legal entity principles. Culprit may incorporate a company to commit fraud and hide behind the veil of incorporation. The veil may be lifted or pierced by the court either under situations provided by the CA 2016 itself or under several other acts (statutory exceptions) or on its own discretion (judicial exceptions).

3.1.1 Lifting The Veil of Incorporation Under Statutory Exceptions

Statutory exceptions under sections 36, 121(2) and 365 provided in the previous CA 1965 has been omitted by CA 2016. Section 36 has been omitted due to the recognition of a one-member company by CA 2016. Further, the law under section 365 has been amended to impose liability on the director and manager of the company if the dividend is paid contrary to the prescribed rule. No more liability to the creditor as in CA 1965. However, CA 2016 has adopted several other circumstances for lifting the corporate veil with different number of sections. The following are the statutory provisions under CA 2016 and other statues that may cause the veil to be lifted and thus make the members or the officers liable:

1. Section 539(3) and section 540(2) - When debts contracted at the time the company has no ability of repayment
According to section 539(3) if an officer contracted debts on behalf of the company and at the time the debts are contracted he had no reasonable or probable expectation that the company would be able to pay the debts, he shall be guilty of an offence against this Act and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding RM500,000 or both. Further, under section 540(2) the court may, on application of the liquidator or any creditor or contributory of the company, declare that officer to be personally liable without any limitation of liability for the payment of the whole or any part of the debts to make good the loss due to creditor.
2. Section 540(1) - When involving in fraudulent trading
According to the section, if in the course of winding up or in any proceeding against a company it appear that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on application of the liquidator or any creditor or contributory of the company, declare that any person who is knowingly a party to the carrying on of the business in that manner to be personally responsible, without any limitation of liability, for all or nay of the debts or other liabilities of the company.
3. Section 186(4) - Failure of obtaining minimum subscription
If a company issues a prospectus and the minimum subscription is not received within four months of the issue of the prospectus, all moneys received from applicants for shares shall be refunded to the applicants without interest or returns. If such money is not refunded within five months after the issue of the prospectus, the directors shall be jointly and severally liable to refund that money with interest or returns at the rate of 10% per annum from the expiration of the period of five months to the applicants. The director, however, is not liable if he can prove that the default in the repayment of the money was not due to any misconduct or negligence on his part.
4. Section 123(4) - Breach of the financial assistance rule

² M. Agus Santoso. (2011). Kajian tentang Manfaat Penelitian Hukum Bagi Pembangunan Daerah. *Yuriska Jurnal Ilmiah Hukum*, 3(2), 14. DOI: <https://doi.org/10.24903/yrs.v3i2.117>

Section 123 of CA 2016 prohibit a company from giving financial assistance for the purchase of shares in the company or shares in its holding company. Any offer who contravenes this, commit an offence and shall, on conviction, be liable to a fine or imprisonment. Further, section 123(4) provides that the officer who is convicted may be held liable by the court to pay compensation to the company or the person who has suffered loss or damage as a result of the breach. Hence, the section indirectly allows the veil to be lifted to impose liability on the officers who authorised a prohibited transaction of giving financial assistance. Such officers cannot hide behind the veil to escape liability.

5. Section 140(1) of the Income Tax Act 1967 - Avoiding payment of tax
Under the section, the Director-General of Inland Revenue is allowed to ignore transactions which have the effect of avoiding and evading any liability to tax. In other words, he may disregard the separate legal personality of a company where that is a mere facade concealing the true state of affairs.
6. Section 46 of the Employee Provident Fund (EPF) Act 1991 - failure of the company to remit contribution to the fund
'EPF' is a compulsory saving for the retirement plan for employees in Malaysia. Both the employer and the employee are to contribute a minimum of 12% and 11% respectively of the employee's salary to the fund. If the employer is a company, any failure of it to remit the contribution to the fund is an offence. Section 46 of the Act provides that the directors of the company at the time the action is taken and the directors at the time of non-contribution are jointly and severally liable with the company. In this respect, the directors and the company are considered one single entity.
7. Section 108A of the Employees Social Security Act 1969 - Failure of the company to remit the premium to the Social Security Organisation (SOCSO)
Social Security Organisation (SOCSO) is established under the Employees Social Security Act 1969 to implement employee's injury insurance schemes for the benefit of the employees. Under the scheme, both employer and employee will contribute toward its premium. According to the section 108A of the Act, if the employer is a company, any failure of it remit the premium to SOCSO, may cause the directors of the company at the time action is taken and the directors at the time of non-payment to be jointly and severally liable with the company for the unpaid amount. This means that the company and the directors are treated as a single entity.

