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Shifting Meaning of State Losses in BUMN Based on the Business Judgment Rule Principle

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Abstract

State-owned enterprise faces complex business dynamics, including the risk of state losses due to managerial decisions. The Business Judgment Rule (BJR) principle serves as the basis for legal protection for the direction to make business decisions with professional freedom, as long as the decisions are made in good faith, with caution, and without conflict of interest. However, the application of this principle in Indonesia is still inconsistent, as seen from cases such as Pertamina and Merpati Nusantara Airlines which show heterogeneity in the assessment of the legal responsibility of directors. The focus of this study is: first, to find the meaning of state losses in the context of State-owned enterprise based on the BJR principle; and to formulate a concept so that the BJR doctrine is not misused. The study uses a normative juridical method (research law) with a doctrinal approach to examine changes in the meaning of state losses in State-owned enterprise based on the Business Judgement Rule.
Keywords: *State Losses, BUMN, Business Judgment Rule.*

Abstrak

BUMN menghadapi dinamika bisnis yang kompleks, termasuk risiko kerugian negara akibat keputusan manajerial. Prinsip *Business Judgment Rule* (BJR) berfungsi sebagai dasar perlindungan hukum bagi direksi untuk mengambil keputusan bisnis dengan kebebasan profesional, selama keputusan diambil dengan itikad baik, penuh kehati-hatian, dan tanpa konflik kepentingan. Namun, penerapan prinsip ini di Indonesia masih belum konsisten, terlihat dari kasus-kasus seperti Pertamina dan Merpati Nusantara Airlines yang menunjukkan ketidakseragaman dalam penilaian tanggung jawab hukum direksi. Fokus penelitian ini adalah: pertama, menemukan makna kerugian negara dalam konteks BUMN berdasarkan prinsip BJR; dan merumuskan konsep agar doktrin BJR tidak disalahgunakan. Penelitian menggunakan metode yuridis normatif (*legal research*) dengan pendekatan doktrinal untuk mengkaji pergeseran makna kerugian negara dalam BUMN berdasarkan *Business Judgement Rule.*
Kata Kunci: *Kerugian Negara, BUMN, Business Judgment Rule.*

Introduction

As a nation governed by the rule of law, Indonesia utilizes the constitution as the primary foundation for all public policies, including economic policy. Article 33 of the 1945 Constitution explicitly states that the economy is structured as a joint endeavor based on the principle of kinship. This provision affirms the state's constitutional responsibility for national economic development to create social welfare. This state involvement is a manifestation of the welfare state concept, which requires the state to intervene in meeting the basic needs of its citizens, not only in terms of security but also in terms of welfare.[1]

One concrete manifestation of the state's role in the economic sector is the establishment of State-Owned Enterprises (BUMN). Based on the General Explanation, number 1 of Law Number 19 of 2003 concerning BUMN, these entities function in public services and the provision of strategic goods and services. Therefore, the existence of BUMN cannot be separated from the state's interest in managing national assets for the welfare of the people.

Within this framework of responsibility, the state established State-Owned Enterprises (BUMN) as an instrument to fulfill the basic rights of citizens. As stated in the General Explanation, number 1 of Law Number 19 of 2003 concerning BUMN, the establishment of BUMN is intended to provide goods and services to the public and support national development. In this position, BUMN are not merely business entities but also implementers of the state's social and economic functions.

State-owned enterprises (BUMN) have a management structure headed by a Board of Directors. Article 2, number 7 of Law Number 28 of 1999 concerning Clean and Corruption-Free State Administration (KKN), includes BUMN Directors as state administrators because they carry out strategic functions. BUMN capital comes from separated state assets as stipulated in Article 2, letter g of Law Number 17 of 2003 concerning State Finance, keeping these entities within the scope of public law.[2]

In the Indonesian legal system, State-Owned Enterprises (BUMN) hold a unique position as entities that perform economic functions while simultaneously carrying out the state's mission. As business entities, BUMN are subject to corporate management principles, including business risk. However, as entities that manage separated state assets, BUMN are also subject to public legal oversight, particularly regarding the potential for state losses.[3]

As a limited liability company, a state-owned enterprise (BUMN) is also subject to the private law regime stipulated in Law Number 40 of 2007 concerning Limited Liability Companies. This legal dualism creates normative tension. Normative tension arises when business losses inherent in taking business risks are considered state losses from a criminal law perspective, particularly in law enforcement practices by the Corruption Eradication Commission (KPK).[4] In many cases, law enforcement officers tend to interpret every loss experienced by a BUMN as a form of state loss without considering the principle of limited liability and managerial autonomy held by directors based on the principle of business judgment rule (BJR).[5]

This tension has become evident in a number of legal cases involving state-owned enterprise directors. One significant example is the case of Karen Agustiawan, the former President Director of PT Pertamina.[6] In the case of the BMG Block acquisition in Australia and the procurement of LNG, Karen was charged with corruption, causing estimated state losses of

[1]Sugeng Bahagijo dan Darmawan Triwibowo, Mimpi Negara Kesejahteraan (Jakarta: LP3ES, 2006), 9.

