The Business Judgment Rule as The Limit of The Responsibility of State-Owned Enterprise Directors for Losses Due to Business Decisions

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Abstract. The limitations of civil responsibility for directors of state-owned companies (SOEs), which combine the twin characteristics of commercial organizations and public policy instruments, are determined in large part by the commercial Judgment Rule (BJR). This frequently leads to uncertainty about who is responsible for corporate losses brought on by actions made. The purpose of this study is to examine the BJR's doctrinal formulation and normative foundation as the boundaries of directors' liability. Through an analysis of the SOE Law and the Limited Liability Company Law, a normative juridical methodology using statutory, conceptual, and comparative methods is employed. The findings demonstrate that, if decisions are taken prudently, in good faith, within the bounds of lawful power, and without a conflict of interest, the BJR shields directors from civil responsibility. However, legal ambiguity and the possibility of criminalizing sound business actions are brought about by inconsistent law enforcement, especially when it comes to the equating of corporate losses with state losses. Maintaining a balance between management liberty and responsibility requires consistent application of the BJR.

Keywords: Business Judgment Rule, Civil Liability, Directors, State-Owned Enterprises, Corporate Governance.

1 Introduction

SOE Boards, notably Persero Boards, are at the crossroads of public and corporate legal systems. The Board of Directors manages a Limited Liability Company (Persero) for the company's benefit in accordance with the company's goals and objectives and policies deemed appropriate within the bounds of the articles of association and the law. On the other hand, because the state is the majority shareholder and because the status of separated state assets is still often positioned as part of 'state finances', the business decisions of SOE Directors are often drawn into the realm of public accountability, even criminal, when the results of these decisions result in losses [1].

This tension has direct implications for the quality of business decision-making. In modern corporate theory, risk is an inherent part of business activity: not all decisions

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will generate profits; some decisions will actually result in losses as a consequence of market dynamics, technological change, regulatory uncertainty, and global competition. Therefore, corporate law in various jurisdictions has developed doctrinal tools to prevent judicial second-guessing of otherwise reasonable business decisions [2]. One of the most important tools is the Business Judgment Rule (BJR), which states that courts should not replace judges' business judgment with directors' if they operate in good faith, with informed consent, and without conflict of interest.

Indonesia has a rich civil law tradition, but protecting directors' discretion is not new. According to Law Number 40 of 2007, which controls corporate law, every Board member must operate the company in good faith and with full responsibility. The law allows the Board of Directors to be exonerated if they can prove over time that the losses were not their fault, that management was acting prudently and in good faith in line with the company's goals, that there was no conflict of interest, and that measures were taken to prevent losses. In terms of norms, this conception has actually embraced a framework for protection that is consistent with the Business Judgment Rule (BJR) theory [1].

Nonetheless, in the management of state-owned enterprises, these parameters have not always functioned as a safe haven. When losses occur, the directors are often accused of abuse of authority. This is the case despite their business-rational but speculative decisions, as well as failed investments due to external factors. The situation is worsened when the law enforcement agencies treat corporate losses as state losses resulting into a shift from corporate civil liability regime to criminal liability particularly at the instance of corruption. In these situations, the border between acceptable business risk and unlawful action, requiring mens rea, becomes blurred.

The tensions got heated after Law Number 1 of 2023 concerning the Criminal Code which stated the restitution of state losses does not eliminate criminal sanctions. In addition, the act defines the criminal acts of “causing losses to state finances or the economy of the state” and “abusing authority that causing loss to state finances or the economy of the state”. The interpretation of this law expands the notion of state finances to include public properties that are different from either state or regional enterprises. Thus, although losses suffered by the company are the result of business risks that cannot be avoided, loss suffered by the state will directly arise if assets separate as capital of a Limited Liability Company (Persero) still considers state finances.

This circumstance has led to a tendency known as the "criminalization of business decisions." Directors of state-owned enterprises are typically risk cautious because they fear criminal penalties if their firm fails. But according to Law Number 19 of 2003 concerning State-Owned Enterprises, the state-owned enterprise policy itself accepts both the public-benefit-oriented Perum (Public Corporation) and the profit-oriented Persero (Persero) form, which is subject to the limited liability corporation system. Managerial professionalism is nevertheless necessary for both types, and it cannot be entirely risk-free [3].

