

# **Urgency of Regulation of Business Judgment Rule As A Reason For Criminal Deletion In Criminal Acts of Corruption**

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## **ABSTRACT**

State-Owned Enterprises are business entities whose capital is wholly or substantially owned by the state through direct participation originating from separated state assets. The Board of Directors is responsible for the business activities of the company as stipulated in Article 97 paragraph (1) of the Limited Liability Company Law, so that any decisions cannot be taken without taking into account the elements of prudence and applicable regulations. The purpose of establishing BUMN is to pursue profits, while in making decisions BUMN directors are often faced with decisions that are fraught with the risk of loss or bankruptcy so that a legal umbrella is needed for BUMN directors to relieve the responsibility borne by directors or what is known as the Business Judgment Rule. This study aims to determine the urgency of setting the Business Judgment Rule as a reason for eliminating criminal acts of corruption and this research uses juridical research methods. The research method uses normative juridical research with two approaches, namely the statute approach and case approach. Business decisions that are protected by the principles of the Business Judgment Rule are business decisions taken based on good faith and the principle of prudence. The existence of this principle will make the directors have no doubts in making business decisions because the principle of the Business Judgment Rule is an excuse if in the future there are things that must be accounted for by the directors.

**Keywords:** Business Judgment Rule, Director Of A State-Owned Enterprise, Corruption Crime.

## **1. INTRODUCTION**

Promoting welfare for all the people as mandated in the preamble to the 1945 Constitution which is further regulated in more detail in Article 33 of the 1945 Constitution is a constitutional duty for all components of the nation. In this regard, it is deemed necessary to increase control over all national economic power, either through sectoral regulations or through state ownership of certain business units with the aim of providing maximum benefits for the people's prosperity. State-Owned Enterprises (BUMN), whose entire or major capital comes from separated state assets, are one of the economic actors in the national economic system, in addition to private businesses and cooperatives. In carrying out its business activities, BUMN, the private sector and cooperatives play a role of mutual support based on economic democracy.

In 1969, there were three forms of state companies, namely service companies (perjan), public companies (perum), and limited liability companies (persero), as stated in Law Number 9 of

1969 concerning Stipulation of Perpu Number 1 of 1969 concerning Forms State Enterprises become law. Furthermore, on June 19, 2003, the Indonesian government through Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN Law) simplified the form of a state company from three forms to become two forms, namely perum and Persero and created a new terminology which originally became a state company. BUMN which has the following meaning: "State-Owned Enterprises, hereinafter referred to as BUMN, are business entities whose capital is wholly or mostly owned by the state through direct participation originating from separated state assets".

According to Erman Rajagukguk, the characteristic of a legal entity is the separation of the legal entity's assets from the assets of its owners and management (Erman Rajagukguk, 2016). The main element of a legal entity is what is called "separate patrimonial", which means owning separate assets from shareholders as owners. The second characteristic of a legal entity is the limited liability of shareholders as company owners and company managers (Erman Rajagukguk, 2011). With the separation of these assets, BUMN is expected to be more flexible in carrying out its business activities. However, because BUMN capital comes from the state, BUMN automatically acts as an extension of the Indonesian government in implementing government programs.

BUMN is also an extension of the government in carrying out various business activities as well as being one of the actors in economic activity in the national economy, so the implementation of the role of BUMN in the national economy is to realize people's welfare. By managing various BUMN productions, the government has the goal of preventing market monopoly on public goods and services by powerful private companies because if there is a market monopoly on goods and services that fulfill the lives of many people, then it is certain that the common people will become victims as a result of rising price levels. Because of that, SOEs are regulated in such a way that they have the purposes and objectives of establishment that are different from other business entities or companies (Wawan Zulmawan, 2017).

According to the provisions of article 2 paragraph (1) of Law Number 19 of 2003 concerning State Owned Enterprises, the aims and objectives of establishing a BUMN are:

- 1) Contributing to the development of the national economy in general and state revenue in particular;
- 2) Pursuit of profit;
- 3) Carrying out public benefits in the form of providing goods and/or services of high quality and sufficient to meet the needs of the people;
- 4) Become a pioneer of business activities that cannot be carried out by the private sector and



cooperatives;

- 5) Participate actively in providing guidance and assistance to entrepreneurs from economically weak groups, cooperatives, and the community.

