

EXPLORING : VARIOUS CHARACTERISTIC OF THE BUSINESS JUDGMENT RULE WITHIN THE LEGAL FRAMEWORKS OF DIFFERENT COUNTRIES

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Abstract: *Business judgment rule is a legal principle of the common law legal system that aims to provide protection to the directors in carrying out their duties as decision-makers in the company not to be legally accountable if the decision turns out to be detrimental to the company. Indonesia is trying to transplant this concept to be applied in Indonesia, which can be seen in article 97 of Law No.40 of 2007 concerning Companies, but this rule does not regulate in detail the conception of the business judgment rule, including legal remedies to prove the business judgment rule, moreover the paradigm change that occurred in the latest SOE Law in looking at the losses of SOEs, the principle of Business Judgment Rule is rapidly developing in the Common Law legal system, Until now, the debate about the conception of Business Judgment Rule has become a debate, moreover, the characteristics of Business Judgment Rule that have developed in Indonesia are quite different from the concept of Business Judgment Rule abroad, making this Business Judgment Rule in Indonesia limp in terms of rules and implementation. The writing of this article uses normative legal research, using primary legal sources that are authoritative, namely the Company Law, the Law on State-Owned Enterprises, the written rules of Foreign Countries, data collection techniques through literature studies. Using deductive patterns as a method of analysis by connecting major and minor premises to draw conclusions.*

Keywords: *Business Judgment Rule, Competition, Foreign Countries*

Introduction

The responsibility of the board of directors sometimes holds hostage the maximum ability of the directors to provide their ability to increase the company's value while increasing profits for the company and providing large dividends for shareholders. In carrying out corporate actions, the directors of SOEs carry out office orders related to investment and corporate decisions, they are always faced with a situation of "double-edged sword", on the one hand, carrying out state duties to contribute to state revenue, on the one hand, if there is a state loss due to its corporate actions, the directors are sued for committing acts of corruption. The Company's Board of Directors is required to dare to take risks based on their authority and adhere to the principles of BJR that they have for the company's purposes, being over-prudent makes the company at risk of losing the opportunity to advance higher, as for the risks that occur during corporate actions are a risk of the company's business and responsibility, Prasetyo said that decisions taken related to

business by the board of directors are more qualified in accordance with their capacity compared to the court¹.

The doctrine of the Business Judgment Rule (BJR) is one of the doctrines that is developing in the midst of increasingly comprehensive business practices to protect the actions of directors². Efforts to protect the actions of the directors are needed so that the actions of the directors are not easily held legally accountable. The Board of Directors, as an important element in determining the company's policies, is also given space to take actions that, from the perspective of business logic, have the potential to benefit the company³. However, it is not uncommon for the actions of the board of directors that aim to prioritize the company's profits actually have the opposite effect, namely potentially detrimental to the company. The losses suffered by the company as a result of the actions of the board of directors in this context must be protected because if all the actions of the board of directors are legally responsible, it can hinder the creativity of the board of directors in dealing with various issues, including profit-oriented efforts for the company.

The *Business Judgment Rule* (BJR) or Business Decision Doctrine is a legal principle that protects the directors or management of a company from personal liability for the company's losses, as long as the decision is taken in good faith, prudence, without conflict of interest, and rationally. This doctrine originated in *the Common Law* (United States) and is now applied in various countries. Although Business Judgment Rule is a doctrine derived from countries that adhere to the Common Law legal system, Indonesia as a country that adheres to the Civil Law legal system also has provisions on the principle of Business Judgment Rule. The provisions are regulated in several laws and regulations, such as the Limited Liability Company Law No. 40 of 2007, however, the regulation in Indonesia does not explicitly use the term Business Judgment Rule or other terms. In any case, until the emergence of SOE Law No. 1 of 2025, it also comes with the concept of providing legal protection for members of the directors, but regarding the business judgment rule grammatically there is no mention in this law.