In this context, BJR should not be understood merely as a defense doctrine in court, but rather as a governance framework that emphasizes the quality of the decision-making process. A study of the PT ASDP Indonesia Ferry (Persero) case, for example, shows that BJR is not absolute protection, but rather an evaluative standard that requires good faith, prudence, loyalty, legitimate authority, informed decisions, business rationality, absence of abuse of discretion, and adequate documentation and accountability. Thus, the primary focus of BJR lies in process-based review, not solely on the final outcome of profit or loss.

The Indonesian corporate legal system reflects this process-based assessment. The Company Law (UUPT) places the principles of good faith, propriety, and good corporate governance as obligations that cannot be overridden by the articles of association or other internal provisions [1]. This means that standards of propriety and fairness in the management process are the fundamental principle inherent in every company, including state-owned limited liability companies (BUMN). Additionally, the UUPT offers a way to investigate businesses if there are suspected illegal activities that might harm the business or its shareholders. This creates room for a factual assessment of the governance and decision-making procedures of the Board of Directors.

State-owned businesses (BUMN), especially limited liability firms (Persero), have a distinct legal identity from their stockholders since they are corporations. As a result, the company's losses are, in theory, corporate losses rather than shareholder losses. Limited liability firms are based on the separation of assets theory. However, because of the idea of divided state assets, the division of SOE assets is frequently questioned in Indonesian debate. Constitutional Court decisions addressing the relationship between separated state assets and state finances provide a crucial context for this controversy. The research challenge lies in defining operational boundaries: when losses to state-owned enterprises (BUMN) are treated as corporate losses recoverable through governance and civil law, and when they become state losses triggering public consequences [4].

Corporate losses can originate from two major sources. First, pure business losses, which are a natural consequence of risk and uncertainty. Second, losses resulting from unlawful acts stemming from fraud, conflicts of interest, violations of procurement procedures, or abuse of authority for personal gain or for the benefit of others. Law enforcement problems arise when these two categories are mixed: business losses are treated as losses resulting from unlawful acts without adequate due process testing. The article "Persero Business Losses: BJR versus Corruption Crimes" demonstrates the doctrinal debate regarding the position of Persero losses within corruption crimes and how BJR should limit the extent of the offense. On the other hand, the Criminal Code is designed as an extraordinary crime that is intolerant of abuse of authority, so the line must be strictly defined so as not to weaken the eradication of corruption and not stifle legitimate risk-taking.

From a civil law perspective, it is important to reiterate that the Board of Directors' liability is fault-based, not result-based [1]. Therefore, the assessment of the Board of Directors' liability should focus on the quality of the decision-making process (process-based review), not solely on the existence of losses. The BJR principle serves as a normative boundary that distinguishes between legitimate business risks and unlawful acts that give rise to personal liability [2].

Based on these problems, the study of the Business Judgment Rule as the limit of civil liability of BUMN Directors is relevant and urgent. Importance of the research are to clarify the doctrinal construction of the Business Judgment Rule in the Indonesian legal system, to examine the consistency of the regulation of BUMN with the BJR, and to formulate the limmits between the business discretion and the unlawful act.

The clarity of these boundaries can ensure the legal certainty of the Board of Directors and strengthen the governance of BUMN as a pillar of the national economy. In this regard, the research seeks to answer two basic questions: how the Business Judgment Rule doctrine is normatively regulated in the Indonesian corporate legal system and how to reconstruct the ideal Business Judgment Rule as the limit of liability of Directors of BUMN in order to avoid criminalizing business decisions made in good faith. This model of issue formulation is expected to provide a systematic analytical framework for assessing the status of BJR as a legal protection tool and an accountability mechanism in the management of BUMN.

2 Literature Review

The study of the Business Judgment Rule (BJR) initially developed within the common law tradition, particularly through corporate judicial practice in the United States, particularly Delaware jurisprudence. In classical corporate law literature, the BJR is understood as a doctrine that grants judicial deference to business decisions of directors as long as those decisions are made in an informed manner in good faith and without conflict of interest. Anglo-Saxon literature emphasizes that the BJR is not absolute immunity, but rather a standard of review that shifts the focus of assessment from the outcome of the decision to the quality of the decision-making process. This concept developed in response to the risk of hindsight bias in courts' assessments of business failures.