3.1.2 Lifting The Veil of Incorporation Under Judicial Exceptions

Other than by circumstances provided by the statutes, the veil of incorporation can also be lifted by court that is exercising its judicial discretion. The courts have in several occasions lifted the veil and made people behind the veil or the controller of the company liable. The following are among the circumstances where the courts have lifted the corporate veil:

1. When the company is used to evade legal obligations

If a person uses a company as an instrument to evade a contractual duty or legal obligation, the court may lift the veil and disregard the separateness of the company. When this happens, the company and members or officers become a single body and therefore they can be made liable for the company's liabilities.

Gilford Motor Co v Horne

In this case, Horne was formerly the managing director of the Gilford Motor Company (the plaintiff). While he was still with the company he entered into a contract with the company whereby he agreed not to solicit customers of the company after the termination of his employment. When he left the company he set up a company called JM Horn & Co.Ltd. Through this new company he solicited the Plaintiff's customers. The plaintiff then brought an action against Horne and his company for breach of contract.

The court granted injunction against both Horne & his company, having held that he had breached his contract even though he was not the one who personally solicited the customers. He was liable for the act of the company as the court lifted the veil and treated him and the company as a single entity. Horne had used his company to evade contractual obligation.

Jones v Lipman

In this case, Lipman entered to a contract to sell a house to Jones. However before the house was transferred to Jones he changed his mind. To avoid the liability of transferring the house, Lipman set up a company called Alamed Ltd. and transferred the house to it. Alamed Ltd. was wholly owned and controlled by Lipman. Lipman then wrote to Jones offering to pay damages for the breach of contract. However Jones sought an order of specific performance against the company. Alamed Ltd raised a defense claiming that it was not a party to the contract. Therefore specific performance could be ordered against it.

Russell J declined to accept this defense. Alamed Ltd was a creature of Lipman, a device and a sham, a mask he holds before his face in an attempt to avoid the contractual obligation. Therefore both Lipman and the company were ordered to specifically perform the contract to sell the house. Both were treated as a single body.

The decision in the above two cases were approved by the then Supreme Court of Malaysia in the case of *Lim Kar Bee v Duofortis Properties (M) Sdn. Bhd.*. In this case Peh Swee Chins SCJ said that the court had a discretion to lift the corporate veil for the purpose of discovering any illegal or improper purpose.

2. When the company is used to commit fraud or improper purpose

If a company is used as a cloak to commit a fraud, the court will lift the corporate veil and impose liability upon the person who is involved in the fraud.

Re Darby

In this case, Darby and Gyde formed a company called City of London Investment Corporation Ltd. (City). City purchased a license to work in a quarry. Then, City formed and promoted another company called Welsh Slate Quarries Ltd. (Quarries). City sold the quarrying license to Quarries at a substantial overvalue. The profits were then divided between Darby and Gyde. Quarries then failed and had to go into liquidation. The liquidator sought to make Darby liable to account for the profit made on the grounds of breach of duty as a promoter. Darby raised a defense claiming that in law he and City were different persons. The profit was made by the company formed by Darby and Gyde and not by Darby himself. The court rejected the defense and held him liable to disgorge his profit because the company (City) was a ‘dummy company’ formed for the purpose of enabling him to penetrate fraud.

In *Re Bugle Press Ltd.* there were three shareholders, J, S and T in Bugle Press. J and S wanted to buy T’s shares. As T refused, J and S incorporated another company, J&S Holdings Ltd. J&S Holdings Ltd then offered to buy all the shares in Bugle Press Ltd from J, S and T. J and S accepted. J&S Holding Ltd then exercised its legal right to compulsorily take over the company and compel T to sell his shares to the company. In this case the court lifted the veil of incorporation of J&S Holdings Ltd. The court held that J&S Holding was a sham as it was incorporated to enable the majority shareholders of J&S Holdings Ltd, namely J and S, to expropriate shares from T, the minority shareholder.