Discussing the implementation of BJR in several countries such as America and Australia has imposed BJR as a statutory obligation and has been implemented in the judicial process, while in Indonesia even though BJR has been adopted, it has not been fully implemented or even rarely used. The implementation of BJR in Indonesia is an effort to protect the Board of Directors from a legal aspect if no fraud is found, conflict of interest, while the implementation in America in the judicial process, the judge will evaluate the decision-making process before making a decision, while in Indonesia itself the concept and existence of the business judgment rule that is not offensive causes its application in some cases there are several disparities in the application of *the Business Judgment Rule* itself, which should be *The Business Judgment Rule is an Immunity Doctrine* for the administrators of the State-Owned Enterprise.⁴

The update in writing this study aims to conduct a study on the Business Judgment Rule between Indonesia, Australia and America where the three countries adhere to different legal systems, namely the civil law system is adopted by Indonesia while the common law system is adopted by

¹ Prasetio, *The Dilemma of SOEs Clashing in the Application of Business Judgment Rule*, ed. by Eben Ezer Siadari and Henry Sulaiman Salim Shahab, Print I (Jakarta: PT. Rayyana Komunikasindo, 2014). Page 143

² Abdullah Ahmed and Alkayat Alazemi, Introducing The Business Judgment Rule In Select Countries Of The Arabian Gulf, *Comparative Law Review* 28, No. 1 (2022), Hlm.16–20.

³ Shinta Zahara, Construction Application by Business Judgment Rule Principle as Legal Protection against Directors' Decisions That Harm the Company, *Legal Brief* 11, No. 5 (2022), Hlm.2722–4643.

⁴ Siti Hapsah Isfardiyana, Business Judgement Rule by the Company's Board of Directors, *Jurnal Panorama Hukum*, Vol. 2 No. 1 June 2017, (Malang: Faculty of Law, Kanjuruhan University of Malang, 2017), ISSN: 2527-6654, p. 17.

Australia and the United States to find similarities and differences, including the factors that cause these similarities and differences. and hopefully get good input from these differences in the implementation of the Business Judgment Rule in Indonesia.

Literature Review

A. Concept of Business Judgment Rule

In the application of company law, there are doctrines or teachings that accompany it. Doctrine is a scientific opinion or stance that is rationally compiled and stated by legal scientists and can convince others, influence jurisprudence and can become a rule of law, therefore doctrine is part of the source of law. In the Indonesian legal system, doctrine is recognized as one of the sources of law. Doctrine in law is defined as "analytical study of law" or "doctrinal study of law" which means science. Legal doctrine is also called legal dogmatics. The concept or Doctrine of Business Judgement Rule is a concept that has developed and lived first as a deverative law originating from companies in the US, Business judgement rule (BJR) is a concept that exists and develops in business law or company law, the concept exists to provide protection for directors where directors cannot be held accountable in the event of losses arising from business or business competition by directors based on Good Faith and full of caution. Black's Law Dictionary defines BJR as something that can take and control a decision that is not intended and clashed with personal desires, full of facts where this is a good consideration for the company (best interest). In order to be implemented properly, BJR has principles that must be fulfilled, namely: Good Faith, proper purpors (right goals), Having a rational basis (rationality), due care (full of prudence), in this case by looking for things that can be trusted as the best interset (the best decision) for Limited Liability Companies⁵.

In this case, the BJR doctrine becomes applicable because the Board of Directors in conducting conflicts of interest transactions does not harm the company. In addition, it can also be supported if the Board of Directors has good faith and is responsible for its decisions, where this is regulated in Article 97 paragraph (5) letter b of Law No. 40 of 2007 concerning Limited Liability Companies (UUPT). Then, based on the provisions in Article 97 paragraph (5) letter c of the UUPT, it is also added that the members of the Board of Directors cannot be held accountable if the Board of Directors can prove that there is no direct or indirect conflict of interest in the management actions that result in losses. This means that the Board of Directors must be responsible if in carrying out a conflict of interest transaction has clearly harmed the company, and if the transaction otherwise provides profits, then he is not held accountable by the company, and automatically this BJR doctrine becomes applicable to protect him as a Board of Directors.