[2]Juliani, Henny: *Pertanggungjawaban Direksi BUMN Terhadap Perbuatan yang Mengakibatkan Kerugian Keuangan Negara*, Jurnal Masalah - Masalah Hukum, Jilid 45, No. 4, 2016, 7.

[3]Law of the Republic of Indonesia Number 19 of 2003 on State-Owned Enterprises.

[4]Komisi Pemberantasan Korupsi, Laporan Tahunan 2023, 45-46.

[5]Asep Saeful Muhtadi: *Pengelolaan Risiko Bisnis dan Kerugian Negara dalam BUMN*. Jurnal Hukum Bisnis. Vol. 7. No. 2. 2022. 112.

[6] Christian, Natalis, Julie Tryany, and Vera Laurence Liang. "Analisis Motivasi Fraud dengan Pendekatan Teori Fraud." *JSMA (Jurnal Sains Manajemen dan Akuntansi)* 16.1 (2024): 77-95.

trillions of rupiah. Although she was found guilty at first instance, the Supreme Court acquitted her on appeal, arguing that her actions were part of a business judgment. The Supreme Court stated that these actions did not meet the elements of an unlawful act in the crime of corruption, as they were based on legitimate and rational business judgment and had undergone due diligence.

This case demonstrates an inconsistency in understanding the boundary between business risk and corruption. However, corporate law recognizes the principle of fiduciary duty, consisting of the duty of care and the duty of loyalty.[7] This principle requires directors to act with prudence and good faith in the best interests of the company. If directors have complied with this principle, any losses arising from business decisions should not be classified as criminal acts, unless there is an element of fraud, conflict of interest, or gross negligence.

The business judgment rule is a legal doctrine that provides protection for directors' decisions as long as they are made reasonably, in good faith, and prioritize the interests of the company. This principle recognizes that in the business world, not all decisions result in profits; losses are an unavoidable part of the business dynamic. Therefore, legal intervention should only be undertaken if there is evidence of intent, abuse of authority, or fraud.[8]

However, in practice, the BJR principle is often ignored in corruption investigations. For example, in several cases involving state-owned enterprise directors, investigators prioritize a state loss approach based on audit results from the Supreme Audit Agency (BPK), without conducting a comprehensive assessment of the context in which the business decision was made. This demonstrates a shift in the meaning of state loss from actual loss to potential loss or even hypothetical loss, which can create legal uncertainty for state-owned enterprise managers.

This situation has serious implications for the management climate of state-owned enterprises, as it creates a disproportionate deterrent effect. Directors are reluctant to make risky strategic decisions, even if they have the potential to yield long-term benefits, for fear of criminalization. This tension between economic logic and a legalistic approach must be addressed in normative studies to find a balance between protecting state assets and managerial freedom to take legitimate business risks.[9]

Therefore, a critical examination of how state losses are understood in the context of state-owned enterprises (BUMN) is necessary, and how the business judgment rule principle can be used as a boundary for legal intervention in assessing these losses. This research will focus on the shifting meaning of state losses and the extent to which the BJR principle can be used as a legal analysis tool to ensure legal certainty and protection for SOE managers.

Research Method

Research methods are scientific ways to obtain data for specific purposes and uses.[10] This research uses a normative legal research method. Legal research focuses on understanding the implementation of legal norms or legal rules within positive law,[11] This study focuses on "The

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[7] Akhdharisa, Muhammad. "Hakikat Keuangan Perseroan Terbatas Pada Bumn Di Indonesia." *Journal of Law Justice (JLJ)* 1.2 (2023): 74-88.

[8] Robert C. Clark: *The Business Judgment Rule*, Harvard Law Review, Vol. 57, No. 2, 1964, 153.

[9] Erwin Siregar: *Dampak Penegakan Hukum Terhadap Manajemen Risiko di BUMN*, Jurnal Kebijakan Publik, Vol. 10, No. 1, 2023, 85.

[10] Sugiyono, *Metode Penelitian Kuantitatif Kualitatif* (Bandung: Alfabeta, 2019), 2.

[11] Herowati Poesoko, *Diktat Mata Kuliah Metode Penulisan dan Penelitian Hukum* (Fakultas Hukum Universitas Jember, 2012), 34-35.