The Indonesian legal system is based on civil law, however corporate law experts say Article 97 paragraph 5 of Law Number 40 of 2007 regulating Limited Liability Companies has adopted the BJR method. National literature associates BJR with fiduciary obligations, particularly the duty of care and loyalty. Several studies show that this normative design protects directors but is nonetheless generic and not entirely operative in judicial practice.

Academic debate is even more intense when BJR relates to SOEs. The research on SOE law illustrates the paradoxical position of a limited liability company (Persero) as both a private firm and a vehicle for public policy. Some studies identify conceptual problems in these big framework lessons: notably what they have to say about the nature of "separated state assets" and how this will affect expansion of the definition of state losses in corrupt cases. Against this backdrop, the article notes that there are a number of which discuss what we have described as a connection between its business losses and corruption offences which talk about separating pure business loss from unlawful loss.

The comparative studies also evidence that the implementation of BJR in other jurisdictions does not come isolated, but worked together with corporate governance mechanisms, record keeping standards and internal control systems. The literature emphasizes the importance of protection for directors is based upon process based review rather than proving a lack of bad intent.

While numerous studies have been conducted on the BJR and the responsibilities of directors, a research gap remains regarding the reconstruction of the BJR as a limit to the civil liability of state-owned enterprise directors in the context of potential criminalization of business decisions. Therefore, this research aims to fill this gap by formulating operational parameters for the BJR that are adaptive to the legal structure and governance of state-owned enterprises in Indonesia, while maintaining a balance between managerial autonomy and public accountability.

3 Methodology

This normative or doctrinal legal research analyzes Business Judgment Rule norms, principles, and doctrines utilizing secondary evidence from literature studies. Law Number 40 of 2007 on Limited Liability Companies, Law Number 19 of 2003 on State-Owned Enterprises and their derivative regulations, and Aristotle's justice and trust theory are used to examine fiduciary obligations. Business Judgment Rule, BUMN duality, segregated state assets, and independent legal entities are conceptually examined. Because it defines positive legislation, assesses the efficacy of regulations, and reconstructs the ideal model of BUMN Directors' civil responsibility that strikes a balance between corporate discretion and accountability, this research is prescriptive, explanatory, and evaluative. In order to produce a comprehensive and cohesive normative formulation, legal materials are analyzed qualitatively using the following methods: legal interpretation, legal construction, legal argumentation, systematization, and evaluation. Statutory rules, court decisions, including key cases like Aronson v. Lewis and Smith v. Van Gorkom, books, journals, and dissertations, and legal dictionaries and encyclopedias are primary legal materials.

4 Discussion

4.1 Normative Regulation of the Business Judgment Rule Doctrine in the Indonesian Company Law System

The Business Judgment Rule is a principle that protects directors from legal liability for business transactions or actions they undertake in managing a company [5]. Common law, specifically US business law, underpins this theory. According to Black's Law Dictionary, directors must act in good faith, exclusively in the company's best interests, and without conflict of interest while making corporate decisions [6].

The Business Judgment Rule protects directors from personal liability for damages originating from business dealings or activities made in accordance with the company's original goals. In carrying out their management functions, directors are often faced with various strategic choices that do not always result in profits, because every business decision inherently carries risk [7]. This risk is an inherent part of corporate activities and must be managed professionally to minimize potential losses. Therefore, the Business Judgment Rule doctrine provides protection to directors as long as decisions are made through a fair process, based on rational considerations, with full responsibility, and not driven by personal interests. Therefore, if the decision is later proven to be detrimental to the company, the directors cannot necessarily be held personally liable.

Many Indonesian laws use the Business Judgment Rule idea. Article 97 paragraph (5) of Law Number 40 of 2007 on Limited Liability Companies covers general provisions. Directors are not liable for company losses if they can show that the losses were not caused by their error or negligence, that the actions were taken with due care and in good faith, that there was no conflict of interest, and that precautions were taken to prevent or minimize losses. The term "preventive measures" refers to proactive activities taken to halt or lessen possible losses, such as making an attempt to gather sufficient information and taking into account a number of pertinent aspects before making a choice.