The doctrine of business judgment rule is rooted in the doctrine of fiduciary duty or responsibility of the company's directors, where the directors are responsible not only for dishonesty or mismanagement, but also for negligence, even if it is only in the form of minor negligence. The Board of Directors is required to carry out their duties in managing the company in good faith and full of prudence, like an ordinary person (prudent man) in carrying out the management of wealth. The Doctrine of Business Judgment Rule is a form of legal protection for the company's legal entity in avoiding personal liability for the company's losses incurred based

⁵ Alum Simbolon dan Calvin Pramarta, "The Ambiguity Application of Business Judgment Rule Doctrine as Director Immunity Right in the Company Law (Analysis of Supreme Court Verdict no 121k/pid.sus/2020)", *Journal Equity of Law and Governance Vol 3, 2023*: Hlm. 2

on fiduciary duty. There are five (five) main elements in the Business Judgment Rule which are the principles that must be applied as follows⁶:

1. *Business Decisions*, can only be applied to an action taken by the board of directors. These actions include active or passive actions including actions not to take certain decisions.
2. *Disinterestedness*, emphasizes that every decision taken by the board of directors is solely for the benefit of the company and does not contain personal interests or without conflict of interest.
3. *Due Care*, before making a decision, the directors must make the necessary efforts or actions in collecting information related to requesting legal opinions from experts, including making comparisons.
4. *Honest and Good Faith*, the directors must act based on honesty and good faith in carrying out their duties as directors who act in the interests of the company.
5. *No abuse of discretion*, the directors in making decisions in accordance with their duties and authorities for the benefit of the Company.

B. Legal System Theory

A system is a unit of various different devices that work together to achieve a certain goal, where according to Sudikno Mertokusumo, a system is a unit consisting of elements that interact with each other and work together to achieve the goal of the unit. The legal system, according to Bellefroid, is a series of legal regulations that are arranged in an orderly manner according to its principles. Paul Scolten, stated that the legal system is a unity in the legal system, there are no legal regulations that conflict with other legal regulations of that system. Furthermore, according to Subekti, the legal system is an orderly arrangement or order, a whole consisting of parts related to each other, arranged according to a plan or pattern, the result of such a thought to achieve a goal⁷. The existence of the legal system in this world cannot be separated from the development of the idea of the state of law that has existed since 1,800 B.C. According to Jimly Asshiddiqie, the idea of people's sovereignty grew and developed from the Roman tradition while the ancient Greek tradition became the source for the idea of the rule of law⁸.

The theory of the legal system itself according to language is a legal unit composed of three elements, namely: a. Structure is all law enforcement institutions or institutions, along with all the apparatus that includes, the police with their police, the prosecutor's office with their prosecutors, and all professions with their people. b. Substance is all legal principles, legal norms, and legal rules, both written and unwritten, including jurisprudence. c. Legal culture is a habit, opinion, of law enforcers, of community members who live and grow into a habit⁹.

With demikin, if we discuss the legal system, it is the three elements above that are the focal point in the discussion. In analyzing the development of the legal system and law enforcement, there are parties who offer legal system reform. In the theory of the legal system itself, it consists of several parts or what we often know as the term components of the legal system. Legal system theory is an analytical tool ("analytical knife") that is crucial in the comparative (comparative)

⁶ S.A Bagung Fransiskus and Khusnul Yaqin, 2024, *The Implications of the Business Judgement Rule as a Form of Legal Protection for Founders of Sole Proprietorships*, Surabaya: Narotama University Surabaya, p. 1221.

⁷ Mahendra Kurniawan, et al. *Participatory PERDA Academic Manuscript Guidelines*. (Yogyakarta: Kreasi Total Media, 2007), p. 5

⁸ Fajlurrahman Jurdi, *Theory of the State of Law*, (Malang: Setara Press, 2016), p. 17

⁹ H. Juhaya S. Praja, *Legal Theory and Its Applications, Bandung*, (Jakarta: CV Pustaka Setia, Second Edition, 2014), p, 60

method of dissecting, understanding, and comparing law not only as a set of written rules, but as a complex unit.

C. Fiduciary Duty Direksi

Business Judgment Rule (BJR) is a doctrine with the aim of protecting the interests of the Board of Directors as long as the decisions made are based on good faith and responsibility. In practice, one of the decisions is a conflict of interest transaction. This transaction occurs, because in carrying out its business, the Board of Directors often conducts various transactions with parties who have a personal interest in the conduct of these transactions, which may also involve the Director, commissioner, and/or major shareholders.

