Multiple Interpretations of Determining the Reasonable Price of Shares in the Process of Acquiring Rural Banks (BPR)

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Abstract. This article analyzes the multiple interpretations of determining the reasonable price of shares in the BPR acquisition process. Minority Shareholders who oppose the BPR Acquisition process, have the right to request that the Company or BPR buy their shares from them at a fair price. However, the phrase "reasonable price" of shares in question is not clearly defined in both UUPT and POJK No. 21/2019 concerning Mergers, Consolidations, and Acquisitions of BPRs and BPRS, so this creates a blurring of norms and does not provide guarantees of certainty and legal protection for opposing minority shareholders. Examining the legal protection of minority shareholders in the purchase process in relation to the fair price required by laws and regulations is the main objective of the study in this article. The Normative Legal Research Method is used in this study. As analytical tools, the Theory of Legal Protection and Legal Certainty the Statute Approach, and the Analytical and Conceptual Approach are utilized. The analysis leads to the conclusion that Article 62 UUPT and Article 29 POJK No. 21/2019, gives rights to Minority Shareholders, to demand the Company or BPR to obtain their stock at a fair price. However, the phrase "reasonable price", on the other hand, creates a blurring of norms, resulting in a lack of legal protection. On one hand, Majority Shareholders with dominant voting rights can determine the reasonable price of shares following their preference based on the GMS, while on the other hand, Minority Shareholders with fewer voting rights will feel disadvantaged and be compelled to comply with the GMS's decisions. According to the Researcher, to give Minority Shareholders legal security and protection, the determination of the fair price of shares must be adjusted to market value, which is determined through an appraisal agency that is independent and not affiliated with the Company.

Keywords: Legal Protection, Minority Shareholders, Acquisition, Rural Bank (BPR)

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1 Introduction

Promoting public welfare is one of the Republic of Indonesia's objectives and to advance general welfare, based on Section 4 of Article 33 of the Constitution of 1945, the government undertakes various efforts to ensure sustainable economic growth, one of which is to expand the banking industry. Banking is defined as everything related to banks, including institutions, business activities, and methods and processes for carrying out its business activities, in accordance with the provisions of Article 1 Point 1 of Law Number 10 of 1998 on Amendments to Law Number 7 of 1992 on Banking (hereinafter referred to as the Banking Law). Banking has a strategic function of collecting public funds and redistributing them through credit to the community in an effort to help and build the national economy. An economy that is increasingly open and developing rapidly requires extensive, good, and quality banking services, which require a healthy, efficient, resilient, and competitive banking system.

Business entities that carry out business in the banking sector are called Banks. In terms of its function in Indonesia, based on the Banking Law, there are known to be 2 (two) types of banks, specific to Commercial Banks and Rural Banks. Commercial banks are those that conduct business conventionally or in accordance with Sharia principles and offer services related to payment traffic; rural banks are those that conduct business conventionally or in accordance with Sharia principles but do not offer services related to payment traffic (Supramono, 2014: 47). Rural Banks carry out strategic functions and promote equitable economic development, especially by assisting the economic sector of micro, small, and medium-sized enterprises (MSMEs). BPR is a bank-affiliated company that exclusively accepts deposits in the form of time deposits, savings, and/or other equivalent forms, and distributes money in the form of credit or other forms to raise the standard of living of people who run their businesses according to conventional principles or sharia principles and do not engage in payment traffic in their daily operations. (Herli, 2013: 3).

Rural banks have distinct qualities and are more straightforward than commercial banks. The operational premise of focusing on speed and convenience while still implementing the precautionary principle has a considerable attraction for MSME company actors; in fact, many commercial bank debtors seek cash flow assistance from the BPR under unexpected circumstances. BPRs have a considerably more streamlined organizational structure than commercial banks. Commercial banks operate under a variety of conditions, with multiple levels of authorities deciding loan offers depending on the requested credit limit. Quick decisions on loan proposals are a distinct advantage that contributes to the competitiveness of the BPR. The BPR market sector is designed to meet the needs of MSMEs such as farmers, breeders, fishermen, merchants, small enterprises, employees, and retirees, as this market segment has yet to be served by Commercial. In addition, the goal is to provide shared banking services, equal business possibilities, and equal income distribution.