Government Regulation Number 23 of 2022, which offers comparable rules on the relief of directors from liability provided the requirements of good faith, prudence, and lack of conflict of interest are fulfilled, also emphasizes the Business Judgment Rule for SOEs. This was subsequently strengthened by Article 9F of Law Number 1 of 2025, which stipulates that directors cannot be held legally responsible if they can demonstrate that a loss was due to neither their mistake nor negligence and management occurred in good faith without any conflict of interest as well as preventive measures were taken.

These rules apply to all firms, including state-owned enterprises (BUMN) as Limited Liability corporations. Thus, they are limited by limited liability corporation law and BUMN restrictions. As a corporation, the Board of Directors oversees and represents the company internally and externally. This includes managing the company's assets, keeping books, creating work plans and budgets, overseeing GMS, and performing representative duties in court and before third parties. These responsibilities have legal consequences in the form of an obligation to act professionally, carefully, and faithfully in the interests of the company, as reflected in the principle of fiduciary duty and the possibility of personal liability in the event of negligence.

In state-owned enterprises (BUMN) in the form of a Limited Liability Company (Persero), the scope of the directors' responsibilities becomes more complex because in addition to carrying out profit-oriented corporate functions, they also bear a public mandate to support state policies and realize the prosperity of the people. In accordance with the framework of good corporate governance, the directors must create work plans and annual reports, protect and manage distinct state assets, fulfill social and environmental obligations, and implement the principles of accountability, transparency, responsibility, independence, and fairness. Therefore, the Business Judgment Rule's inclusion in various regulations serves as both a safeguard for directors' business discretion and a normative boundary that guarantees that this freedom stays within the bounds of good faith, caution, and the public interest and company's best interests, all of which are inherent in BUMN [8].

4.2 Reconstruction of the Ideal Business Judgment Rule as the Limit of Responsibility of BUMN Directors to Avoid Criminalization of Well-Intentioned Business Decisions

In this context, reconstruction is needed at least at three levels. First, the conceptual level: defining the beneficiary fiduciary duties of SOE directors, whether they are solely for the company, or also for the state/public, and how to operationalize them without creating conflicting obligations. Second, the normative level: interpreting and drafting the parameters of Indonesia's BJR (Company Law) into a test standard that can be applied by civil judges in compensation claims against directors. Third, the institutional level: designing governance and documentation mechanisms that strengthen the BJR evidence, so that the burden of proof does not solely depend on narratives after the loss occurs.

First, the standard of 'good faith' must be distinguished from the mere absence of malice. Good faith in business decisions includes intellectual honesty: Directors do not cherry-pick data, do not conceal material information from the Commissioners/GMS, and do not construct false justifications for decisions that are actually directed at other interests.

Second, the "prudence" standard needs to be reduced to process indicators, such as feasibility studies, due diligence, sensitivity analysis (stress testing), and the use of independent appraisers for material transactions. The ASDP document emphasizes the importance of due diligence and independent appraisals for material acquisitions as part of the duty of care.

Third, the "no conflict of interest" standard must encompass both direct and indirect conflicts, including affiliated transactions, the acceptance of office-related gratuities, and corporate opportunities. This is where the relationship with the anti-corruption regime arises, as office-related gratuities can be classified as bribery under the Criminal Code.

Fourth, the obligation to "take action to prevent the occurrence or continuation of harm" requires an adaptive response. A director is tested not only during decision making but also when new information becomes available which requires correcting the course of action: renegotiation of a contract, termination of a project or introduction of measures for risk mitigation.

Fifth, the restraint of authority is central. Ultra vires decisions cannot be protected by BJR. Thus, the mapping of the authority structure of SOEs (Board of Directors, Board of Commissioners, GMS and relevant ministries) should be a part of fiduciary duty reconstruction.

Sixth, documentation is the proof currency. Such documents as meeting minutes, internal memos, legal opinions and fairness opinions become key tools in rebutting challenges to business decisions made years earlier by demonstrating that the Board of Directors acted on an informed basis and exercised its business judgment.

