

Business Judgment Rule from the Perspective of Director's Liability: A Comparative Study of Indonesia and the United States

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Abstract : *This research examines the structural weaknesses in the application of the Business Judgment Rule (BJR) within the Indonesian legal framework governing directors' liability, particularly the absence of clear normative parameters and judicial standards for assessing good faith, due care, and informed decision-making. As a result, law enforcement practices frequently adopt a result-oriented approach that equates corporate losses with legal fault, thereby exposing directors acting in good faith to potential criminal liability. This study aims to analyze the regulatory and doctrinal gaps in the Indonesian BJR framework and to propose a more coherent legal model aligned with international corporate governance standards. The research employs normative doctrinal legal research using statutory, conceptual, and comparative approaches, supported by an analysis of judicial reasoning and case law, particularly from the United States where the BJR has evolved through Delaware jurisprudence and the codification of the Model Business Corporation Act (MBCA) 2016. The findings indicate that although elements of the BJR are implicitly recognized in Article 97 paragraph (5) of the Indonesian Company Law, the absence of explicit doctrinal structure and consistent standards of judicial review has contributed to the overcriminalization of directors' business decisions involving ordinary commercial risks. Indonesian courts and law enforcement authorities therefore tend to emphasize outcomes rather than the integrity of the decision-making process. This research contributes by proposing a normative reconstruction of the BJR through clearer codification of its elements, integration with fiduciary duty principles, and the development of enforcement guidelines designed to distinguish legitimate business judgment from unlawful conduct, thereby strengthening legal certainty while maintaining balanced corporate accountability.*

Keywords : *Director's Liability; Business Judgment Rule; Company Law;*

Abstrak : Penelitian ini mengkaji kelemahan struktural dalam penerapan Business Judgment Rule (BJR) dalam kerangka hukum Indonesia yang mengatur tanggung jawab direksi, khususnya terkait tidak adanya parameter



normatif yang jelas serta standar yudisial dalam menilai itikad baik, kehati-hatian, dan pengambilan keputusan yang didasarkan pada informasi yang memadai. Akibatnya, praktik penegakan hukum kerap mengadopsi pendekatan yang berorientasi pada hasil, yang menyamakan kerugian perusahaan dengan kesalahan hukum, sehingga membuka kemungkinan bagi direksi yang bertindak dengan itikad baik untuk tetap dikenai pertanggungjawaban pidana. Penelitian ini bertujuan untuk menganalisis kesenjangan regulatif dan doktrinal dalam kerangka BJR di Indonesia serta mengusulkan model hukum yang lebih koheren dan selaras dengan standar tata kelola perusahaan internasional. Metode penelitian yang digunakan adalah penelitian hukum normatif doktrinal dengan pendekatan peraturan perundang-undangan, konseptual, dan perbandingan, yang didukung oleh analisis pertimbangan hakim dan yurisprudensi, khususnya dari Amerika Serikat di mana BJR berkembang melalui yurisprudensi Delaware dan kodifikasi dalam Model Business Corporation Act (MBCA) 2016. Hasil penelitian menunjukkan bahwa meskipun unsur-unsur BJR secara implisit telah diakui dalam Pasal 97 ayat (5) Undang-Undang Perseroan Terbatas, ketiadaan struktur doktrinal yang eksplisit serta standar pengujian yudisial yang konsisten telah berkontribusi pada kecenderungan kriminalisasi berlebihan terhadap keputusan bisnis direksi yang melibatkan risiko komersial yang wajar. Oleh karena itu, pengadilan dan aparat penegak hukum di Indonesia cenderung lebih menitikberatkan pada hasil akhir daripada integritas proses pengambilan keputusan. Penelitian ini memberikan kontribusi dengan mengusulkan rekonstruksi normatif terhadap BJR melalui kodifikasi yang lebih jelas atas unsur-unsurnya, integrasi dengan prinsip fiduciary duty, serta pengembangan pedoman penegakan hukum yang bertujuan untuk membedakan antara penilaian bisnis yang sah dengan tindakan yang melanggar hukum, sehingga dapat memperkuat kepastian hukum sekaligus menjaga keseimbangan akuntabilitas korporasi.

Kata kunci : Tanggung Jawab Direksi; Business Judgment Rule; Hukum Perusahaan;

Introduction

The development of a legal framework that accommodates calculated risk-taking has become increasingly important in fostering innovation and ensuring sustainable corporate growth.¹ Company directors are frequently required to make complex strategic decisions in circumstances marked by market volatility and rapid technological change.² The Business Judgment Rule (hereinafter referred to as the BJR) is a corporate law doctrine originating from common law jurisdictions, such as the United States and Australia. *Black's Law Dictionary* defines the BJR as “the presumption that, in making business decisions not involving self-interest or self-dealing, corporate

¹ R. Narendra Jatna *et al*, “Strengthening the Business Judgment Rule in Indonesia: Lessons from Malaysia”, *Journal of Sustainable Development and Regulatory Issues (JSDEI)*, 3 no. 3, (2025): 568.