Shifting Meaning of State Losses in State-Owned Enterprises Based on the Business Judgment Rule Principle."

The type of legal research used to address this issue is doctrinal research. Doctrinal research is the study of law and legal concepts. Based on this type of research, the researcher aims to identify the shifting meaning of state losses in State-Owned Enterprises based on the Business Judgment Rule principle.

Results and Discussion

The Meaning of State Losses in State-Owned Enterprises Due to Policies Taken by the CEO Based on the Business Judgement Rule Principle

The issue of the meaning of state losses in the context of State-Owned Enterprises (BUMN) cannot be interpreted solely normatively as defined in Article 1 paragraph (22) of Law Number 1 of 2004 concerning State Treasury. In this provision, state/regional losses are defined as a real and definite shortage of money, securities, and goods, as a result of unlawful acts, whether committed intentionally or through negligence. These elements emphasize that state losses occur if there is a perpetrator or person responsible (such as a treasurer or state official) who acts unlawfully and causes a real shortage of state finances. [12]

In practice, state losses in state-owned enterprises often arise as a consequence of business decisions that have undergone rational deliberation, based on adequate information, and in good faith. This is where the importance of examining the Business Judgment Rule (BJR) principle lies, as a crucial pillar in distinguishing between losses resulting from legitimate business risks and losses resulting from legal violations.

The BJR principle provides legal protection for directors in making business decisions, as long as those decisions are[13] a). Taken reasonably, b). Conducted without any conflict of interest, c). Intended for the benefit and advancement of the company. This principle has developed in the jurisprudence of countries such as the United States (for example, in the case of Aronson v. Lewis) and Germany (through Aktiengesetz), which emphasizes that courts will not interfere with legitimate business policies, even if the results result in losses.

Meanwhile, in Indonesia, the BJR principle has not been explicitly regulated in legislation, although several Supreme Court decisions have begun to show a tendency to consider this principle. One example is Supreme Court Decision Number 1555 K/Pid.Sus/2016, in the case of the President Director of PT Merpati Nusantara Airlines. In this decision, the Court stated that not every state loss arising from a director's policy can automatically be declared an unlawful act. Although the defendant was ultimately found guilty, the panel of judges' reasoning demonstrated that there is room to distinguish between reasonable business risks and clear violations of the law.

Understanding the concept of state losses in Indonesia remains heavily influenced by political power and the influence of those in power. The definition of state losses itself has not been fully established on a solid foundation of legal theory, but rather relies heavily on the provisions of applicable laws and regulations. In legal practice, the interpretation of state losses

[12] Khana Karrina, Memahami Arti Dari Kerugian Negara, Kementrian Keuangan, 2024

[13] Shigeko Hadi, Aam Suryamah, and Anita Afriana. "Prinsip Business Judgement Rule Dalam Pertanggungjawaban Hukum Direksi Bumn Yang Melakukan Tindakan Investasi Yang Mengakibatkan Kerugian." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 4.2 (2021): 171-190.

is often debated, leading judges in some decisions to base their judgments on personal perception rather than a solid theoretical basis.

Based on Article 1 number 22 of Law Number 1 of 2004 concerning State Treasury, what is meant by state or regional losses is a shortage of money, securities and goods that is real and certain in amount as a result of unlawful acts, whether committed intentionally or due to negligence.[14] Based on this definition, it can be concluded that a state loss is considered to have occurred if certain elements are met, namely an unlawful act resulting in a shortage of state assets in the form of money, securities, or goods, and a clear causal relationship between the act and the resulting loss. Furthermore, there must be a perpetrator or party responsible for the loss, such as a treasurer, a non-treasurer civil servant, or another official.

However, the definition of state loss according to the State Treasury Law is limited only to losses that have occurred in a concrete and definite manner. Therefore, normatively and administratively, state losses can only be stated based on the amount or magnitude of the loss that has actually occurred and is measurable.[15] This is different from the definition used in Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption in conjunction with Law Number 20 of 2001. In these provisions, unlawful acts that are included in criminal acts of corruption include acts of enriching oneself, another person, or a corporation that can harm state finances or the state economy.[16] The phrase "may cause harm" indicates a broader meaning, meaning that state losses are not limited to those that have actually occurred, but also include potential losses that may arise in the future as a result of the corrupt act. [17]

Thus, there is a significant difference between the administrative approach in the State Treasury Law and the criminal approach in the Corruption Crime Law. The Treasury Law emphasizes proof of real and certain losses, while the Corruption Law accommodates the possibility of potential losses as a form of early protection for the state's finances and economy.