In carrying out his duties, a director is attached to Fiduciary in Latin known as *fiduciarius* which means trust. Technically, the term fiduciary is interpreted as someone who holds something in trust for the benefit of others. A person has fiduciary duty when he or she has fiduciary capacity. A person is said to have a fiduciary capacity if the business he transacts, the property or wealth he controls is not for his own benefit, but for the benefit of others. Fiduciary duty is a doctrine derived from the Common Law legal system which teaches that there is a fiduciary relationship between directors and companies. So that the director only acts like a trustee or agent only, who has an obligation to serve fully and best to the company. Fiduciary Duties occur when one party does something for the benefit of another party by putting aside his own personal interests, but for the benefit of others¹⁰. Fiduciary Duties by Black's Law Dictionary is defined as the duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person (such as the duty that one partner owes to another). Translated into Indonesian which means Fiduciary Duties is a duty to act at the highest level for honesty and loyalty to others and in the best interests of others (such as a duty that one partner owes to another).

That in principle, the board of directors is burdened with the principle of Fiduciary Duties towards the company, not towards the shareholders. Therefore, only the company can force the board of directors to carry out the principle of Fiduciary Duties. However, in carrying out his function as a board of directors, in general he must also pay attention to the interests of shareholders. Although he bears the principle of Fiduciary Duties as a director, he remains free to vote and opinion according to his beliefs and interests in every meeting he attends. The Board of Directors also has the freedom to make decisions according to their business considerations and business instincts as long as the decision is not detrimental to the Company¹¹.

Method

The term method means a way, to get to but the desired result with the desired analysis knife. The research methods applied in this article are included in the category of Normative Law research, where in its making it is more focused on the analysis of legal norms as the object of research. In addition, Soerjono Soekanto introduced the concept of literature law research, which is a method carried out by studying related literature. The normative legal research method uses the normative juridical approach method. Normative juridical approach is "an approach that refers to the conceptual, and comparative approach that applies, with the nature of explanatory research. Then to collect data and materials using primary legal materials and

¹⁰ Munir Fuady, *Modern Doctrines in Corporate Law and Its Existence in Indonesian Law*, (Bandung: PT Citra Aditya Bakti, 2002), p.33.

¹¹ Munir Fuady, *Corporate Law in the Paradigm of Business Law*, (Bandung: PT Citra Aditya Bakti, 2002), p.61

secondary legal materials, by reading and understanding data, legal materials, and other literature that are still online. Related to the legal literature that has been found and analyzed qualitatively and comprehensively. After being analyzed, it is presented in the form of a qualitative analysis.

Result and Discussion

The BJR doctrine which is a form of protection for business judgement for the Board of Directors has been regulated in regulations in Indonesia, America and Australia. Indonesia, the United States, and Australia are countries that have different legal systems, namely Indonesia with a civil law system, while Australia has a commol law system. The legal system according to Lawrence M. Friedman is divided into 3 (three elements, namely legal structure, legal substance, and legal culture.) These three elements are interrelated to create effective laws in a social society, there are things that must be considered in this study, where there are different legal systems, namely Indonesia with a civil law system and the common law is American and Australian.

In Black's Law Dictionary, it is defined as an act or action carried out by the Board of Directors in issuing a business consideration in order to obtain a decision for the company by prioritizing the best interests of the company, done in good faith. Sutan Remi Syahdeni in the business law journal stated that BJR is a principle that provides a form of protection or immunity to the Board of Directors in connection with the implementation of its duties and responsibilities. In the United States of America is the origin of the Business Valuation Rule. In America, this rule was developed through a court decision based on common law. The use of Business Appraisal Rules in the United States is strictly controlled by corporate law and the common law system. The primary purpose of the Business Valuation Rules is to protect the directors and officers of the company from lawsuits over business decisions, as long as the decisions are made in good faith, with useful information, and are considered in the best interests of the company. The United States courts will only question this decision in cases of failure to act prudently or in breach of duty. This shows that the Business Appraisal Rules in the United States allow directors to take reasonable risks without fear of personal responsibility, as long as the decision-making process is done appropriately. The Long History of Business Judgment Rule in America is codified in the Model Business Corporation Act (MBCA) of 2016, which was compiled by the American Bar Association as a reference for corporate legislation in various states. MBCA 2016 emphasizes the two main obligations of the board of directors, namely the duty of care and the duty of loyalty. Article 8.30(a) provides that every director shall act in good faith and in the best interest of the corporation. Meanwhile, Article 8.30(b) stipulates that every director must act with due care, use information that is trustworthy, and make rational considerations. MBCA 2016 makes the BJR a codified rule, which stipulates that the decision of the board of directors that meets these elements cannot be legally accounted for, even if the results are detrimental to the company. Article 8.31 of the MBCA 2016 clarifies the limits of the application of BJR, namely that directors cannot be protected if: (a) they obtain undue personal gains, (b) act with malicious intent to harm the company, (c) commit criminal acts, (d) abuse the company's business opportunities, or (e) conduct transactions with conflicts of interest, this rule harmonizes in managerial taking and legal responsibility. Thus, the 2016 MBCA transformed the BJR from a mere doctrinal presumption to a statutory standard of corporate accountability, which ensures that business policies remain protected as long as they meet the principles of prudence, honesty, and corporate loyalty [In addition to the MBCA, The American Law Institute (ALI) played a major role in formulating the normative principles of the BJR through its publication Principles of Corporate Governance: Analysis and Recommendations (1994). In Section 4(c), ALI states that a director or officer of a corporation discharges a duty of care if: (1) He has no personal