² I Gede Agus Kurniawan *et al*, “The Business Law in Contemporary Times: A Comparison of Indonesia, Vietnam, and Ghana”, *Substantive Justice International Journal of Law*, 7 no. 2, (2024): 114.

directors act on an informed basis, in good faith, and in the honest belief that their actions are in the best interests of the corporation.”³

Within this framework, the BJR provides that directors may not be held legally liable for business decisions that result in losses, provided they can demonstrate that: (1) the loss was not caused by fault or negligence on their part; (2) the decision was made in good faith and with due care for the benefit of, and in accordance with, the purposes and objectives of the company; (3) there was no direct or indirect conflict of interest in the management action that caused the loss; and (4) reasonable measures were taken to prevent the occurrence or continuation of such loss, as stipulated in Article 97 paragraph (5) of Law Number 40 of 2007 on Limited Liability Companies (the Company Law). Notwithstanding this provision, law enforcement authorities in Indonesia continue to adopt a result-oriented approach, whereby business decisions that cause losses to the state or state-owned enterprises are readily construed as criminal acts of corruption. This tendency reflects a limited understanding of business judgment, corporate risk, and managerial discretion.

In essence, the BJR is intended to encourage innovation and support decisive yet adaptive leadership without exposing directors to unreasonable legal consequences. In Indonesia, however, one of the principal obstacles to the effective implementation of the BJR is the persistent phenomenon of overcriminalization. Directors particularly those serving in state-owned enterprises (SOEs) are frequently subjected to criminal prosecution under Law Number 31 of 1999 on the Eradication of Corruption, as amended by Law Number 20 of 2001 (the Anti-Corruption Law), for business losses incurred in good faith, absent any evidence of corrupt intent or personal gain. This practice illustrates a legal culture that has not fully internalized the principles of reasonable business risk and managerial discretion inherent in the BJR, thereby constraining decision-making autonomy, discouraging prudent risk-taking, and ultimately impeding innovation and corporate competitiveness.⁴

Within the Indonesian legal context, the most recent amendment to the State-Owned Enterprises Law, Law Number 16 of 2025 concerning the Fourth Amendment to Law Number 19 of 2003 marks a significant shift in the legal treatment of SOE directors by clarifying that they are not classified as public officials and that SOE losses do not constitute state losses. Nevertheless, the scope of this reform is confined to SOEs, leaving directors in the private sector without comparable legal protection and perpetuating unequal application of the BJR.⁵ While this amendment may shield SOE directors from unwarranted criminalization for legitimate business decisions, it has also raised concerns regarding the potential creation of de facto immunity for unlawful conduct that harms the corporation.

In judicial practice, the application of the BJR in Indonesia remains at a relatively nascent stage and has yet to generate a consistent body of jurisprudence comparable to that found in common law jurisdictions such as

³ Bryan A. Garner, *Black's Law Dictionary*, (America, West, Thomson Group), 212.

⁴ Andrew Keay dan Joan Loughrey, “The Concept of Business Judgment”, *Legal Studies*, 39 no. 1, (2019): 36.

⁵ Retno Dewi Pulung Sari *et al*, “State Financial Losses as a Result of Environmental Damage”, *Journal of Human Rights, Culture and Legal System*, 4 no. 1, (2024): 121.

the United States.⁶ Indonesian courts tend to emphasize the outcomes of business decisions rather than the decision-making process itself, despite the fact that the core rationale of the BJR lies precisely in evaluating the process by which decisions are made. Consequently, corporate losses are frequently presumed to indicate negligence or misconduct without first assessing whether the decision was taken in good faith, with due care, and on the basis of adequate information, as required under Article 97 paragraph (5) of the Company Law. This outcome-oriented approach underscores the limited judicial understanding of the functional role of the BJR as a mechanism for protecting legitimate managerial discretion.

One of the fundamental factors contributing to the weak implementation of the Business Judgment Rule (BJR) in Indonesia lies in the absence of clear normative parameters and well-defined judicial standards of proof concerning the meanings of “good faith,” “due care,” and “adequate information.” These three elements, however, constitute the core pillars that distinguish a mere error in business judgment from legally actionable negligence. In some judicial practices, particularly in certain corporate liability cases, judges are often confronted with difficulties in determining the extent to which a director’s conduct may be classified as the exercise of reasonable care or, conversely, as legal negligence. This difficulty arises from the lack of comprehensive evaluative guidelines that can serve as authoritative benchmarks in assessing directors’ actions. As a result, the application of the BJR doctrine in Indonesia tends to be casuistic and heavily dependent on the subjective interpretation of judges in individual cases, rather than grounded in a systematic conceptual framework as required for the effective enforcement of good corporate governance principles.

This study aims to examine the conceptual and normative foundations of the Business Judgment Rule (BJR) in Indonesian corporate law and to analyze the limitations of its application in judicial practice, particularly in relation to directors’ liability for corporate losses. Through a comparative legal analysis with the United States corporate law framework, this research seeks to identify structural weaknesses in the Indonesian regulatory framework and the absence of clear evaluative standards governing the elements of good faith, due care, and informed decision-making. The contribution of this study lies in providing a systematic doctrinal reconstruction of the BJR within the Indonesian legal system by integrating comparative insights derived from the Model Business Corporation Act (MBCA) 2016, Delaware jurisprudence, and the principles developed by the American Law Institute (ALI). The novelty of this research resides in proposing an expanded set of normative parameters for assessing directors’ business decisions, emphasizing a shift from the prevailing result-oriented approach toward a process-oriented standard of review. By articulating clearer legal indicators for the application of the BJR, this study seeks to contribute to the development of a more coherent framework that balances the protection of legitimate managerial discretion with the need for legal accountability in both civil and criminal contexts.