BPR also has several deficiencies, such as simpler management, frequent owner intervention, and insufficient human resources. If these weaknesses occur sustainably, they will certainly affect the health condition of the BPR. The problem faced by BPR from a non-structural perspective is that it starts with debtors who do not pay their

obligations, increasing the Non-Performing Loans (NPL). The problem will not influence the BPR's health level as long as the concerned debtor is managed appropriately by carrying out recovery efforts (restructuring) as well as settlement attempts (auction and/or voluntary surrender). However, if non-performing loans are not controlled and NPLs continue to rise, it will become a structural problem because it will affect liquidity and prevent BPRs from paying their current debts (monies provided by third parties in the form of interest, savings, and deposits), which will then begin to undermine capital and ultimately affect the bank's health level.

On the basis of the authority conferred by legislation, the Financial Services Authority (OJK), as the supervisor and supervisor of BPRs, can order and take solutions to carry out mergers, consolidations, and acquisitions of unhealthy BPRs. Concerning BPR mergers, consolidations, and acquisitions, according to Financial Services Authority Regulation Number 21/POJK.03/2019 Concerning Mergers' Article 2 Paragraph 1, Consolidations, and Acquisitions of Rural Credit Banks and Sharia Rural Banks (referred to as POJK No. 21 moving forward) /2019 Regarding the acquisition, consolidation, and merger of BPR and BPRS, states that Merger, Consolidation, and Acquisition of BPR or BPRS can be carried out on BPR Initiatives or by order of FSMA, or the Financial Services Authority. This is done resulting in BPRs that are healthy, efficient, and capable of competing in the era of globalization and free trade. Consequently, BPRs must be supported by strengthening themselves through various efforts including mergers, consolidations, and acquisitions. The acquisition procedure is the most straightforward of the three initiatives outlined above. The acquiring party benefits from being able to immediately own a relatively large bank without having to build and raise it first; not having to deal with licensing for the establishment of a new bank; and taking over the existing system without having to procure new equipment, new workers, etc. Meanwhile, the acquisition of the bank has benefits for the bank being acquired, including the ability to obtain an injection of funds for a bank that is short of funds; the previous bank owner can receive cash if they so desire; if the party that acquired the bank has a name in the community, the bank will have a more positive image (Untung, 2020: 171).

2 Research problem

According to Article 126 paragraph 1 of Law Number 40 on Limited Liability Companies, legal actions involving mergers, consolidations, acquisitions, or separations of BPRs in the form of limited liability companies must consider the interests of the company, minority shareholders, company employees, creditors, partners, other businesses of the company, society, and fair competition in the marketplace. Regarding the interests of minority shareholders during the acquisition process, which is based on Article 62 Paragraph (1) of Law Number 40 of 2007 Concerning Limited Liability Companies and Article 29 Paragraph (1) of POJK 21/2019 Concerning Merger, Consolidation, and Acquisition of Rural Banks and Sharia Rural Banks, this is interesting enough to be designated as research material, both of which stipulate that minority shareholders in the BPR acquisition process who do not approve of the ac-

quisition process can only claim rights in the form of purchasing shares at a reasonable price. The phrase “fair price” in this provision is not clearly regulated, so according to the author, this phrase will lead to multiple interpretations, resulting in unclear norms, creating uncertainty, and not providing legal protection to Minority Shareholders.

3 Research Methods

In this work, normative legal research is used. Normative legal study involves examining the laws and rules that are relevant to a certain legal issue. Legal norms are the focus of normative legal study, which investigates the law from within (Diantha, 2017: 12). Two theories—the Theory of Legal Certainty and the Theory of Legal Protection—that apply the Statute Approach and the Analytical and Conceptual Approach, respectively, are employed to investigate these legal issues.

4 Result and Discussion

4.1 The Position of Minority Shareholders and Majority Shareholders in a Limited Liability Company

Majority Shareholders make up the majority of the shareholders in a Limited Liability Company and Minority Shareholders. According to Rudy Prasetya, Majority Shareholders are one or several shareholders who relatively control more shares issued by the company. While Minority Shareholders are one or several shareholders who relatively only control several shares, which are outnumbered by one or a group of other shareholders (Wilamarta, 2005: 85). Both shareholders have the right to be protected and maintained through the procedures set out in the Limited Liability Company Articles of Association.

