

# *Some Problems in the Implementation of the Business Judgment Rule Principles to the Directors of State-Owned Enterprises in Indonesia*

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**Abstract-** Principles of Business Judgment Rule is not a principle that has existed for years. This principle is like two sides of a coin, on the one hand it is used to ensure directors work according to the corridor, on the other hand it can be used to protect moral hazard of the company's directors. In Indonesia this principle is often present in the trial of corruption cases for the benefit of the second side. Although in fact there has been a harmonization of principles in the management of the Business Rule in Indonesia, the Company has set out in Regulation of Legislation in Indonesia. But in its application is still not optimal. Based on several corruption cases that have occurred in Indonesia, the Board of Directors has not been able to protect them. The company law and BUMN are still limited to accommodating this principle, not yet explaining in detail what conditions and how this principle can be applied. The results of this study indicate that there are already regulating regulations related to the principles of the business judgment rule, but in the regulation it has not been implemented, because many who do not know the directors of state-owned enterprises can be protected by the principle of business judgment rules, and in those regulations not specific set criteria to meet the principles of the business judgment rule.

**Keywords-** *Business Judgment Rule; Directors; State-Owned Enterprises; Business Decisions; Indonesia*

## I. INTRODUCTION

Limited Liability Company in the form of state-owned companies have Directors in charge of carrying out the functions of the company. As a business entity [1], in principle accommodate the Company Law Business Judgment Rule [2],[3] in the execution of duties of Directors at the Company Limited. The existence of this law certainly expected there are some legal protections to the Directors who carry out their duties that are fiduciary (fiduciary duty) [4] has been accommodated. But on the other hand, the Board of Directors was also still burdened with personal responsibility when it violates the principles contained in the standard of fiduciary duty. Company Law has been set that the members of the Board of Directors cannot be sued personally accountable if they meet the requirements as stated in Article 97 paragraph (5). But what is stated in Article 97 paragraph (5) the principle of a new character that still need to be translated into more concrete to be applied correctly and fair. Business Judgment Principle needs good faith [5]. Business

Judgment is a principle which teaches that a decision regarding the activities of the Company's Board of Directors may not be contested by anyone, although the decision was later proved wrong or harm the Company throughout the decision meets the following requirements [6]: Ruling according to law; Carried out in good faith; Decisions have a rational foundations; Carried out with prudence (due care) as is done by people who are quite cautious in a similar position; Done in a manner that is reasonably believed (reasonable belief) as the best (best interest) to the Company.

There are two (2) the concept of thinking in the case law in the United States regarding the Business Judgment Rule in relation to the authority of the court in examining the substance of directors' decisions. The first concept that the court should examine and objectively examine the decisions of directors who have met the criteria of Business Judgment Rule in a limited manner (judicial review), is called the Business Judgment Rule as a standard of liability [7]. This concept was developed by the Delaware Supreme Court, in the case of *Graham v. Allis-Chalmers Mfg. Co.* [8], with the rationale that needs to be proved "What a directors to act with the same amount of care the which ordinarily careful and prudent men would use in Similar circumstance." The second concept is the Business Judgment Rule as abstention doctrine [9],[10]., which is against the decision of the board of directors has met the criteria of Business Judgment Rule should not be carried out judicial review by the courts (court abstained) and faced with the Act. This concept developed in the case of *Shlensky v. Wrigley* [11], the argument as follows: "that court will not step in and interfere with honest business judgment of directors UNLESS there is a showing of fraud, illegality or conflict of interest". The concept is a tremendous form of immunity for directors in making decision based on good faith and the precautionary principle.