⁶ Dominik Dellermann *et al*, “Design Principles for a Hybrid Intelligence Decision Support System for Business Model Validation”, *Electronic Markets*, 20 no. 3, (2019): 432.

Methods

This research adopts a normative legal research (doctrinal legal research) approach, which is conducted to address legal issues formulated in the research questions and to analyze them by relying on legal materials as the primary basis of examination and reference. The study employs three methodological approaches, namely the statutory approach, the conceptual approach, and the comparative approach. The legal materials used in this research consist of primary and secondary legal sources. The primary legal materials include Law Number 16 of 2025 concerning the Fourth Amendment to Law Number 19 of 2003 on State-Owned Enterprises; Law Number 31 of 1999 on the Eradication of Criminal Acts of Corruption in conjunction with Law Number 20 of 2001 amending Law Number 31 of 1999; Law Number 40 of 2007 on Limited Liability Companies; OJK Regulation No. 33/POJK.04/2014 on the Board of Directors and Board of Commissioners of Issuers or Public Companies; American Law Institute (ALI); and the Model Business Corporation Act (MBCA) 2016. Secondary legal materials comprise legal textbooks, scholarly doctrines, academic opinions of legal scholars, and law journal articles relevant to the legal issues examined in this study. The procedure for collecting legal materials is conducted through systematic analysis, selection, and tracing of both primary and secondary legal sources by means of library research. The analysis of legal materials begins with the collection and inventory of relevant legal materials, which are then systematically classified and analyzed in accordance with the research questions. Secondary legal materials are utilized to support and enrich the analysis of primary legal materials, thereby enabling the formulation of reasoned conclusions that adequately address the legal issues under examination.

Result And Discussion

The Concept of the Business Judgment Rule in Indonesia

The Business Judgment Rule (BJR) doctrine is closely associated with the doctrine of fiduciary duty. In order to assess the trust conferred by the company upon its directors under fiduciary principles, directors, as corporate organs responsible for conducting the company's business in accordance with its purposes and objectives, are inevitably exposed to business risks.⁷ Such risks may, at times, extend beyond the directors' maximum capacity to control or anticipate. Accordingly, to protect directors from the inherent limitations of human judgment, the BJR doctrine operates as a legal safeguard. Directors cannot reasonably be expected to make flawless decisions at all times, as error is an inherent aspect of human nature. It is therefore inappropriate to impose generalized liability on directors for mere errors of judgment without due consideration of the human element involved.⁸ The BJR doctrine provides legal protection for directors against potential liability arising from reasonable and ordinary business misjudgments.

⁷ Cornelius Simanjuntak dan Natalie Mulia, *Organ Perseroan Terbatas*, (Sinar Grafika, Jakarta, 2009), 39.

⁸ Try Widiyono, *Direksi Perseroan Terbatas Keberadaan, Tugas, Wewenang, dan Tanggung Jawab*, (Ghalia Indonesia, Bogor, 2008), 98.

Indonesian Company Law does not explicitly regulate or formally codify the BJR doctrine. Nevertheless, upon closer examination, the principle of good faith as stipulated in Article 97 paragraph (2) of Law Number 40 of 2007 on Company Law substantively incorporates elements of the BJR.⁹ Consequently, the relationship between the good faith requirement and the factual basis of claims brought against directors for loss-causing business activities becomes tenuous, particularly where directors invoke the BJR as a defense. This is because good faith is inherently subjective and difficult to prove, as it resides within the internal state of mind of the decision-maker. In practice, distinguishing between actions genuinely undertaken in good faith and those constituting ordinary performance of directorial duties remains challenging. Typically, the assessment of whether an act was proper or improper only becomes apparent *ex post facto*, after the company has suffered a loss as an outcome.¹⁰ Importantly, the elements of acting in the company's interest and objectives, together with good faith and full responsibility as integral components of corporate management, must be fulfilled cumulatively rather than alternatively.¹¹

Furthermore, uncertainty persists regarding whether errors in transactions or business decisions by directors should be assessed on a transaction-by-transaction basis or cumulatively across multiple transactions within a financial year, such as at the annual general meeting. The absence of clear statutory guidance allows the General Meeting of Shareholders to interpret the scope of the BJR either per transaction or based on profit-and-loss outcomes reflected in financial statements. Where directors are deemed to have caused losses to the company and fail to demonstrate that their actions fall within the protective ambit of the BJR, they may be subject to dismissal. Within the Company Law, the BJR doctrine is reflected in Articles 69 paragraphs (3) and (4), Article 97 paragraphs (3) to (5), and Article 104 paragraphs (2) and (3).