Majority It is legal and in compliance with the provisions outlined in the Company Law that shareholders may exercise legitimate control over the company through the application of the majority rule and the one share, one vote concept, particularly when making GMS decisions. According to this principle, Majority Shareholders must perform Fiduciary Duties for Limited Liability Companies and Minority Shareholders. Similarly, the Minority Protection principle is applied to protect the rights of Minority Shareholders, when they feel disadvantaged as a result of a board of directors' decision or a GMS decision, such as in the acquisition process. Equal protection refers to the idea that Majority Shareholders and Minority Shareholders should be treated equally. Regardless of whether they are Majority or Minority shareholders, this rule is an ideal legal rule among shareholders in a Limited Liability Company.

The principle of equal protection among shareholders is fundamental in company law that it has become a coercive law (Fuady, 2008: 173). UUPT expressly recognizes this principle, particularly for shareholders in the same classification, so this principle cannot be disregarded; in this case, the principle of equal protection takes precedence

over the principle of freedom of contract between shareholders, implying that this principle cannot be ruled out, even if all shareholders shares agreed to approve it. Violation of this principle may result in huge financial losses for shareholders, such as inequal rights among shareholders to obtain certain information from the company. This disparity in information availability will serve as a stage for shareholders with access to this information to pursue personal advantage while harming the interests of other owners. In this case, it is referred to as selective contact, which is the exchange of information between the company and specific shareholders (institutional investors). This cannot be justified because all information must be supplied to shareholders in an equitable manner, without discriminating amongst shareholders and infringing the principle of equal protection.

4.2 Appraisal Rights as Efforts to Provide Legal Protection Against Minority Shareholders in the Acquisition Process.

Minority shareholders have a dissenting opinion right, which allows them to have a different opinion, including the ability to object to certain decisions performed by the directors (Fuady, 2008: 177). After exercising the dissenting opinion right, but the Majority Shareholders remain in their stance, in the sense that they still differ in opinion from the Minority Shareholders, the Minority Shareholders can use their right to sell their shares to the Company (appraisal right) or also called the dissenters right or right of dissent, which is the right to leave the company with a duty on the part of the company or other shareholders to buy the leaving shareholders' shares with appraised shares at a reasonable price. Due to the Company's activities that might jeopardize their interests or the Company itself, shareholders have the right to demand that the Company value and buy their shares at a fair price. According to Article 62 paragraph 1 of the Company Law, the harms mentioned here are those associated with amending the articles of association, transferring or guaranteeing assets worth more than 50% (fifty percent) of the Company's net assets, and processing a merger, consolidation, acquisition, or separation.

Based on the principle of decency, the Company or Majority Shareholders are obligated to purchase shares from shareholders who wish to sell their stock for a reasonable price. Minority Shareholders are often concerned about being affected by Majority Shareholders or disagree with the company's actions that are likely to harm their interests. Most of the actions taken by Minority Shareholders to sell their shares are forced. This coercion may be arranged in this manner by a Majority Shareholder with ill purpose, or it may be referred to as a squeeze-out (Wilamarta, 2005: 295).

The appraisal right does not imply that Minority Shareholders may object to or obstruct the company's actions. because if that is the case, for instance in the acquisition process, what will happen is an imbalance in which the rights of Minority Shareholders become too large and can even become tyrannical for the minority (Wilamarta, 2005: 296). Thus, the law only allows Minority Shareholders who disagree with the company's actions to demand that the company purchase shares from opposing shareholders at a fair price. This is the context for the emergence of the appraisal right.

According to Phillipus M. Hadjon's Theory of Legal Protection, legal protection entails both the recognition of human rights that belong to legal subjects and the defense of dignity against arbitrariness. There are two sorts of legal protection: repressive legal protection, which is more concerned with settling conflicts, and preventative legal protection, which allows people to voice their concerns or ideas before a government decision is definitive (Hadjon, 1987: 38). The appraisal right is one of the legal rights offered by the Law for Minority Shareholders, according to the Theory of Legal Protection. According to the notion, minority shareholders who disagree with a company can demand that it buy their shares at a reasonable price. Determination of the fair price will be decided through the GMS, albeit the process will be more dominated by Majority Shareholders using the majority rule. UUPT gives shareholders of the same classification the same rights to submit thoughts and input during the GMS. However, if the GMS determines that the interests of the minority shareholders will be harmed by the fair price of the shares, the Minority Shareholders may pursue Derivative Action to protect their rights.