This difference demonstrates that, in the context of law enforcement, perceptions of state losses can vary depending on the legal framework used. Often, legal incidents related to state losses involve high-ranking officials within State-Owned Enterprises (BUMN) in the form of Limited Liability Companies (Persero). They are deemed to have abused their authority, resulting in losses for the business entities they lead, and are subsequently sued in corruption cases. In Tatiek Sri Djatmianti's view, within the framework of state administrative law, corruption is the personal responsibility of the officials who commit it. The main parameters used as benchmarks are the existence of abuse of power and arbitrary actions (unreasonableness). If these two elements are found, maladministration can be concluded, which ultimately indicates an unlawful act. Therefore, all legal consequences arising from these actions become the personal responsibility of the officials concerned.[18]

Legally, the definition of state losses in the context of Indonesian positive law is explicitly explained in Article 1, number 22 of Law Number 1 of 2004 concerning the State Treasury. It

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[14] Law Number 1 of 2004 on State Treasury, Article 1 number 22.

[15] Law Number 1 of 2004 on State Treasury, Article 1 number 22.

[16] Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption in conjunction with Law Number 20 of 2001, Articles 2 and 3.

[17] Permata Bela Pertiwi & Muhammad Reyhan Daru Quthni, "Kerugian Keuangan Negara dalam Undang-Undang Pemberantasan Korupsi perspektif Yuridis Normatif" *Rechtenstudent Journal* 4, No. 2 (2023): 190. DOI: https://doi.org/10.35719/rch.v4i2.299.

[18] Tatiek Sri Djatmiati, et al, *Hukum Administrasi Dan Tindak Pidana Korupsi: Pelayanan Publik Dan Tindak Pidana Korupsi* (Yogyakarta: Gadjah Mada University Press, 2011), 49.

states that state losses are a real and definite shortage of money, securities, and/or goods resulting from unlawful acts, whether intentional or negligent. This formulation emphasizes two main points: (1) the existence of a real and definite shortage, and (2) a direct link to the unlawful act, whether in the form of an active violation or passive negligence.

However, in the context of State-Owned Enterprises (BUMN), particularly those in the form of Limited Liability Companies (Persero), the application of the definition of state losses is not straightforward. This is due to the special nature of BUMN as private legal entities, which have assets separate from the state. Article 1, number 3 of Law Number 19 of 2003 concerning BUMN states that BUMN in the form of Limited Liability Companies (Persero) are limited liability companies whose capital is divided into shares, the majority of which are owned by the state. Thus, the wealth that has been deposited by the state as shares in the State-Owned Enterprise (BUMN Persero) is no longer directly state wealth, but has changed status to become the wealth of a private legal entity.

This separation of assets is not merely administrative but also has significant legal consequences. Constitutional Court Decision No. 48/PUU-XI/2013 confirms that state assets invested in state-owned enterprises (BUMN) are no longer included in the scope of state assets as defined in Article 2 of Law No. 31 of 1999 concerning the Eradication of Corruption. In its ruling, the Court stated that assets that have become part of a company's capital are subject to generally accepted corporate governance mechanisms, not the state's financial legal regime.[19]

The consequences of this view are significant, particularly in assessing whether losses suffered by state-owned enterprises (BUMN) as a result of board policies can be classified as state losses. If BUMN assets are no longer defined as state assets, then losses incurred in their business activities must be viewed from a corporate perspective, and not automatically interpreted as public state losses.

The principle of the Business Judgment Rule has long been recognized in the Anglo-Saxon legal system and has begun to be adopted into the Indonesian legal system, particularly through Supreme Court decisions. For example, in Supreme Court Decision No. 1842 K/Pid.Sus/2007, the Supreme Court stated that the actions of directors in making business decisions are not criminally punishable as long as they are carried out in good faith and based on reasonable business considerations, even if the policy subsequently results in company losses. Therefore, losses arising from a business policy cannot necessarily be criminalized as state losses. It is important to distinguish between losses arising from normal business risks and losses resulting from irregularities or unlawful acts. Forcing the interpretation that every loss suffered by a state-owned enterprise is a state loss has the potential to create legal uncertainty and excessive fear among policymakers.[20]

Several academics emphasize the importance of this understanding to ensure legal certainty and effective governance of state-owned enterprises. Hari Sutra Disemadi, in his article, states that the criminal law approach to the activities of state-owned corporations must be based on the characteristics of the business, not solely on the ownership status of its capital. He emphasized that the use of criminal instruments in situations that should be responded to

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[19] Waluyo, et.al, "Aligning State Finance Regulations with SOE Bankruptcy Policy: Evidence from the United States" *Journal of Human Rights, Culture and Legal System* 5, No. 1 (2025): 249.