In addition, the BJR has been adopted by the Financial Services Authority (Otoritas Jasa Keuangan/OJK) for publicly listed companies through OJK Regulation No. 33/POJK.04/2014 on the Board of Directors and Board of Commissioners of Issuers or Public Companies, particularly in relation to corporate losses. Article 13 paragraph (2) of this regulation mirrors the BJR framework under the Company Law, providing that members of the board of directors cannot be held liable for losses incurred by an issuer or public company if they can prove that: (a) the loss did not result from their fault or negligence; (b) they performed their managerial duties in good faith, with full responsibility and due care, for the benefit of and in accordance with the purposes and objectives of the issuer or public company; (c) they had no direct or indirect conflict of interest; and (d) they took measures to prevent the occurrence or continuation of such losses.

⁹ *Ibid.*

¹⁰ Gatot Supramono, *Hukum Perseroan Terbatas Yang Baru*, (Djambatan, Jakarta, 1996), 81.

¹¹ Sutan Remy Sjahdeini, *Hukum Kepailitan, Memahami Faillissementsverordening Juncto Undang-Undang No. 4 Tahun 1998*, (Pustaka Utama Grafiti, Jakarta, 2002), 425.

The Concept of the Business Judgment Rule in the United States

In the United States, the Business Judgment Rule (BJR) is substantively reflected in the *Model Business Corporation Act* 2016 (hereinafter referred to as the MBCA), in which the duties of care and loyalty constitute its core components.¹² The BJR plays a fundamental role in the American corporate governance model and has formed part of the common law tradition for more than 150 years. Historically, the BJR functioned as a judicial doctrine rather than a codified statutory rule. Although it has long been recognized implicitly in numerous statutory provisions, it has not always been expressly defined or labeled as the Business Judgment Rule.¹³

The BJR originated within the common law system, particularly as a derivative of United States corporate law, as a means of preventing courts from second-guessing directors' business decisions.¹⁴ Stephen M. Bainbridge explains that the primary function of the BJR is to strike a balance between directors' authority to manage the corporation and the need for managerial accountability to shareholders.¹⁵

In its early development, the BJR was understood as a doctrine of judicial abstention, emphasizing that courts should refrain from reviewing the substantive merits of business decisions made by corporate directors.¹⁶ The doctrine was first articulated in judicial reasoning in *Percy v. Millaudon* (1829), where shareholders alleged that directors had acted negligently by making decisions that resulted in financial losses.¹⁷ The Louisiana Supreme Court, however, protected the company's managers on the grounds that the decisions had been made in good faith and in the absence of conflicts of interest. The court declined to assess the substance of the business decisions, focusing instead on the manner in which those decisions were made. The court reasoned that if judges were to focus solely on outcomes rather than decision-making processes, competent and honest individuals would be discouraged from serving as directors, leading to excessive risk aversion and ultimately harming shareholders and the broader public interest.¹⁸

This reasoning marked the emergence of the abstention doctrine, under which courts refrain from intervening in business decisions so long as directors act with due care and good faith. The doctrine reflects a legal acknowledgment

¹² Faisah Santiago, "Reconstruction of the Business Judgment Rule Doctrine in Indonesia: Legal Comparison with England, Canada, the United States, and Australia", *Jurnal IUS Kajian Hukum dan Keadilan*, 12 no. 1, (2024): 117.

¹³ Zeeshan Ashraf, "The Position Of The Business Judgment Rule In Different Corporate Cultures And Structures: A Study And Analysis", *Thesis*, Institute of Comparative Law McGill University Montreal, (2001), 5.

¹⁴ Diky Anandya, Kurnia Ramadhana dan Lalola Easter, *Mendudukan Kembali Implementasi Prinsip Business Judgement Rule Dalam Perkara Korupsi*, (Indonesia Corruption Watch (ICW), Jakarta, 2023), 10.

¹⁵ Hendra Setiawan Boen, *Bianglala Business Judgement Rule*, (Tatanusa, Jakarta, 2008), 100.

¹⁶ Alicia Andromeda Sanyoto dan Gunardi Lie, "The Business Judgment Rule in the Context of Directors' Liability: A Comparative Study of the United States, Canada, and Indonesia", *Indonesia Journal of Law and Economics Review*, 20 no. 4, (2025): 9.

¹⁷ Desty Sari Wardani, "Perlindungan Direksi Terhadap Keputusan Bisnis Melalui Penerapan Prinsip Business Judgement Rules Di Amerika Serikat, Jepang, Dan Indonesia", *Jurnal Program Magister Hukum Fakultas Hukum Universitas Indonesia*, 2 no. 3, (2022): 1141.

¹⁸ Aurelio Gurrea-Martinez, "Re-Examining The Law And Economics Of The Business Judgment Rule: Notes For Its Implementation In Non-US Jurisdictions", *Journal of Corporate Law Studies*, 18 no. 2, (2018): 417.

that risk is an inherent component of business activity and that not every loss resulting from managerial decisions constitutes legal negligence. In other words, an error in economic judgment does not automatically equate to legal fault. This principle underscores the necessity of delineating the boundary between directors' legal liability and their professional discretion, ensuring that courts evaluate the rationality and integrity of the decision-making process rather than the outcome alone.