When many of Directors wants bolder in taking business decisions that company is also more advanced, but remember vividly if wrong in deciding business policy which will occur according to court losses to the state. A case in point is when the Special Unit of the Attorney General (AGO) arrested former director of Merpati Nusantara Airlines Hotasi Nababan [12] sought since May 2014. The arrest of alleged corruption convict

lease of a Boeing 737-400 and 737-500 were conducted at the Terminal 3 of Soekarno-Hatta, Cengkareng, on Tuesday, July 22, 2014, at around 19:19 pm. The Supreme Court (MA) gives 4-year sentence and a fine of Rp 200 million to Hotasi Nababan. That have happened to the directors of state-owned enterprises are the former Chief Recruiter of PT. Pertamina, Karen Agustiwam, is convicted of corruption due to the business decisions taken by it [13]. Based on the description above, which will be studied in this paper is about the harmonization of principles Business Judgment Rule in the laws and regulations in Indonesia and the application of these principles in the management of state-owned enterprises.

## II. RESEARCH METHOD

The type of legal research that I use is normative legal research (doctrinal research). The nature of the research that the author chooses is prescriptive research. The approach used in this study is the statute approach, the historical approach (statue approach), and the conceptual approach. Legal research conducted by the author is based on primary legal material and secondary legal material. Primary legal materials consist of Law Number 19 of 2013 concerning State-Owned Enterprises, and Law Number 40 of 2007 concerning Limited Liability Companies.

## III. FINDINGS AND DISCUSSION

### 1. Regulations

Business Judgment Rule principles developed in countries with a common law system, such as the United States. Where the principle is a form of protection for the Board of Directors. According to Black's Law Dictionary, which is Business Judgment Rule is the rule that immunizes management from liability in a corporate transaction undertaken within the power of the corporation and the authority of management where there is reasonable basis to indicate that the transaction was made with due care and in good faith [14]. That can be interpreted that the principle of Business Judgment Rule protects the business decisions made by the Board of Directors the authority to decide where the limits are already set in the Articles of Association as well as had been done with prudence and good faith.

Directors in conducting business decisions must be made in good faith, responsibly and in accordance with the objectives of the Company. Principle Business Judgment Rule accommodate the requirements that must be done by the Board of Directors so that the decision-making process runs properly. In general, the principle of Business Judgment Rule has been adopted in the Company Law, as stated in Article 97 of the Company Law.

According to Article 97 of the Company Law of the above, the Board of Directors shall undertake the

management of state-owned in good faith and with full responsibility. If the Board of Directors has made the management of state-owned in good faith and with full responsibility, it can not be held liable personally as a result of loss owned. Terms of Directors should be held personally liable is at fault or negligent in performing their duties by the management is not acting in good faith and not full responsibility. Directors have to do with the full responsibility of the Company intention is to pay attention carefully and diligently. So it can be concluded that the actions of the Board of Directors of the Company shall be conducted in compliance with the juridical sebagai following three conditions: Good faith (good faith); Full responsibility; and For the benefit and business of the Company (proper purpose).

Pursuant to Article 97 paragraph (5) above the Company Law, a measure can be the implementation of the concept of Business Judgment Rule is:

- 1) Losses incurred through no fault or negligence;
- 2) Good faith and prudently for the benefit and in accordance with the purposes and objectives of the Company;
- 3) Does not have a conflict of interest;
- 4) Have taken action to prevent such loss arising or continuing.

Directors personally accountable should qualify for losses arising from errors or omissions. Errors and omissions of the Board of Directors views of formality actions were not in accordance with the provisions of the legislation and the articles of association of the Company. Judging from the substance of the action is not based on good faith and the precautionary principle (duty to act in good faith, duty of care, duty of loyalty) to the detriment of the Company.

The Decesion of Chairman of Bapepam-LK Number. Kep-45 / PM / 2004 dated 29 November 2004 in the form of Regulation No. IX.I.6 of the Board of Directors and Commissioner of Issuers and Public Companies (Decree of Bapepam). The wording of Article 3 are: "Members of the Board of Directors and or Commissioners are prohibited from directly or indirectly making incorrect statements about the fact that material and does not disclose material facts that the statements made not misleading as to the state of the Issuer or Public Company that occurred at the time the statement was made."

While Article 5 states: "Members of the Board of Directors and or the Commissioner can not be held responsible individually or jointly responsible ... ..when members of the Board of Directors and Commissioners are concerned or have been quite careful in determining that the statement is true and not misleading."