4.3 Determination of the Fair Price of Shares

The Big Indonesian Dictionary (KBBI) define “price” as the value of goods determined or represented by money; the amount of money or other equivalent means of exchange, that must be paid for a product or service at a certain time and in a certain market. Meanwhile, the meaning of the term “fair” is normal as it is; according to actual conditions; as it should be. When the two words are combined, the definition of “fair price” is the value of an object as it is at the moment and the market conditions when the item is sold. If it is related to the fair price of shares, it may be concluded that the meaning is that the fair price of shares is the selling price of a company's shares at the moment of sale and market conditions.

Furthermore, in relation to Article 34 paragraph (2) UUPT, it states that in the case of payment of share capital in different forms, as mentioned in the previous sentence (1) The fair value calculated in line with the price market or by experts who are not connected to the Company is used to value the payment for share capital. A systematic interpretation is utilized to clarify the fair value of the shares referred to in the article's elucidation, it is determined that the fair value of the paid-up capital of shares is decided based on market value. If market value is unavailable, fair value is established using the valuation method best suited to the deposit's attributes, based on the best relevant information. Additionally, a "unaffiliated expert" is a professional who is not related to any employees, board members, commissioners, or shareholders of the company, either horizontally or vertically; who does not have a relationship with the company because one or more board members or commissioners are similar to another; who does not have a controlling relationship with the company, either directly or indirectly; or who does not own 20% or more of the company's stock. Based on these provisions, it is possible to conclude that the valuation of shares is based on fair value, which is calculated based on “market values” and “expert appraisers” who are not linked with the Company (Harahap, 2013: 238).

The Fair Market Value mentioned above is formed on the assumption that something is expected to occur, such as facts, conditions, or circumstances that may affect the Appraisal Object or Appraisal Approach and its fairness has been analyzed by the Business Appraiser as part of the appraisal process. In order to obtain the Fair Market Value, an appraisal process is required which is carried out by a special appraisal institution, which has competence in carrying out appraisal activities by providing a written opinion on the economic value of an object of appraisal in accordance with the Indonesian Appraisal Standards (SPI). The appraiser referred to above is often referred to as a Public Appraiser.

The conclusions of the Public Appraiser will therefore be taken into account as material information when the General Meeting of Shareholders decides on the appropriate share price. At a GMS related to acquisitions, a minimum of 3/4 (three quarters) of the total number of shares with voting rights must be present or represented, and a decision is valid if approved by at least 3/4 (three quarters) of the votes cast, unless the articles of association specify the quorum for attendance and/or provisions regarding the requirements for decision-making at a large scale. If it is based on the principle of majority rule or one vote one share when forming a Limited Liability Company, the BPR acquisition process will be dominated by the number of votes from the Majority Shareholders, while Minority Shareholders with a limited number of votes can only accept the GMS's resolutions.

If it is tied to Gustav Radbruch's Theory of Legal Certainty, that law must be inherently sure and equitable. Certain, as a behavioral guideline, and fair, as a reasonable order must be supported by the code of conduct (Rato, 2010: 59). The Majority Shareholders' dominance in the GMS is a legal certainty that guarantees the rights and risks owned by the Majority Shareholders as the principal investors in a Limited Liability Company, therefore their dominance in the GMS related to the acquisition process is reasonable. However, in order to balance the Majority Shareholders' dominance, the Company Law also applies the Minority Protection principle to Minority Shareholders, for instance, appraisal rights and collateral proceedings. These principles seek to establish balance by protecting the rights of the Majority Shareholders as the primary funders of the Limited Liability Company, while not overriding the interests and rights of the Minority Shareholders (equal protection).

5 Conclusions

Minority Investors who object to the BPR Acquisition process have the right to request that the Company or BPR buy their shares at a reasonable price. However, the phrase “fair price” creates an unclear norm, leaving Minority Shareholders without legal certainty and protection. On one hand, Majority Shareholders with dominant voting rights can determine the reasonable price of shares following their preference based on the GMS, while on the other hand, Minority Shareholders with fewer voting rights will feel disadvantaged and be compelled to comply with the GMS's decisions. According to the Researcher, in order to give Minority Shareholders legal security and protection, the fair price of shares must be adjusted if the market value is unavail-

able, the fair price is calculated using the valuation method that best fits the deposit's characteristics, based on the best relevant information, through an appraisal agency that is independent and not affiliated with the Company. If the fair price of the shares in question cannot be determined through deliberation, then Minority Shareholders who feel disadvantaged by the acquisition, whether due to decisions of the Directors, Commissioners, or GMS, can use the court's authority to intervene through derivative actions.

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