By the twentieth century, the abstention principle evolved into a more structured standard of judicial review, particularly through the influential role of the Delaware courts, which are widely regarded as the most authoritative jurisdiction in the development of United States corporate law. This evolution involved a shift toward examining the procedural integrity of directors' decision-making and defining the scope of directorial liability.¹⁹ Under this framework, the BJR operates as a legal presumption that protects directors unless a breach of fiduciary duty is established.²⁰ This transformation from a principle of non-intervention to a legal presumption was crystallized in *Aronson v. Lewis*, a landmark decision of the Delaware Supreme Court, which formulated the modern articulation of the BJR. In that case, the court held that directors' decisions are presumed to have been made on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. Importantly, the court emphasized that judicial review must focus primarily on the decision-making process undertaken by the board rather than the economic outcome of the decision itself. As long as directors demonstrate that they relied upon reasonably available information and exercised rational deliberation, courts will refrain from substituting their judgment for that of the board. Through this reasoning, the Delaware courts established the BJR as a process-oriented standard of review designed to preserve managerial discretion while maintaining accountability through fiduciary duty principles.

The Delaware Supreme Court further reinforced the BJR as a substantive standard of review in *Smith v. Van Gorkom*. In that case, the board of directors of Trans Union approved the sale of the company without obtaining an independent valuation of the company's shares or consulting external financial advisors. The court held that the directors had failed to meet the requirement of being adequately informed and were therefore not entitled to BJR protection. The decision emphasized that directors must actively inform themselves of all material information reasonably available before making a business decision. The court therefore concluded that the board's approval of the merger constituted a breach of the duty of care because the decision was made without sufficient deliberation and without a reasonable informational basis.

These doctrinal developments were subsequently codified in the MBCA, drafted by the American Bar Association as a model for corporate legislation across U.S. states. The MBCA 2016 expressly affirms two principal fiduciary

¹⁹ Hendy Herijanto, *Prinsip Keputusan Bisnis Pemberian Kredit Perbankan dalam Hubungan Perlindungan Hukum*, (PT. Alumni, Bandung, 2014), 169.

²⁰ Santika Nanda Lestari, "Business Judgment Rule Sebagai Immunity Doctrine Bagi Direksi Badan Usaha Milik Negara Di Indonesia", *Notarius*, 8 no. 2, (2015): 306.

duties of directors: the duty of loyalty and the duty of care.²¹ Under Section 8.30(a), directors are required to act in good faith and in the best interests of the corporation. Section 8.30(b) further provides that directors must act with due care, rely on information reasonably believed to be reliable, and engage in rational deliberation.²² Through these provisions, the MBCA elevates the BJR from a common law presumption to a statutory norm, establishing that directors' decisions meeting these criteria cannot give rise to legal liability, even when such decisions result in corporate losses.

Section 8.31 of the MBCA 2016 further delineates the limits of BJR protection by providing that directors are not shielded from liability where they: (a) obtain improper personal benefits; (b) act with intent to harm the corporation; (c) engage in criminal conduct; (d) usurp corporate opportunities; or (e) participate in conflicted transactions. This framework reflects a deliberate balance between managerial autonomy and legal accountability. Accordingly, the MBCA transforms the BJR from a doctrinal presumption into a statutory standard of corporate accountability, ensuring that business decisions remain protected so long as they comply with the principles of due care, good faith, and corporate loyalty.

Beyond the MBCA, the American Law Institute (ALI) has played a significant role in articulating the normative foundations of the BJR through its publication *Principles of Corporate Governance: Analysis and Recommendations* (1994).²³ Section 4(c) of the ALI Principles provides that a director or corporate officer satisfies the duty of care if the decision-maker: (1) has no personal interest in the business decision; (2) is adequately informed with respect to the subject matter of the decision; and (3) rationally believes that the decision is in the best interests of the corporation.²⁴

Under U.S. corporate law, directors are thus required not only to act with due care but also to consistently consider the corporation's interests in their decision-making. However, the BJR doctrine recognizes specific exceptions, particularly in situations involving conflicts of interest. Where such conflicts are established, directors may not invoke the protection of the BJR. Furthermore, through various decisions, U.S. courts have articulated core principles of the BJR, including that business decisions must be commercially oriented, based on reliable information, undertaken in good faith, exercised with due care, free from fraud or illegality, not unfair or abusive, and made within the scope of directors' discretion as defined by corporate law and governance instruments.

²¹ Novia Fitriana, "Limitations In Business Judgment Rule: PT Pertamina, The United States And Australia Comparison", *Walisongo Law Review (Walrev)*, 7 no. 2, (2025): 152.

²² Berry Gunawan dan Ariawan Gunadi, "Doctrin Business Judgment Rule Analysis As An Effort To Protect The Law Of Directors Of Limited Liability Companies In Indonesia And The United States", *Edunity*, 2 no. 10, (2023): 1202.

²³ Yafet Yosafet Wilben Rissy, "Ketentuan dan Pelaksanaan *Business Judgment Rule* di Amerika, Australia, dan Indonesia", *Masalah-Masalah Hukum*, 49 no. 2, (2020): 161.

²⁴ Douglas M. Branson, "The Rule That Isn't a Rule - The Business Judgment Rule", *Valparaiso University Law Review*, 36 no. 3, (2002): 634.