[20] Chanda Noviadry Irawan, et.al, "Business Judgement Rule and Criminal Acts of Corruption that Harm the Finances of the Indonesian State" *Russian Law Journal* XII, No. 1 (2024): 790.

with civil or administrative mechanisms would harm the principle of justice and disrupt the investment climate.[21]

The Business Judgment Rule (BJR) is a key principle in modern corporate law, aimed at providing legal protection to directors or company managers from the risk of liability for business decisions that result in losses. This principle stems from the recognition that the business world is dynamic and full of uncertainty, so the success or failure of a decision cannot always be the sole measure in assessing a company manager's legal responsibility. As long as the business decision is made in good faith, based on adequate information, and within the legal framework and the company's articles of association, directors cannot be prosecuted solely for causing losses.

Within the context of the Indonesian legal system, this principle has begun to be gradually adopted and accepted, particularly in Supreme Court decisions. One example is Supreme Court Decision No. 223 K/Pid.Sus/2012, in which the Supreme Court affirmed that directors who make business decisions that result in financial losses cannot necessarily be held criminally liable unless it can be proven that the action was committed with malicious intent (mens rea), such as to unlawfully enrich themselves or another party. This decision marks the importance of recognizing the space for managerial discretion in running a company without always being haunted by the threat of criminal law.[22]

The philosophy underlying this principle is that courage and innovation in business management must be given room to develop. If every policy that risks causing losses is potentially criminalized, it will have a harmful psychological effect on the business ecosystem: management will tend to be passive, reluctant to take risks, and prefer safe decisions even if they are not productive in the long term. This is certainly contrary to the entrepreneurial spirit and competitiveness of the company. Therefore, BJR serves not only as a legal safeguard but also as a moral and operational foundation for implementing sound corporate governance.

In the context of state-owned enterprises (BUMN), the implementation of BJR principles is crucial. In addition to carrying out their business missions, BUMN are often given dual responsibilities to support the country's strategic policies. This places SOE directors in a complex position: on the one hand, they are required to ensure efficiency and profitability like private entities, but on the other, they are burdened with social and political functions by the majority shareholder, the state. Without consistent application of BJR principles, SOE leaders could become victims of criminalization for strategic policies that are actually implemented in the long-term interests of the company and the country.

Furthermore, the lack of clarity in the application of this principle can create legal uncertainty that is counterproductive to the investment climate and the governance of state-owned companies. Therefore, it is crucial for legislators and the judiciary to clarify the boundaries and requirements for the application of the BJR principle in state-owned corporations, while simultaneously strengthening the capacity of law enforcement officials to avoid confusing business risks with criminal acts. Harmonizing the principle of due diligence, good corporate governance, and recognition of the Business Judgment Rule is key to creating a just legal system that supports economic progress.

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[21] Hari Sutra Disemadi: *Penegakan Hukum Tindak Pidana Korupsi pada BUMN: Antara Kerugian Negara dan Risiko Bisnis*, Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional, Vol. 11, No. 1, 2022, 33–45.

[22] Supreme Court of the Republic of Indonesia, Decision Number 223 K/Pid.Sus/2012, 16–18.

The application of the Business Judgment Rule (BJR) principle is essentially intended to provide legal protection to directors in making business decisions, provided that those decisions are made in accordance with the principles of good corporate governance. These principles include transparency, accountability, responsibility, integrity, and the alignment of decisions with the best interests of the company, while always observing applicable laws and regulations. If directors comply with these principles, then even if the business decisions they take result in losses, their actions are still considered legitimate and they cannot be held criminally or civilly responsible.[23]

Conversely, if directors are proven to have acted in poor faith, deviated from sound governance principles, or acted contrary to applicable legal provisions, then the losses arising from these decisions become the personal responsibility of the directors concerned. They can be held accountable, including criminal liability, if their actions meet the elements of a criminal offense, such as corruption.

In practice, there are cases where the application of BJR does not automatically absolve directors from liability. For example, in the case of the procurement of CRJ-1000 and ATR72-600 aircraft at PT Garuda Indonesia (Persero), and the management of pension funds at PT Kereta Api Indonesia (Persero), even though the directors defended themselves based on BJR principles, they were still held liable for the losses incurred because the decisions were deemed inconsistent with GCG principles and detrimental to the company and the state.

Therefore, the application of BJR principles in state-owned enterprises (BUMN) must be carried out carefully, taking into account the legal context and the interests of the state. SOE directors need to ensure that every business decision they make not only benefits the company but also does not harm the state and society. Effective supervision and periodic evaluation of GCG implementation are key to ensuring that the BJR principle continues to function as valid legal protection and is not misused.[24]

State losses caused by errors made by directors, who hold full authority in determining the direction of the company, particularly within state-owned enterprises (BUMN), constitute a business risk. This risk cannot be denied. However, distinguishing between business risk and deliberate action or indications of corruption is the court's responsibility to prove.