Especially for SOEs in the form of Persero, all provisions and principles that apply to limited liability companies as stipulated in Law Number 40 of 2007 concerning Limited Liability Companies apply. One of the rules related to and must be complied with by BUMN is that which regulates good corporate governance (Wawan Zulmawan, 2017). In the elucidation of the BUMN Law in part IV, it is stated that experience has shown that the economic downturn in various countries, including Indonesia, is partly due to companies in these countries not consistently applying the principles of good corporate governance. Corporate governance is a process and structure that is used to direct and manage the business and affairs of the company in order to increase business prosperity and corporate accountability with the main objective of realizing long-term shareholder value while taking into account the interests of other stakeholders (Sofyan A. Djalil, 2000). Good Corporate Governance is one of the efforts to maintain prudence for SOEs in carrying out their business activities, especially in making decisions by the directors and commissioners. The Board of Directors is responsible for the business activities of the company as stipulated in Article 97 paragraph (1) of the Company Law, so that any decisions cannot be taken without taking into account the elements of prudence and applicable regulations.

If we return to the provisions of article 2 paragraph (1) of the BUMN Law that one of the aims and objectives of establishing a BUMN is to pursue profits, while in making BUMN decisions the directors of BUMN are often faced with decisions that are fraught with legal risks. Legal risk is the risk that arises due to the inability of the company's management to manage the emergence of legal issues that can cause losses or bankruptcy for the company. Legal risks, among others, can originate from operations, agreements with third parties, legal uncertainty and negligence in applying the law, obstacles in the litigation process for settlement of claims, as well as juridical issues between countries (Wawan Zulmawan, 2017). The legal risk that must be borne by a company, including BUMN, is also related to the responsibility of the board of directors as the manager of the company.

According to Richard Moorhead (UCL, Director Center for Ethics and Law) and Steven Vaughan (University of Birmingham), regarding legal risk, it can be separated between pure business risk and business risk which is the result of bad faith on the part of decision makers resulting in losses to the company (Richard Moorhead and Steven Vaughan, 2015). Specifically regarding pure business risk, it is necessary to have a legal umbrella for BUMN directors to relieve

the responsibility borne by the directors, while this legal umbrella is known as the Business Judgment Rule.

In formal laws and regulations in Indonesia, there is no definition of the Business Judgment Rule, but according to the understanding provided by the Black's Law Dictionary it can be seen that the Business Judgment Rule protects the directors for every business decision which is a corporate transaction, as long as it is carried out within the limits of authority with great care and good faith (Ningrum Natasya Siratit, 2009). According to Sutan Remy Sjahdeini, it can be interpreted that the Business Judgment Rule is one of the principles of company management which has become part of the common law system around 1950. This business judgment rule protects directors from the duties and responsibilities they carry. If the board of directors has the right to legal protection, then the court has no right to interfere with the decisions they take, but conversely, if they are not entitled to legal protection for the decisions they have taken, the court is obliged to examine the decision whether there is fundamental honesty and good faith towards the company and shareholders. minority and not done for personal gain and must be in good faith (Sutan Remy Sjahdeini, 2011).

The implementation of the Business Judgment Rule by BUMN directors is not only to protect the directors' personal existence from responsibilities imposed by statutory provisions, but also to maintain BUMN business continuity in accordance with applicable regulations and prevent BUMN from potential losses in the future, both financial losses and non-financial losses. The application of the Business Judgment Rule is also routine homework every year for SOEs in Indonesia, because the application of the Business Judgment Rule is a legal obligation for a SOE.