Limitations of the Business Judgment Rule in Directors' Business Decision-Making in the United States

In its contemporary development, the Business Judgment Rule (BJR) has become essential due to the recognition that even intelligent, well-intentioned, and diligent individuals may make erroneous decisions that result in substantial corporate losses. The BJR acknowledges this inherent human fallibility and encourages competent and well-meaning individuals to assume directorial roles without fear of personal liability. Business decisions frequently involve significant risk.²⁵ Without the protection afforded by the BJR, neither directors nor senior officers would be willing to undertake risky decisions. In the long run, such reluctance may harm corporations, as high-risk ventures often carry the potential for substantial returns. Moreover, excessive risk aversion may negatively affect the broader economy, given that dynamic change is a primary driver of efficiency and economic growth. Accordingly, the BJR incentivizes capable directors to undertake risks that they reasonably believe may significantly benefit the corporation.

In general, the application of the BJR requires several cumulative conditions:

- a. **A Business Decision.** A business decision is defined as any conscious decision to take or refrain from taking action necessary for the management of the corporation. In the absence of a deliberate decision by the board to act or to abstain from acting, the BJR does not apply.
- b. **Absence of Personal Interest or Self-Dealing.** A director must not derive improper personal financial benefits from a business decision; rather, any benefit must accrue to the corporation as a whole.
- c. **Informed Consent / Due Care.** To qualify for BJR protection, directors must demonstrate a reasonable level of diligence and care. This standard is generally assessed by the extent to which directors, in the decision-making process, seek out and rely upon information sufficient to enable the consideration of reasonable alternatives.
- d. **No Abuse of Discretion.** A decision that would otherwise fall within the scope of the BJR will not be protected if it is deemed irrational, arbitrary, or constitutes an abuse of managerial authority.
- e. **Good Faith.** Decisions made in bad faith are not protected by the BJR. Bad faith does not refer to poor judgment or negligence; rather, it denotes transactions authorized for purposes other than a sincere effort to advance the welfare of the corporation or actions knowingly taken in violation of applicable positive law.
- f. **Best Interests of the Corporation.** The concept of the "best interests of the corporation" has generated extensive legal interpretation. Courts have progressively broadened its meaning to include actions that do not provide immediate benefits to shareholders but reasonably serve their long-term interests and the sustainable development of the corporation.

²⁵ Sentosa Sembiring, *Hukum Perusahaan Tentang Perseroan Terbatas*, (Nuansa Aulia, Bandung, 2006, 93.

Based on the jurisprudence of the Delaware Supreme Court, the principles articulated by the American Law Institute (ALI), and the scholarly views of Branson and Weinberger, at least eight core elements of the BJR in the United States may be identified: (1) the existence of a business decision; (2) reliance on reasonably reliable information; (3) good faith; (4) due care; (5) absence of conflicts of interest; (6) absence of fraud or illegality; (7) rationality; and (8) absence of unfair dealing. These elements have evolved into evaluative standards applied by courts across U.S. jurisdictions.

Through these developments, the BJR in the United States has transformed from a purely judicial doctrine into a codified legal obligation with statutory dimensions. The principle now functions both as a mechanism for protecting directors who act with professionalism and integrity and as a safeguard ensuring compliance with fiduciary duties. Through the combined influence of Delaware judicial precedent, codification in the MBCA 2016, and the normative framework established by the ALI, the BJR has become a central pillar of the American corporate law system, ensuring a balance between managerial risk-taking and accountability to shareholders and the corporation itself.

Limitations of the Business Judgment Rule in Directors' Business Decision-Making in Indonesia

The responsibility of members of the board of directors in managing the affairs of the company cannot be fulfilled merely by acting in the interest of the company in accordance with its purposes and objectives as stipulated in the Articles of Association. Such management must also be carried out by each director in "good faith" (*goede trouw, good faith*), as required under Article 85 paragraph (2) of the Indonesian Company Law, and with full responsibility.²⁶ In legal doctrine and practice, the notion of good faith in the context of corporate management by directors encompasses a broad range of obligations, including:²⁷

1. the duty to act as a fiduciary, namely to remain trustworthy (*bona fide*) at all times and to act with honesty;
2. the duty to manage the company for proper and legitimate purposes (*duty to act for a proper purpose*);
3. the duty to comply with applicable laws and regulations (*statutory duty or duty of obedience*);
4. the duty of loyalty to the company, which includes refraining from using corporate funds or assets for personal interests, maintaining the confidentiality of corporate information (*duty of confidentiality*), and safeguarding corporate secrets;
5. the duty to avoid conflicts of interest, including prohibitions against misusing corporate assets or information, exploiting one's position for

²⁶ Yahya Harahap, *Hukum Perseroan Terbatas*, (Sinar Grafika, Jakarta, 2009), 373.

²⁷ *Ibid.*, 383.

personal gain, appropriating corporate profits, engaging in self-dealing transactions with the company, or competing with the company.

In addition, directors are required to manage the company with full responsibility, which entails several interrelated duties, namely:

1. the duty of due care, requiring directors to act with the level of care ordinarily exercised by a prudent person in comparable circumstances (*reasonable care*);
2. the duty of diligence, which obliges directors to exercise continuous and reasonable attention to matters affecting the company;
3. the duty to display skill, whereby diligence and perseverance must be accompanied by adequate competence and expertise commensurate with the director's knowledge and professional capabilities.