In practice, the implementation of the BJR principle in Indonesia often faces various legal challenges. One of the biggest challenges is the lack of clarity regarding how courts can assess whether a business decision was made in good faith and based on careful consideration. Many cases in Indonesia demonstrate that SOE directors caught in legal trouble often fail to demonstrate that they have met the requirements stipulated in the BJR principle. For example, Karen Agustiawan, the former President Director of PT Pertamina, was convicted by the Corruption Court (Tipikor) for involvement in an investment decision detrimental to the state through the acquisition of a Participating Interest (PI) in the Basker Manta Gummy Field in Australia. Although this decision was made to increase Pertamina's profits, the court deemed it was not based on rational considerations and ultimately caused the state a loss of Rp 568 billion.

Another case involving Hotasi Nababan, the former President Director of PT Merpati Nusantara Airlines, also highlighted the failure to implement the BJR principle. In a Boeing 737-Family aircraft leasing project, the third party leased the aircraft failed to fulfill the contract,

[23] R. Subekti, *Prinsip-prinsip Tata Kelola Perusahaan dan Tanggung Jawab Direksi* (Jakarta: Penerbit Pustaka Lintas, 2005).
[24] Azheri, B., & Anggunsuri, U.: *The implementation of business judgment rule principle in managing the company*, Nagari Law Review, Vol. 3, No. 2, 2020, 32–44.

resulting in losses to PT Merpati of US$1 million. The court determined that there was negligence in contract oversight and the implementation of Good Corporate Governance (GCG) principles, resulting in the Board of Directors being denied BJR protection, even though the decisions they made were business decisions.

However, losses incurred by state-owned enterprises are not always the result of intentional misconduct. In many cases, business decisions made in good faith and based on careful consideration can still result in losses. Long-term investments, for example, carry risks that cannot be fully predicted. However, according to the BJR principle, as long as the decisions are made in good faith, rationally, and in compliance with applicable regulations, the Board of Directors should be protected from personal liability for any losses.

Although there are no specific provisions regarding the BJR principle in the State-Owned Enterprises Law, this principle remains binding and applies to BUMN, given that a Limited Liability Company (Persero) is an entity regulated by the Limited Liability Company Law. Issues related to the application of the BJR principle still frequently arise in legal practice in Indonesia. Several cases involving BUMN have questioned the BJR principle regarding the accountability of the Board of Directors. Three notable cases are worth highlighting: first, the case involving KA, the former President Director of PT Pertamina, related to the investment project to purchase a Participating Interest (PI) in the BMG Block; second, the case involving HN in a Boeing 737-Family aircraft leasing project; and third, the case involving HRW, the former President Director of PT Kereta Api Indonesia (KAI), related to an investment collaboration with PT OKCM, which acted as investment manager to invest company funds in the capital and money markets.

The internal oversight mechanism for BUMN includes the strategic role of the Board of Commissioners, tasked with overseeing the performance of the Board of Directors and ensuring that business decisions align with the company's vision, mission, and policies. Furthermore, the internal audit function is a crucial tool in identifying potential risks and ensuring compliance with applicable regulations and operational standards. External oversight by the Supreme Audit Agency (BPK) also adds an independent layer of control to audit the finances and performance of BUMN comprehensively.[25]

The prudential principle and good corporate governance are key pillars in preventing business policy deviations and unlawful acts. Directors are required to make decisions based on thorough risk analysis, comprehensive data and information, and attention to broad social and economic impacts. Within this framework, transparency is key to ensuring that the entire decision-making process is accountable to the public, shareholders, and other stakeholders. Furthermore, accountability requires Directors to be transparent about performance results and the consequences of their decisions. The aspect of corporate social responsibility also emphasizes that SOE business policies should not focus solely on profit but must also accommodate the interests of society and the sustainability of national development.

If all these principles are consistently implemented, the risk of loss arising from market dynamics, imbalances between supply and demand, or failed business partnerships should not be immediately considered a violation of the law or a criminal offense. These risks are an inherent part of normal business activities and must be managed with professional strategies. Therefore, the application of the Business Judgment Rule is relevant to protect Directors from

[25] Badan Pemeriksa Keuangan Republik Indonesia, Laporan Hasil Pemeriksaan BUMN, 2023, 12–20.

unfounded lawsuits when the losses occur not due to negligence or bad intent, but rather due to business uncertainty.