Seventh, this study contends that directors can be civilly liable not only for punitive reasons but also as providers of incentive. If standards are too strict, innovation will be sacrificed; if they're not strict enough, moral hazard looms. A precisely delineated BJR emerges as a nexus between these two extremes.

Eighth, SOEs are subject to additional complexities in terms of public policy objectives. Thus, the measure of corporate interest must explicitly include such mandates: directors should not be blamed for decisions that reduce short-term profits, as long as they were made in service to a legitimate public service mandate.

Ninth, this study also assesses the need to differentiate between operational losses and losses resulting from transactions involving conflicts of interest. The second category is more closely tied to unlawful acts, while the first is more closely tied to business risks.

Tenth, conceptual reconstruction will be enriched with comparisons. The Delaware tradition offers lessons on standards of review (business judgment, enhanced scrutiny, and overall fairness) and the role of disclosure. However, this transplantation cannot be done haphazardly; it must be adapted to Indonesia's legal structure and state-owned enterprise governance [2], [9].

The parameters for the release of the Directors' liability in Article 97 paragraph (5) of the UUPT can be read as the four pillars of the Indonesian BJR test: (a) the pillar of causality-fault (losses not due to error/negligence); (b) the pillar of good faith and prudence (good faith and prudence for the benefit of the company); (c) the pillar of conflict of interest (absence of conflict); and (d) the pillar of mitigation (actions to prevent the occurrence/continuation of losses) [1]. These four pillars are basically in line with the principles of BJR in the common law tradition, but require operationalization so that they do not stop as normative clauses.

First, the causality-fault pillar requires a distinction between 'loss' and 'fault.' Loss is a quantifiable economic fact; fault/negligence is a normative assessment of the process. In civil litigation practice, this pillar requires a two-pronged burden of proof: the plaintiff must demonstrate an unlawful act or breach of duty; the Board of Directors can then counter by showing that the loss arose from market risk or force majeure. Without a clear evidentiary framework, this pillar is vulnerable to degenerating into a disproportionate reversal of the burden of proof.

Second, the pillar of good faith and prudence demands contextual standards of reasonableness. In large transactions, reasonable prudence requires due diligence, independent appraisals, legal opinions, and risk assessments; while in daily operational decisions, prudence can take the form of monitoring performance indicators, internal controls, and compliance with standard operating procedures (SOPs). The ASDP document details actions such as gathering sufficient information, considering alternatives, assessing risks, consulting with experts, and documenting processes as part of the duty of care.

Third, conflict of interest pillars should be widely recognized. Conflicts do not always entail ownership of shares or businesses with relatives; they can also involve affiliations, promises of office, other gratuities or political pressure that lead directors to prioritize objectives outside of the company's best interests. Here is where integration with anti-corruption regime comes in. This Code recognizes many types of bribery and gratuities, and these norms enshrine a negative standard director loyalty in business decisions."

Fourth, the mitigation pillar highlights the dynamic aspect of management. A well-intentioned board of directors is not a one-and-done decision, but instead something to monitor continually and iterate on. Within the risk management paradigm, ‘mitigation’ involves establishing early warning indicators, conducting periodic audits, reviewing business assumptions, and executing an exit strategy when those assumptions no longer stand. In a civil litigation context, the mitigation pillar can reduce the scope for accusing directors of wrongdoing solely because the final outcome is a loss.

In state-owned enterprise (BUMN) practice, business decision-making often takes place within an approval chain involving the Board of Directors, the Board of Commissioners, committees under the Board of Commissioners, and the GMS. To assess the fairness of the process, civil judges need to map out: who initiated the proposal, who conducted the review, how alternatives were discussed, how risks were recorded, how performance indicators were agreed upon, and how dissenting opinions (if any) were documented. Such a process assessment will be fairer than assessing solely the final outcome, as BJR rejects hindsight bias. At the same time, process mapping helps distinguish individual and collegial responsibilities within the Board of Directors, for example, in collective decisions taken at Board meetings or in investment committees. In the BUMN realm, this mapping is also important for assessing the role of government assignments (public service obligations) and their impact on benchmarking the company's interests [10].