3. When the company is employed as an agent or alter ego of its controllers

If the company is appointed as an agent by its controllers or shareholders, the controllers or the shareholders being the principals are liable for the company’s acts on normal agency principles.

Smith, Stone & Knight Ltd. v Birmingham Corporation

In this case, Smith, Stone, and Knight Ltds (SSK) was the parent or holding company for Birmingham Waste Co (BW). SSK held all the shares in BW except five which were held by its directors in trust for SSK. All the profits of BW were treated as SSK’s profits and BW was under control of SSK. The Birmingham Corporation desired to compulsorily acquire the premises under their powers. The issue was whether SSK could claim compensation for disturbance of the business which was carried on at those premises. Under section 121 of the Lands Clauses Consolidation Act 1845, the corporation is allowed to get rid of occupiers with no greater interest than a tenancy not exceeding one year by giving notice to terminate their tenancy without paying any compensation. In this case it was contended that BW was operating on behalf of SSK and therefore SSK could claim the compensation.

The court held that SSK, the parent company, was the proper party to claim the compensation. The court was satisfied that the business of BW belonged to SSK and SSK could be regarded as the real occupier of the premises. In other words, BW was regarded as an agent to SSK. So the business carried on by BW on the premises was regarded as the business of SSK.

In Malaysia, it seems that lifting the corporate veil on agency ground has not been fully considered by courts even though the case of *Smith, Stone Knight* was cited in the case of *Jaya Puri Hotel Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor*.

3.2 The Corporate Legal Veil Regulation in Indonesia

3.2.1 Overview of the Application of Corporate Legal Veil Regulation in the Indonesia Legal System

Indonesian corporate law does not explicitly elaborate the concept of the corporate legal veil. The general principle known in Indonesian corporate law is the principle of separate legal entity or limited liability principle as stated in Act Number 40 of 2007 concerning Limited Liability Companies Act or “Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas (UU PT)”. The principle of separate legal entity or limited liability is the main characteristic of a Limited Liability Company. This principle has been recognised since The Commercial Code or Kitab Undang-Undang Hukum Dagang (KUHD) regulated companies. As stated in Article 40 of The Commercial Code (KUHD), asserts that shareholders and owners are not liable for more than the full amount of their shares³. It is maintained and developed in the legislation regulating companies where there is limited liability for shareholders, directors, and/or other corporate organs.

The Commercial Code (KUHD) does not assert that a Limited Liability Company (Perseroan Terbatas) is a legal entity. However, as it evolves, as regulated in Article 1 paragraph (1) of the Limited Liability Company Act (UU PT), it affirms that a Limited Liability Company is a legal entity desired by the law. Based on the thoughts of Ray Widjaja⁴, the characteristics of a Limited Liability Company as a legal entity are as follows: (1) As a capital association; (2) The assets and liabilities of the Limited Liability Company are separate from those of the shareholders; (3) Shareholders: (a) are only responsible for what they have paid or limited liability; (b) are not liable for the company's losses beyond the value of the shares they have taken; (c) are not personally liable for agreements made on behalf of the company; (4) There is a separation of functions between shareholders and management or directors; (5) Having commissioners who serve as supervisors; and (6) Ultimate authority lies with the General Meeting of Shareholders. From the description above, it is clear that a Limited Liability Company has very distinctive characteristics, namely, it has its own assets, and these assets are separate from the shareholders, whose liability is limited to the shares they own in the limited liability company.

However, within the Limited Liability Company Act (UU PT), there is a principle that exempts the principle of separate legal entity as well as instances that can invalidate the principle of separate legal entity⁵. This principle is known as Piercing the Corporate Veil⁶. Piercing the Corporate Veil is a doctrine that allows the limited liability of company management to be disregarded by making limited liability unlimited⁷. This principle explains that a legal entity is legally responsible only to the extent of the assets or wealth of that legal entity, but in certain circumstances, the limits of that liability can be pierced or invalidated.