Within the framework of a modern state based on the rule of law, the principles of legality and justice are the primary foundations for law enforcement, particularly in the context of criminal liability for business policies adopted by managers of State-Owned Enterprises (BUMN). The principle of legality emphasizes that every criminal act must be based on clear and firm laws and regulations,[26] Therefore, no one can be punished without a valid legal basis. Therefore, state losses resulting from business policies can only be used as a basis for criminal punishment if three important elements have been met: an unlawful act, fault (mens rea), and real and legally provable losses.[27]

In this context, decisions or policies made based on business judgment, namely rational business considerations, based on adequate information, and in good faith, cannot automatically be used as the basis for criminal prosecution if the policy results in losses. This is because the business world inherently contains risks and uncertainties that cannot be completely eliminated. This means that, without legally proven intent or gross negligence, policymakers cannot be subject to criminal sanctions simply because their business decisions result in losses for the company or the state.

Legal protection for strategic decision-makers in state-owned enterprises (BUMN) is not merely a form of individual defense, but a fundamental necessity to ensure the sustainability and stability of the national economy. If business policies taken by SOE directors are continuously pursued with the threat of criminal prosecution without objective and comprehensive evidence, it will have a significant negative impact on the investment climate and management of state-owned enterprises. This can lead to legal uncertainty and criminalization due to political or economic pressure, ultimately harming the interests of the state at large.[28]

Thus, law enforcement in the state-owned enterprise (SOE) sector must always be based on the principles of substantive and procedural justice, with intent, good faith, and the business context being the primary considerations before prosecuting policymakers. This approach aligns with the goal of a state based on the rule of law, which upholds legal certainty while protecting the rights of business actors so they can operate effectively and efficiently without fear of unjust criminalization.

Preventing the Misuse of the Business Judgment Rule: Forward-Looking Concepts

The Business Judgment Rule (BJR) principle provides legal protection to directors to make business decisions without fear of lawsuits as long as the decisions are made in good faith, with due care, and without any conflict of interest. However, to maintain integrity and ensure that this principle is not abused, it is important to create a system that is more transparent, accountable, and subject to stricter oversight. Although the BJR aims to provide freedom in decision-making, in practice, this doctrine is at risk of being abused by directors who only

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[26] Herdhianto, Verido Dwiki, Sunny Ummul Firdaus, and Andina Elok Puri Maharani. "Omnibus Law Dalam Kerangka Prinsip-Prinsip Legalitas (Omnibus Law in the Principles of Legality'S Framework)." *Jurnal Inovasi Penelitian* 2.10 (2022): 3473-3484.

[27] Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power; See also Supreme Court Decision Number 223 K/Pid.Sus/2012.

[28] Komisi Yudisial Republik Indonesia, Kajian Perlindungan Hukum bagi Direksi BUMN dalam Perspektif Negara Hukum, 2021.

prioritize personal or group interests, or who fail to consider the long-term impact on the company.[29]

a. Increasing Transparency in Business Decision-Making

One important step to ensure that the BJR is not misused is to increase transparency in every decision made by the Board of Directors. Transactions conducted by the Board of Directors must be clear and accountable, both to shareholders and regulators. For example, decisions regarding major expenditures or strategic investments must be accompanied by detailed risk analysis and in-depth economic and financial studies. Furthermore, it is important for companies to publish reports on these decisions in public forums such as the General Meeting of Shareholders (GMS) or the company's annual report.[30]

b. Establishing a Strict Code of Ethics and Decision-Making Standards

To prevent the BJR from being used as a loophole to evade responsibility, companies must have a clear code of ethics that governs decision-making standards. This code of ethics should include guidelines for avoiding conflicts of interest and abuse of authority. With a clear code of ethics, every member of the Board of Directors must adhere to the basic principles of fair and transparent decision-making.

In addition, companies must implement decision-making standards that require the Board of Directors to consider various factors, including social, environmental, and ethical impacts, in every major decision. For example, any investment decision involving public funds or highly valuable assets must first undergo an approval process from the Board of Commissioners or even shareholders. These standards also include the obligation to involve external experts in certain high-risk decisions, such as acquisitions or mergers. Thus, decisions are made not only based on the Board of Directors' internal assessments but also through independent evaluations by parties with expertise in their respective fields.

a. Enhanced Oversight by the Board of Commissioners and Shareholders

Although the Board of Directors is granted decision-making freedom through the BJR principle, strict oversight is still necessary to ensure that decisions are in the best interests of the company and its shareholders. Therefore, the Board of Commissioners must play an active role in overseeing the strategic policies adopted by the Board of Directors. The Board of Commissioners must be more than a passive supervisory body, but rather a partner in providing constructive input to the Board of Directors. This oversight must be carried out through regular evaluations of major decisions made by the Board of Directors, as well as reviews of the decision-making process itself. The Board of Commissioners needs to evaluate whether these decisions align with the company's long-term goals and do not simply benefit certain parties in the short term. Furthermore, the Board of Commissioners must ensure that the Board of Directors has a strong professional background and relevant experience to make difficult strategic decisions.