The words "if the person concerned (or the Board of Directors and Commissioners) have been quite careful in determining that statement (about the material fact that

was not true) done very carefully" clearly shows that this sentence is directed against the existence of a standard of care which must be owned by each Board of Directors and Commissioners of the company or open, and a decision to consider using the standard of care would refer to a Business Judgment Rule. Article 13 paragraph 2 of the Regulation of Financial Services Authority No. 33 / POJK.04 / 2014 of the Board of Directors and Board of Commissioners of Public Company : "Members of the Board of Directors shall be accountable for any loss of Public Company referred to in paragraph (1) if it can prove:

- a. The loss is not due to error or negligence;
- b. has made the maintenance of good faith, full of responsibility, and prudence for the benefit and in accordance with the intent and purpose of the Issuer or Public Company;
- c. does not have a conflict of interest, either directly or indirectly, for the management of the resulting losses; and
- d. have taken action to prevent such loss arising or continuing."

In paragraph b which states that the Board of Directors has made the maintenance of good faith, full of responsibility, and prudence for the benefit and in accordance with the intent and purpose of Public Company clearly is a manifestation of the principles of Business Judgment Rule. This is evident by their word in good faith, full of responsibility and prudence which is the standard of duty and standard of care in the principles of Business Judgment Rule. In the letter c which states that the Board of Directors has taken action to prevent continuing losses incurred or are part of the Business Judgment Rule principles for the Board of Directors has acted is best for the corporation or the best interest for the corporation which is one of the requirements of a Board of Directors can be said to have conduct a business decision in accordance with the principles of Business Judgment Rule.

In Law No. 19 of 2003 on State-Owned Enterprises (SOE Act), state-owned enterprises is a country where the majority of its capital owned by state through direct investments originating from the wealth of separated state. This is in contrast to the Law No. 17 Year 2003 on State Finance (State Finance Law). In the State Finance Act mentioned in Article 2 paragraph g State Finance Law. Article 2 letter g states: "Financial State referred to in Article 1 paragraph 1, include: g. Wealth of the country/ area properties managed by other parties in the form of cash, marketable securities, accounts receivable, goods, as well as other rights that can be valued in money, including the wealth of the company separated in the state/ regional companies."

## *2. Some problems in the implementation of the business judgment rule principles*

In Lawrence Meir Friedman's theory this is called a substantial system that determines whether or not the law can be implemented. The substance also means the product produced by people who are in the legal system that includes the decisions they make, the new rules they compile [15]. The substance also includes living law, not only the rules in the law (law books). This system affects the legal system in Indonesia. One effect is the existence of the principle of Legality in the Criminal Code. In Article 1 of the Criminal Code it is determined "there is no criminal act that can be legalized if there are no rules governing it". So that whether or not an action is subject to legal sanctions if the act has obtained its arrangement in the laws and regulations.

The principle of the business judgment rule has been stated in Law Number 40 of 2007 concerning Limited Liability Companies in Article 97 Paragraph 5. In that article, it has referred to the principle of the business judgment rule, but in this article it is less clear that it relates to the business judgment rule, which creates multiple interpretations. In addition, the principles of the business judgment rule are not regulated in other laws.

In Article 97 Paragraph 5 letter b, in mentioning good faith it can be multiple interpretations, where in the explanation of the article there is no clear explanation regarding good faith. The good faith in question must be in accordance with the fiduciary duty and this is explained in the Explanation of Article 97 Paragraph 5 letter b. According to Ridwan Khairandy fiduciary arises when one party does something for the benefit of another by setting aside his own personal interests. The Directors' Fiduciary Duties contain the following principles [16] :

- a) The Board of Directors in carrying out their duties may not do so for personal or third party interests without the consent and / or knowledge of the company;
- b) The Board of Directors may not use his position as a manager to obtain profits, both for himself and third parties except with the company's approval;
- c) The Board of Directors may not use or misuse company assets for their own and / or third parties' interests.