As shareholders, the law provides limitations on their liability to the company as stated in Article 3 of the Company Act (UU PT) that shareholders of a company are not personally liable for agreements made on behalf of the company and are not liable for losses of the company exceeding their share ownership. These provisions regarding limitations of liability do not apply if: (1) shareholders, either directly or indirectly, maliciously exploit the company for personal gain; (2) shareholders are involved in unlawful acts committed by the

³ Widjaya, I. G. . (2003). *Hukum Perusahaan: Berbagai Peraturan dan Pelaksanaan Undang-Undang di Bidang Usaha*. Jakarta: Penerbit Kesaint Blanc.

⁴ I.G. .G. Ray Widjaja. (2000). *Hukum Perusahaan, Cet.1*. Jakarta: Kasaint Blanch. p.132.

⁵ Reed, B. C. (2021). *Clearing Away the Mist: Suggestions for Developing a Principled Veil Piercing Doctrine in China*. Vanderbilt Journal of Transnational Law. 39(5).

⁶ Widiyono, T. (2013). *Perkembangan Teori Hukum dan Doktrin Hukum Piercing The Corporate Veil dalam UUPT dan Realitasnya serta Prospektif Kedepannya*. *Lex Jurnal*, 10(1), p. 26–39.

⁷ Fuady, M. (2007). *Doktrin-Doktrin Modern dalam Corporation Law dan Eksistensinya dalam Hukum Indoneisa*. Bandung: PT. Citra Aditya Bakti

company; or (3) shareholders, either directly or indirectly, unlawfully use the company's assets, resulting in the company's assets being insufficient to settle the company's debts.

In a company, besides shareholders, two (2) organs play important roles in the management of the company. First, The Board of Directors as mentioned in Article 1 Number 5 “The Board of Directors is the Company Organ vested with full authority and responsibility for managing the Company in the interests of the Company, in accordance with the purposes and objectives of the Company, and representing the Company, both in and out of court, in accordance with the provisions of the articles of association”. Second, The Board of Commissioner as mentioned in Article 1 Number 6 “The Board of Commissioners is the Company Organ tasked with general and/or specific supervision in accordance with the articles of association and advising the Board of Directors.” The assignment of tasks and responsibilities to these organs is based on the Fiduciary Duty Doctrine. Members of the Board of Directors and the Board of Commissioners are obliged to manage the company's affairs with good faith, observe the principle of due care, take full responsibility,⁸ and adhere to the limits stipulated in the Company Act and/or the company's articles of association.

The principle of entrusting the company's responsibilities to the directors through the Fiduciary Duties principle is divided into two main components⁹: (1) Duty of Care, wherein all decisions and policies of the company must be carried out with care and consideration, taking into account all relevant and reasonable information; (2) Duty of Loyalty, wherein directors must always prioritize the interests of the company they lead. Directors entrusted with responsibility must act for the benefit of shareholders, act in the interests and objectives of the company, and prioritize the company's interests over personal interests.

However, suppose issues arise when making business decisions that ultimately harm the company. In that case, the Business Judgment Rules Theory¹⁰ protects directors and commissioners from personal liability as long as they make decisions honestly, prudently, and in good faith, and within the limits specified in the Company Act and/or the company's articles of association. Article 97 Clause (5) for The Board of Directors and Article 115 Clause (3) for The Board of Commissioners mentioned that Their liability cannot extend to personal assets as long as they can prove: (1) the loss was not due to their fault or negligence; (2) they managed affairs with good faith and prudence for the company's interests and in line with the company's purpose and objectives; (3) they do not have any direct or indirect conflicts of interest regarding management actions that result in losses; and (4) they took actions to prevent the occurrence or continuation of such losses. The Business Judgment Rule Theory aims to ensure fairness for directors and commissioners acting in good faith when making business decisions.

3.2.2 Judicial Review of Corporate Legal Veil Regulation and the Application in Indonesia Legal System

The *Corporate Legal Veil* principles, which have already been applied since the colonial era (proved by some Articles in The Commercial Code), are undergoing intense improvement. This improvement is fueled by the whole change in the economy, whether in macro or micro aspects. Also, this is the direct result by the impact of improvements in science, technology, and massive yet rapid globalization, which can have direct and/or indirect impacts on commercial and its parties. Because of those, the applying rules must be “reshaped” with the current conditions. The application of *Corporate Legal Veil* principles in colonial era were not been suitable in nowadays conditions. Therefore, the rules must be modified, according to the present needs.