interest in the business decisions; (2) Have sufficient and relevant information before making a decision; and (3) Rationally believe that the decision is in the best interest of the Company.

Meanwhile, the BJR Concept in Indonesia is explicitly adopted through the UUPT. Unlike the United States and Canada, which recognize the BJR as a result of the evolution of common law and court precedents, Indonesia regulates the BJR in a codified manner as a form of legal protection for members of the board of directors and board of commissioners who carry out their duties in good faith and prudence. The adoption of BJR in the civil law system shows the desire of lawmakers to provide a healthy space for business freedom for company organs without sacrificing the principle of legal accountability. Article 97 paragraph (5) of the Limited Liability Company Law can be understood as a concrete form of the application of BJR in the Indonesian legal system. This provision provides legal protection to the members of the board of directors as long as they can prove four main things: first, the losses suffered by the company were not caused by their fault or negligence; second, the actions taken are based on good faith and prudence in the best interest of the company; third, they do not have a conflict of interest in such decision-making; and fourth, has made efforts to prevent the occurrence and continuation of losses for the Company, the emergence of Law No. 1 of 2025 article 9 letter F which in concept is still the same as the Limited Liability Company law, where in Indonesia the element of good faith that is still gray is difficult to prove, moreover the settlement and proof of the Business Judgment rule in Indonesia has not been strictly regulated.

Meanwhile, in law in Canada, Canada has the principle of Business Judgment Rule which was born by the court and then codified in the UUP in the United Kingdom, namely In Canada, the doctrine of BJR (Business Judgment Rule) also develops through the principle of duty of skill and prudence, similar to its application in the UK. Specifically, the principle of skill and diligence obligation is formulated in Section 122(1)(b) of the CBCA 2019 (Canada Business Corporations Act), which emphasizes that good faith is the primary principle that allows directors to be exempted from liability for company decisions. In practice, the doctrine of the Business Judgment Rule (BJR) in Canada has evolved, as exemplified in the 1998 case of *Maple Leaf Foods v Schneider*. In this case, the judge emphasized that good faith is a fundamental principle for the board of directors, and directors, where non-share stakeholders including minority shareholders can sue the directors.

That there is a significant difference between the three rules, where this is also influenced by different legal systems, the recognition of the protection of the board of directors is more painfully noticed and appreciated in countries with a common law system than in Indonesia, where in Indonesia there are still many rules that are not strict on the rules.

Conclusion

That the differences between these three countries, also influenced by different legal systems, in the United States MBCA 2016 changed the BJR from a mere doctrinal presumption to a statutory standard of corporate accountability where the Long History of the BJR and jurisprudence makes the BJR a principle that must be considered in prosecuting a director in his decision-making, likewise in the CBCA 2019 where the development of BJR practice is very developed, this is proven With the decision by the judge in 1998, which became the basis of BJR, then it was decided against a director in making a decision that could be filed a derivative lawsuit and Oppersison Remedy, Indonesia also adopted the principle of BJR but in it there are still shortcomings and voids this is due to the lack of harmonization and explicit explanations resulting in multiple interpretations in the application of the Business Judgment rule.

References