In Lawrence Meir Friedman's theory this is called a Structural system that determines whether or not the law is implemented properly. The legal structure based on Law Number 8 of 1981 includes; starting from the Police, Prosecutors' Office, Courts and Criminal Executing Bodies (Lapas). The authority of law enforcement agencies is guaranteed by law. So that in carrying out their duties and responsibilities regardless of the influence of government power and other influences. There is an adage that states fiat justitia et pereat mundus even though the world is collapsing the law must be enforced. The law cannot walk or erect if no law enforcement officer is credible, competent and independent. How good a law is if it is not supported by good law enforcement officers then justice is only wishful thinking. The weak mentality

of law enforcement officers has resulted in law enforcement not working properly [15].

In connection with the principle of business judgment rule in law enforcement officials, law enforcement officials do not know that the directors of state-owned enterprises have basically been protected by the business judgment principle stated in Article 97 Paragraph 5 of Law Number 40 of 2007 concerning Limited Liability Companies.

Legal culture according to Lawrence Meir Friedman is the human attitude towards the law and legal system-beliefs, values, thoughts, and expectations. Legal culture is an atmosphere of social thought and social power that determines how law is used, avoided, or misused. Legal culture is closely related to community legal awareness. The higher the legal awareness of the community will create a good legal culture and can change people's mindsets about the law so far. In simple terms, the level of public compliance with the law is one indicator of the functioning of the law. The relationship between the three elements of the legal system itself is helpless, like mechanical work. The structure is likened to a machine, substance is what is done and produced by a machine, while legal culture is anything or anyone who decides to turn on and turn off the engine, and decide how the machine is used. District Court, KPK, BPK, the Criminal Investigation Police, and the US Court Decision. When the Board of Directors do business decisions must be through a series of rapid processing and is considered appropriate for the pursuit of profit. The business world is a dynamic world we need a quick business decision.

Associated with the legal system in Indonesia, Friedman's theory can be used as a benchmark in measuring the law enforcement process in Indonesia. The police are part of a joint structure with organs of prosecutors, judges, lawyers, and prisons. This interaction between the legal service components determines the solid legal structure. However, the establishment of law is not only determined by the strength of the structure, but also related to the legal culture in society. However, until now the three elements as said by Friedman have not been implemented properly, especially in the legal structure and legal culture. For example, in the legal structure, police officers who are expected to be drug trappers, the police themselves are involved in drug networks. Likewise the prosecutors, until now, are still very difficult to find prosecutors who are truly honest in completing cases. In line with or in agreement with M. Friedman, Sajtipto Rahardjo said that talking about law is basically inseparable from the principles of the legal paradigm consisting of legal fundamentals and legal systems. Some legal fundamentals include legislation, enforcement and justice while the legal system includes substance, structure and legal culture. All of that greatly affects the effectiveness of the performance of a law. In the society's stigma, when the directors carried out an action that was ensnared by the Corruption Crime it was ensured that the board of directors was guilty, where someone became a

suspect was confirmed to be a defendant. Business or corporate actions are in fact many considerations of a decision taken, not necessarily everyone understands that making business decisions can be understood by others, one of which is law enforcement. Because law enforcement officials see a case based solely on the point of view of a criminal act rather than looking at it from a business perspective.

#### IV. CONCLUSION

Some Problems in the implementation of the business judgment rule principle is based on three factors. First is the substance of the law, where in the explanation of Article 97 Paragraph 5 letter b which states that good faith becomes multi-interpretation because there is no definite explanation and should explain the explanation of the good faith article must be in accordance with the fiduciary duty. Second is law enforcement, where law enforcement officials do not understand that the directors can be protected by the principles of the business judgment rule. The third is legal culture, where the stigma of the public sees that if someone becomes a suspect then automatically becomes a defendant, and law enforcement officers only see from a criminal perspective and do not consider the business perspective.

To be able to implement the Business Judgment principles, a comprehensive and good understanding is needed, so that there is a need to improve laws and regulations related to business judgment rules because the current understanding of business judgment rules is limited and not comprehensive. There needs to be harmonization of laws and regulations between one and the other legislation so as to create a continuation of legislation, not legislation that actually weakens one another

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