Based on these elements of good faith and full responsibility, if a director fails to perform such duties, commits errors in the management of the company, or violates prohibitions governing corporate management, and such negligence or misconduct results in losses to the company or to the state in the case of state-owned enterprises the director shall bear full personal liability for those losses.²⁸ The forms of directorial misconduct that give rise to liability are those that contravene the principles of fiduciary duty.²⁹ Including, but not limited to: (a) violations of the duty of due care, whether arising from intent or negligence; (b) violations of the principle of prudence; (c) breaches of the duty of good faith; (d) actions inconsistent with proper business purposes; (e) lack of competence; (f) violations of applicable laws and regulations; (g) decisions made on the basis of inadequate information; (h) hasty decision-making; and (i) decisions taken without adequate investigation and rational consideration.³⁰

Based on the results of a comparative analysis of the application of the Business Judgment Rule (BJR) in Indonesia and the United States, several alternative solutions may be proposed as both normative and practical recommendations to address inconsistencies in the application of the BJR in determining directors' liability in Indonesia. The comparison demonstrates that the United States has successfully developed the BJR as a *standard of review* that evaluates the decision-making process rather than its outcome, through a combination of Delaware judicial precedent, the codification of the Model Business Corporation Act (MBCA) 2016, and the principles formulated by the American Law Institute (ALI). In contrast, Indonesia continues to assess directors' liability in a predominantly result-oriented manner, thereby exposing good-faith business decisions to potential criminalization, particularly in the context of corporate criminal liability and corruption-related offenses.

A review of the relevant provisions of the Indonesian Company Law (Undang-Undang Perseroan Terbatas) and Financial Services Authority Regulation No.

²⁸ Ahmad Yani dan Gunawan Widjaja, *Seri Hukum Bisnis: Perseroan Terbatas*, (PT RajaGrafindo Persada, Jakarta, 2003), 111.

²⁹ Munir Fuady, *Doktrin-doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia*, (PT. Citra Aditya Bakti, Bandung, 2002), 1147.

³⁰ *Ibid.*

33/POJK.04/2014 indicates that the existing framework governing the BJR and affording protection to directors and commissioners is, in principle, adequate. However, unlike the MBCA 2016 in the United States, Indonesian legislation does not explicitly recognize or define the BJR as a coherent legal doctrine. The key elements of the BJR contained in the Company Law and the OJK Regulation appear fragmented and conceptually detached from directors' common law duties to act with care and skill, as well as from their fiduciary duties to act in good faith and in the best interests of the company. This fragmentation underscores the need for broader codification of the BJR beyond the Company Law, drawing upon the MBCA 2016 model, which expressly articulates the duties of care and loyalty and their corresponding limitations.

In Indonesia, the BJR is only implicitly reflected in the Company Law and later reiterated in OJK Regulation No. 33/POJK.04/2014, without a unified conceptual framework. Accordingly, a more systematic codification is required in the form of: (1) explicit statutory provisions within the Company Law delineating the elements and limits of the BJR; (2) sector-specific guidelines, such as regulations issued by the Ministry of State-Owned Enterprises or the Financial Services Authority, setting forth technical indicators for the application of the BJR; and (3) criminal enforcement guidelines designed to distinguish areas of legitimate business judgment from unlawful acts. Such comprehensive codification would enhance legal certainty for directors, courts, and law enforcement authorities.

The most appropriate and comprehensive solution for strengthening the application of the BJR in Indonesia is a normative reconstruction of its core elements within the Company Law and its implementing regulations, so as to align them with doctrinal standards prevailing in common law jurisdictions, particularly as practiced in the United States. The four elements of the BJR currently reflected in the Company Law and POJK regulations have proven insufficient to provide adequate legal protection for directors, as they fail to encompass fundamental parameters necessary to assess the reasonableness of business decisions. Therefore, the BJR elements should be expanded to expressly provide that directors and commissioners shall not incur liability where: (a) business decisions are made on the basis of adequate, reliable, and rational information; (b) no fraud is involved; (c) there is no abuse of position or authority; and (d) no personal benefit is derived from the decision.

These additional elements should be reinforced by explicit recognition of the principles of the duty of care, duty of skill, good faith, and acting in the best interests of the company as minimum standards for evaluating directors' conduct. These parameters have proven effective within the U.S. legal system in maintaining a balance between managerial discretion and legal accountability. By adopting a similar approach, Indonesian courts would be better equipped with clear guidance to distinguish mere errors of business judgment from legal negligence or unlawful conduct. This is crucial to prevent investigators, prosecutors, and judges from treating corporate losses as the sole indicator of criminal fault. Accordingly, the assessment of the decision-making process should serve as the primary filter before imposing liability.

Such normative reconstruction is not only necessary to ensure consistency between the substantive content of the BJR and international practice, but also to correct the prevailing tendency among law enforcement authorities to adopt

a result-oriented approach and to draw good-faith business decisions into the realm of criminal law.³¹ By formulating the BJR more comprehensively, courts and enforcement agencies would possess an objective *standard of review* to distinguish ordinary business losses arising from reasonable risk-taking from unlawful conduct. At the same time, it must be emphasized that the BJR operates as a legal shield only insofar as directors act without fraud, without conflicts of interest, without abuse of authority, and without intentional wrongdoing.