This chain of approvals differentiates the decision-making process of state-owned enterprise (SOE) directors from that of private companies in general. In practice, business proposals typically begin at the work unit/subsidiary level, then escalate to the Board of Directors via an internal memorandum containing commercial justification, risk profile, and policy support requirements. Afterward, the same material often "circulates" for review by legal, compliance, risk management, finance, internal audit, and the Board of Commissioners' committees. Under certain circumstances, decisions are also linked to the approval of the GMS/Minister, either because the transaction value exceeds a certain threshold, because it involves changes to the capital structure, or because it touches on the assignment mandate.

The Business Judgment Rule (BJR) should be reconstructed as the limit of SOE directors' accountability based on the idea that the board is a corporate organ with business discretion to make strategic decisions under uncertainty and risk. This principle is reflected in Indonesian positive law in Law Number 40 of 2007 concerning Limited Liability Companies, Government Regulation Number 23 of 2022, and Law Number 1 of 2025, which exempts directors from responsibility if they can prove that the loss was not due to their error or negligence, the decision was made in good faith and prudence, there was no conflict of interest, and preventative measures were taken. However, in practice, there is still a tendency to expand the meaning of "state loss" in SOEs, which has implications for the criminalization of business decisions that are actually legitimate corporate risks [11].

Conceptually, an ideal BJR reconstruction must emphasize a clear distinction between business risk and criminal misconduct. Not every loss can be classified as an unlawful act or crime, especially if the decision is made through a rational process, based on adequate information, and within the company's best interests [2]. In particular, the dynamics are complicated by an inherent double nature of SOEs as both a business organization (firm) and a policy instrument. So from the standpoint of the reconstruction model, BJR must be framed as an "initial normative filter" that must pass before police officers identify criminal elements under the condition that we first test loss evaluation through corporate governance examination and fiduciary duty [12].

A reconstruction will ideally include certain aspects. Finally, the laying down of more prominent parameters relating to good faith, duty of care and rational basis criterion. Second, the recognition that determining fault must take into account the decision-making process and not just the endpoint. Third, reinforces the understanding that losses at the state-owned enterprises (BUMN) in a limited liability company (Persero) are corporate loss and would not by nature be state financial loss from criminal perspective unless there was element of abuse of authority or conflict of interest. Fourth, the harmonization of the corporate law regime and the criminal law regime to avoid overlapping interpretations [13].

Therefore, a good reconfiguration of the Business Judgement Rule not only provides greater defence for SOE directors' business discretion, but also finds counterbalance between managerial freedom and public accountability. This warranty serves as crucial checks against the defensive decision-making phenomenon in which directors tend to avoid any innovative or strategic decisions for fear of criminalization resulting in inferior SOE performance and competitiveness [14].

5 Conclusion and Recommendation

BJR doctrine if examined through the lens of Indonesian corporate legal system has a relatively sound normative basis such as Law Number 40 Year 2007 concerning Limited Company, Government Regulation Number 23 of Year 2022 and Law Number 1 of Year 2025 yet still needs better operationalization to craft limits to SOE Directors in order not so easy but still fairly easy for directors concerned to avoid civil lawsuit. To provide clarity to business leaders and ensure that the BJR remains effective, an optimal reconstruction of the BJR must focus on distinguishing between genuine business risk-taking and unlawful acts or abuse of authority by centering the inquiry not on whether a bad outcome occurred (outcome-based review) but rather on whether decision-making processes were performed at a reasonable standard. The four key pillars of no errors, good faith and prudence, unilateral absence of conflicts of interest, and presence of mitigation measures must be expressed through due diligence standards and other measurable indicators such as thorough and balanced documentation, clearly defined limits of authority, and governance frameworks that are held responsible. For SOEs that operate as both a business and a public policy tool, the BJR must act as the first normative filter to avoid the criminalization of legitimate business decisions, leading to the right balance between managerial freedom and public scrutiny. To achieve this, a greater clarity of operational frameworks, consistency in the case law, enhancement in the practice of good corporate governance, and the corporate law and public finance law balance are requisites to provide clarity of the law and support business risk in a responsible and economically justifiable manner.

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