Aside from enforcing the novel rules (which are passed together by the Government and the House of Representatives or DPR), judicial review is one of the tools to revise the applying rules and/or enable new legal principles. Established in 2003, the Constitutional Court (Mahkamah Konstitusi or MK) has passed many judicial reviews, which change the current laws with novel situations, in terms of the philosophical, sociological, and/or legal circumstances, also the current laws are not compatible with the State Constitution (Undang-Undang Negara Republik Indonesia Tahun 1945/UUD NRI 1945). With the judicial review, the existing laws can be optimally transformed and usefully convenient in the future.

⁸ Chatamarrasjid Ais,(2000), *Menyingkap Tabir Perseroan (Piercing The Corporate Viel) Kapita Selektta Hukum Perusahaan*, Citra Aditya, Bandung, p. 71.

⁹ Ridwan Khairandy. (2013). *Pokok-Pokok Hukum Dagang Indonesia*, cetakan ke-1. Yogyakarta: FH UII Press. p.109.

¹⁰ Arsht, S.S. (1979). *The Business Judgement Rule Revisited*. Hofstra Law Review, 8(1)

One of the judicial reviews' scopes are economy and commercial. Plenty of judicial reviews have been applied in both sectors. Wherefore, both sectors are quickly evolving in a short time and have been influenced by a lot of elements, so the current rules must quickly evolve, too. The judicial reviews carry out substantial components, from performing commercial agreements to applying policies. The purpose of carrying out those are to play out commercial transactions in a helpful way, and to prevent the costs for the society.

In the case of enabling the *Corporate Legal Veil* principles in the Indonesian laws, there are some Constitutional Court's decisions on implementing the principles in the current rules. Necessarily, the application of *Corporate Legal Veil* principles is not only at the corporation's structure, but also at some other things, for example, the tax law. Even though, those judicial reviews advance the implementation of the principles. Therefore, those judicial reviews have major impacts on the enterprises (especially Limited Liability Company/LLC or Perseroan Terbatas/PT) to make decisions, whether the state-owned enterprises or private-owned enterprises.

One of the Constitutional Court's decisions is Constitutional Court's Decisions Number 48/PUU-XI/2013. This decision is filed by some scholars towards Article 2 Letter g and i Act Number 17 Year 2003 about State Finance, in which the article explains that the scope of state finance is the whole national wealth, whether independently managed by the state itself or other parties, including the separated wealth.¹¹ So, the state has the obligation to maintain the wealth through its enterprises (state-owned enterprises). According to the plaintiff, this can be burdensome to the state finance itself. The argument is that the state-owned enterprises are not necessarily responsible to its companies, because if the state takes the whole companies' responsibility, the state will be in danger in supplying the state finance. Whereas according to the Act, those companies are permitted to seek out other revenues, aside from the state. The applicant wants the Constitutional Court to decide that the article is constitutional and contradicts to the State Constitution.

Based on this request, the panel of constitutional court judges stated legal considerations through this decision. The panel of judges was of the opinion that state-owned enterprises are the representative of the state to carry out some of the state's duties to achieve state goals. Therefore, state enterprise capital originating from state finances (either in part or in whole) is a concrete form the representation of the state, so that state-owned enterprise finances cannot be separated from the role of the state itself. In fact, the panel of judges stated that if the proposed article contradict with the state constitution, legal uncertainty would arise regarding the status of state finances in state companies, which would certainly create a legal vacuum for the state to implement and supervise the running of state finances itself, which could create legal loopholes for misusing state finances for personal gain.¹²

Therefore, the Corporate Legal Veil principles do not apply as a whole to state enterprises, especially in the financial sector. The state has the right to intervene through the management and supervision of all state finances, including those in state enterprises. Thus, the state can hold some and/or all organs of a state enterprise responsible if state assets given to a state company are not used well. To carry out the interests and goals of the state, all state finances and assets must be managed and supervised optimally. Thus, the principle of Piercing the Corporate Veil is applied in matters of state company finances, so that the state company carries out its business in the interests and goals of the state itself. In the end, the applicant's petition was rejected in its entirety by the panel of constitutional court judges, because it had no legal grounds.