Ultimately, these solutions aim to construct a more operational, consistent, and enforceable BJR framework applicable in both civil and criminal contexts. This approach strikes a balance between two competing interests: protecting directors from criminalization for reasonable business risks, and safeguarding corporate and state interests against abuses of authority that deviate from fiduciary duties. By functionally adopting core principles from the U.S. system without mechanical transplantation Indonesia can develop a BJR model that is better aligned with its national legal system and the practical needs of corporate criminal law enforcement.

From a comparative legal perspective, the legal framework governing the Business Judgment Rule (BJR) in the United States demonstrates several institutional strengths arising from the interaction between statutory regulation and judicial precedent. In practice, the doctrine functions as a standard of judicial review applied by courts, particularly the Delaware Court of Chancery and the Delaware Supreme Court, when assessing directors' compliance with fiduciary duties. Courts do not evaluate the commercial merits of the decision itself, but instead examine whether the directors acted on an informed basis, exercised due care, and remained free from conflicts of interest. Judicial reasoning in cases such as *Aronson v. Lewis* and *Smith v. Van Gorkom* illustrates how the courts scrutinize the procedural integrity of board deliberations, including the adequacy of information considered, the extent of consultation with financial advisors, and the rationality of the decision-making process. In contrast, the Indonesian legal framework regulates similar elements through statutory provisions contained in the Company Law and OJK Regulation No. 33/POJK.04/2014, yet these provisions function primarily as formal legal requirements rather than as an operational standard of judicial review. Consequently, enforcement practices in Indonesia often emphasize the financial consequences of a decision rather than the procedural steps undertaken by directors prior to making that decision. This difference in judicial orientation significantly affects how directors' liability is assessed in both jurisdictions.

Conclusion

Based on a comparative analysis of the application of the Business Judgment Rule (BJR) in Indonesia and the United States, it can be concluded that the

³¹ Waluyo Waluyo, Hilaire Tegan, dan Noni Oktiana Setiowati, "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): 246.

principal difference lies in the approach to assessing directors' liability. The United States has successfully positioned the BJR as a standard of review that focuses on the decision-making process rather than on outcomes, through the integration of Delaware court precedents, the codification of the Model Business Corporation Act (MBCA) 2016, and the principles of the American Law Institute (ALI). By contrast, the application of the BJR in Indonesia remains implicit, fragmented, and predominantly result-oriented, thereby creating the risk of criminal liability for directors even where business decisions are made in good faith and within the bounds of reasonable business risk. Although the Indonesian Company Law (Law on Limited Liability Companies) and Financial Services Authority Regulation No. 33/POJK.04/2014 contain provisions intended to afford protection to directors, these regulations have not yet formed a coherent and comprehensive conceptual framework of the BJR, nor do they provide clear parameters for law enforcement authorities and the judiciary. Consequently, strengthening the implementation of the BJR in Indonesia requires normative reconstruction through more explicit and systematic codification, both within the Company Law and its implementing regulations, by clarifying the elements, limitations, and the relationship between the BJR and the duties of care, skill, good faith, and acting in the best interests of the company. By expanding and clarifying the elements of the BJR and adopting a process-oriented standard of review as practiced in the United States, Indonesia may develop a more operational and consistent BJR framework. Such an approach is expected to strike an appropriate balance between protecting directors from criminalization arising from reasonable business risks and ensuring legal accountability for conduct involving fraud, conflicts of interest, or abuse of authority, in both civil and criminal contexts.

Recommendation

Based on the comparative analysis of the application of the Business Judgment Rule (BJR) in Indonesia and the United States, this study recommends strengthening the Indonesian BJR framework through a more systematic and explicit legal codification. Although several elements of the BJR are reflected in the Indonesian Company Law and OJK Regulation No. 33/POJK.04/2014, these provisions remain implicit and fragmented and therefore do not yet form a coherent doctrinal framework. Accordingly, clearer statutory provisions should be introduced within the Company Law to explicitly define the elements and limitations of the BJR, complemented by sectoral guidelines issued by the Financial Services Authority or relevant ministries, as well as enforcement guidelines designed to distinguish legitimate areas of business judgment from unlawful conduct.

In addition, this study recommends a normative reconstruction of the core elements of the BJR to align them more closely with doctrinal standards developed in international corporate law practice, particularly those reflected in Delaware judicial precedents and the codification of the Model Business Corporation Act (MBCA) 2016. Such reconstruction should clarify that directors should not incur liability for business decisions where those decisions are made based on adequate information, undertaken in good faith, free from conflicts of interest, and not involving fraud or abuse of authority,

and where they are intended to serve the best interests of the company. By clarifying these parameters, Indonesian courts and law enforcement authorities would have a more objective standard of review for evaluating directors' decision-making processes. Through this strengthened normative framework, the application of the BJR in Indonesia may gradually shift from a predominantly result-oriented approach toward a process-oriented standard of review. Such an approach is essential to achieving a balanced legal framework that simultaneously protects directors from the criminalization of reasonable business risks while ensuring legal accountability for conduct involving fraud, conflicts of interest, or abuse of authority.

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