b. Strengthening the Role of Supervisory and Regulatory Authorities

In addition to internal oversight, supervisory authorities, such as the Financial Services Authority (OJK) for public companies or the Ministry of State-Owned Enterprises (BUMN) for state-owned enterprises, must play a more active role in overseeing the implementation of BJR

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[29] Wicaksono, Adi Hardiyanto. "On harming the state finances or the state economy by a state-owned enterprise (bumn) and/or its subsidiaries in Indonesia." *Scientia Business Law Review (SBLR)* 1.2 (2022): 63-73.

[30] Alum Simbolon & Camvin Pramarta, "The Ambiguity Application of Business Judgment Rule Doctrineas Director Immunity Right in the Company Law (Analysis of Supreme Court Verdict no 121k/pid.sus/2020)" *Journal Equity of Law and Governance* 3, No. 1, (2023):11. **DOI:** https://doi.org/10.55637/elg.3.1.6613.1-12

principles. They must monitor decisions that could significantly impact the public or state interest and ensure that such decision-making complies with applicable laws and regulations.

Supervisory bodies also need to develop clearer technical guidelines regarding the implementation of BJR principles to prevent misinterpretation at the company level or by law enforcement. These guidelines will serve as a reference for the Board of Commissioners, Board of Directors, and regulators to assess whether their decisions truly meet the requirements for protection under BJR principles.

Furthermore, regulators need to introduce effective reporting and whistleblowing mechanisms, allowing external parties to report suspected abuses of BJR principles or violations of good corporate governance obligations. This way, companies can avoid making detrimental decisions that go undetected.

c. Implementation of Firm and Effective Legal Sanctions

To ensure that the BJR principle is not used to avoid accountability for detrimental decisions, stricter sanctions are needed for Directors found to have committed violations. While BJR provides protection for Directors, this protection only applies if the decisions are made in good faith and based on rational considerations.

If it is found that a decision made by a Director is clearly detrimental to the company and violates applicable regulations, the Directors must be prepared to be personally accountable for that decision. Strict legal sanctions must be applied, whether in the form of fines, civil lawsuits, or even criminal charges if malice or fraud is found in the decision-making.

The implementation of these sanctions also aims to provide a deterrent effect for other Directors, preventing them from recklessly using BJR to protect themselves from actions that are detrimental to the company or the country. With clear sanctions, Directors will be more cautious and careful in making risky decisions.

d. Ongoing Education and Training for Directors

Finally, to ensure that Directors can use the BJR principles appropriately and avoid misuse, ongoing training covering business ethics, risk management, and good corporate governance is necessary. This training program should be tailored to the latest developments in law and business practices, and provide sufficient knowledge on how to manage risk without harming the company.

With these more detailed and comprehensive steps, it is hoped that the Business Judgment Rule principles can be used more wisely, prevented from misuse, and continue to provide fair legal protection to Directors, without neglecting their responsibilities to the company and the public. This principle can remain valid as a tool to support risky decisions, but with clear boundaries and oversight to avoid greater losses.

Conclusion

The discussion appropriately outlines the multifaceted liability of a President Director under the 2025 Revised BUMN Law while incorporating the Business Judgment Rule (BJR) as a framework for legal protection. However, it could be critiqued for its lack of depth regarding how the BJR threshold of “good faith and adequate information” is assessed in practice, especially in state-owned enterprises where political and public interest considerations often influence decision-making. Additionally, the analysis of reputational and political pressures remains descriptive and would benefit from linking these pressures to governance mechanisms or empirical examples, thereby providing a stronger analytical foundation.

The future application of the Business Judgment Rule (BJR) must balance directors' decision-making discretion with accountability, ensuring it is not misused to justify harmful corporate actions. Strengthening BJR implementation requires integrating its principles with robust corporate governance, transparent oversight, and clear regulatory frameworks. Such a systematic approach will preserve directors' legal protection while safeguarding long-term corporate, shareholder, and public interests.

The research suggests strengthening the application of the Business Judgment Rule (BJR) through several measures: enhancing transparency in directors' decision-making, enforcing ethical and corporate governance standards, reinforcing oversight by commissioners and shareholders, and empowering supervisory authorities with clear guidelines and reporting mechanisms. Consistent legal sanctions and continuous professional development for directors are also essential to prevent misuse. These steps aim to balance decision-making discretion with accountability, ensuring the BJR functions as both a protective and integrity-preserving instrument for corporate sustainability.

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