Another Constitutional Court decision that carried out the judicial review was Constitutional Court Decision Number 62/PUU-XI/2013. In fact, this judicial review decision is still related to Decision Number 42 (previous decision), but this decision focuses more on the role of the Audit Board of The Republic of Indonesia (or Badan Pemeriksa Keuangan/BPK) as the state financial supervisor to monitor all state assets. The applicants for this judicial review are several active directors in state-owned enterprises (or Badan Usaha Milik Negara/BUMN). The applicant believes that after the state assets are separated into a state-owned enterprise, then the state assets can only be managed and supervised by the state enterprise itself. Thus, the state directly

¹¹ Article 2 paragraph (g) dan (i) of Republic of Indonesia Law Number 17 of 2003 concerning State Finances

¹² Lala Taprisa Paksi Nurfaumi, Henny Juliani, and Nabitatus Sa'adah. (2019). Tinjauan terhadap Pemaknaan Kekayaan Negara yang Dipisahkan pada BUMN dan Akibat Hukum yang Timbul Pasca Putusan Mahkamah Konstitusi Nomor 48/PUU-XI/2013. Diponegoro Law Journal, 8(2), 1277-1294, p. 1279.

does not have the right to audit or intervene in state assets. Apart from that, BUMN in the form of a Limited Liability Company (PT) is also comply to the rules regarding Limited Liability Companies (UU PT), where the PT has the right to manage the company's assets separately (*business judgement rules*) with the principle of limited liability (or separate legal entity).¹³ So, the applicant states that the state does not have the right to intervene directly in BUMN assets, because BUMN assets are separate from the state itself.¹⁴

From this petition, the panel of constitutional court judges stated legal considerations, that even though state assets have been released and separated into state enterprises (BUMN and/or BUMD) this does not mean that state enterprise assets are completely separated from state assets. There is a reason for this, that this separation cannot be defined as the transfer of ownership of wealth from the state to the enterprise, but only limited to the management of state assets, which moves from management in government administration (*government judgement rules*) to management in business administration (*business judgement rules*). Thus, this wealth remains under state supervision.

Furthermore, BPK has the authority to conduct audits of state assets held in enterprises (both BUMN and BUMD). Furthermore, the judicial review emphasized that the Corporate Legal Veil principles cannot be fully applied in the case of state enterprises, because the state has the right to manage and supervise the running of state assets, one of which is through the BPK. In this case, the BPK has implemented the PCV principle in state enterprises, so that state enterprises do not have the right to prohibit the state from interfering in the management of state assets in these state enterprises. However, state enterprises have an obligation to manage their own assets according to enterprise principles, but they must be in accordance with and in harmony with the interests of the state. In the end, the applicant's application was rejected in the judicial review decision.

Last but not the end, the Constitutional Court Decision that carried out a judicial review of the implementation of Corporate Legal Veil was Constitutional Court Decision Number 41/PUU-XVIII/2020. This application was submitted by a former Tax Director of PT. UCI regarding Article 6 paragraph (2) and Article 32 paragraph (2) of the General Tax Provisions Act (or Ketentuan Umum Perpajakan/KUP), according to which the PT has been declared bankrupt and all of the PT's assets have been liquidated by the curator. However, the tax office suddenly asked him to be personally responsible, even though he no longer served as the company's Tax Director. The legal reasons given by the tax office are based on these two articles, namely that company representatives are personally and/or jointly responsible for the payment of tax owed,¹⁵ unless it can be proven to the Director General of Taxes that in their position it is impossible for them to be held responsible for the tax company.¹⁶

Of course, the tax office's actions are very detrimental to the interests of the applicant. Apart from that, the applicant also cannot be asked for personal damages, because of the limited liability (Corporate Legal Veil) in the PT, where the entire responsibility of the PT is limited to the PT's own assets, not including the personal assets of the company's organs, unless there is negligence committed by the PT organ itself (*separate legal personality*). The applicant also proved that he did not commit any negligence that caused PT. UCI is in bankruptcy status, so the applicant has no legal reason to be held liable. Apart from that, after the company is declared bankrupt, all of the company's assets are handed over to the curator for liquidation.

The panel of constitutional court judges stated legal considerations to the petition, namely that logically negligence in paying company taxes can only be held accountable by active management, when the company has not been declared bankrupt. Because the company management determines whether company taxes are paid immediately when they make a profit or postpone tax payments. Apart from that, in the Explanation to Article 70 of the Limited Liability Company Act (UU PT) it is stated that the net profit of a PT comes from the difference between profits/profits for the current year deducted by tax, and this action is one of the obligations of the PT. Furthermore, the liquidation of all debts of a company with bankruptcy status is accounted for by the company's management, to the extent that the loss occurred due to elements of negligence and/or deliberate action by the active management at a time when the company had not yet been declared

¹³ The Republic of Indonesia Law Number 41 of 2007 concerning Limited Liability Companies

¹⁴ Sentosa Sembiring. (2017). *Hukum Dagang* (5th Edition). Bandung: PT. Citra Aditya Bakti, p. 62.

¹⁵ Article 6 paragraph (2) of Republic Indonesia Law Number 28 of 2007 concerning the Third Amendment to the Republic of Indonesia Law Number 6 of 1983 concerning General Provisions and Taxation Procedures.

¹⁶ *Ibid*, article 32 paragraph (2).

bankrupt. Therefore, all active company managers are representatives of the company itself, in order to ensure the certainty of the company's position to be held accountable. However, regarding settlement of losses and their relationship to negligence and/or management, this is not the authority of the Constitutional Court, but is the authority of Commercial Court Judges in resolving these disputes in concrete cases.¹⁷

Thus, the principles of Corporate Legal Veil do not apply in matters of processing taxes owed, whether in bankruptcy or non-bankruptcy. However, this principle must be proven by the negligence and/or deliberate intention of the company management to delay or even not pay taxes while the company is active. Thus, the tax borne by the company is an obligation that must be fulfilled by the active management of the company using company profits, depending on whether there was negligence and/or deliberate action by the management along with legal and concrete proof.

Judicial review of the implementation of Corporate Legal Veil principles in Indonesia has had a clear impact on the management of companies in Indonesia. The Judicial Review provides comprehensive confirmation (among the applicable regulations), that the Corporate Legal Veil principle cannot be implemented in its entirety, but must fulfil certain conditions, as well as the absence of negligence/mistakes committed by company organs. Each company organ has its own status and position, whose responsibilities are only limited to the scope of the company. However, the company must be run in good faith and the management of the company is carried out in an accountable, efficient, optimal and transparent manner.¹⁸

4. Conclusion

The application of the Corporate Legal Veil principles in legislation and judicial review in Indonesia and Malaysia has subtle differences. In Indonesia, the approach taken is more about inconsistencies with applicable regulations. Meanwhile in Malaysia, the approach taken is real cases that occur in company sustainability. Therefore, the results of existing judicial reviews are also formally different, but the substance is relatively the same. Because the two countries have different legal systems (Indonesia adopts Civil Law System, while Malaysia adopts Common Law System), the judicial review process is also different between each country.

In the end, the judicial review of the application of the Corporate Legal Veil principle in Indonesia and Malaysia has 2 (two) main objectives, namely explaining further the limitations of the responsibilities of each company organ, and providing exceptions to the application of the Corporate Legal Veil principle. Restrictions occur due to lack of clarity regarding the application of the Corporate Legal Veil principle, while these exceptions occur due to negligence and/or errors by company organs which can be detrimental to the company. Therefore, a judicial review of the Corporate Legal Veil principle has a positive impact on the structure and implementation of the company, so that the company has an organ that has definite authority and does not cause losses in the future.

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¹⁷ Rachmat Dwi Putranto, et. al. (2021). The Application of Tax Law to a Corporation's Bankruptcy Restricted in Indonesia. *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)*, 4(3), 6877-6888, p. 6884.

¹⁸ Sandi Nugroho, Ningrum Natasya Sirait, and Bismar Nasution. (2020). Implementation of Shareholder's Alter Ego and Its Accountability According To Piercing The Corporate Veil Doctrine in Indonesia. *PalArch's Journal of Archaeology of Egypt*, 17(7), 2515-2526, p. 2522.

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