This homework is getting heavier with the condition that the government's laws and regulations do not specifically regulate matters related to the application of the Business Judgment Rule by SOE in a more focused and detailed manner in a special regulation, so that it can cause confusion for SOE in implementing Business Judgment Rule, including in assessing the legal risk of the business activity itself. In fact, this could affect the performance of the directors and the company as well as their legal responsibilities, including in the field of corruption.

Performance is a person's success in carrying out a job. This explains that performance is the result achieved by a person according to the standards that apply to the job in question. A person's performance can be seen through his activities in carrying out daily work. This activity describes how he tries to achieve the goals that have been set. In other words, a person's performance is related to how he carries out the task and the results achieved (Sudaryono, 2014). The performance of a SOE director will not be remembered by anyone if he stumbles upon



corruption problems which can occur because the Business Judgment Rule is not applied, which means he is not careful in carrying out his duties.

The corruption case related to the business judgment rule occurred in the case of Ir. Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan who is a former Director of PT Pertamina (Persero). Karen Agustiawan was charged with committing a criminal act of corruption when PT Pertamina invested in the Australian Basker Manta Gummy (BMG) Block in 2009 so that the District Court decision No. 15/Pid.Sus/TPK/2019/PN Jkt.Pst. Jo. The High Court Number 34/Pid.Sus-TPK/2019/PT.DKI stated that the Defendant Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan had been proven legally and convincingly guilty of committing the crime of "corruption carried out jointly" as in the indictment Subsidiary Article 3 Jo. Article 18 paragraph (1) letter b PTPK Law Jo. Article 55 Paragraph (1) 1st of the Criminal Code, but the decision of the Supreme Court Number 121 K/Pid.Sus/2020 is actually inversely proportional to the decision of the District Court and the decision of the High Court so that it states that the Defendant Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan is proven committed the act as charged in the public prosecutor's indictment, but the act was not a crime so that the defendant was therefore released from all lawsuits (*ontslag van alle rechtsvervolging*) and restored the rights of the defendant in terms of ability, position and dignity.

Based on the explanation above, the writer is interested in doing research with a normative type of research entitled "The Urgency of Setting a Business Judgment Rule as a Reason for Erasing Crimes in Corruption Crimes (Case Study of the Supreme Court Decision of the Republic of Indonesia Number 121 K/Pid.Sus/2020 March 9 2020 Regarding the Managing Director of PT Pertamina (Persero))".

## **2. RESEARCH METHOD**

The type of research in this study is research on normative juridical law, namely research based on literature studies which include primary legal materials and secondary legal materials. Primary legal material is carried out by examining laws and regulations and legal regulations related to the legal question being investigated and secondary legal material in the form of books, journals and documents, as well as related studies related to predetermined titles. by the author.

There are two approaches in this journal, namely the statute approach and the case approach. The statute approach is an approach that is taken by identifying and discussing the



applicable laws and regulations, which are related to the issues discussed, while the case approach is analyzing the ratio decidendi of court decisions on cases discussing Business Judgment. rules.

### **3. RESULTS AND DISCUSSION**

#### **The Concept Of Business Judgment Rule In Indonesia**

The Business Judgment Rule is a doctrine originating from America, namely a country that adheres to the Common Law/Anglo-Saxon legal system. The Business Judgment Rule doctrine allows directors to be able to release responsibility for decisions they have taken that have resulted in losses for the company. The Business Judgment Rule is essentially the basis for protection for directors in making a business decision policy in running the company they lead, this principle is the argument that every policy taken for the company is the best decision for the survival of the company even though in the end the policies that have been taken the company suffers a loss or bankruptcy. Henry Campbell Black formulates, "Business Judgment Rule. This rule immunizes management from liability in corporations undertaken within both power of corporation and authority of management where there is reasonable basis to indicate that the transaction was made with due care and in good faith (Tri Widiyono, 2008). Black's Law Dictionary defines "the presumption that in making business decisions not involving direct self interest or self dealing, corporate directors act in the honest belief that their actions are in the corporation's best interest" (Sartika Nanda Lestari, 2015).

The Business Judgment Rule is a reflection of independence and is the discretion of the board of directors in making business decisions. This doctrine provides protection to every member of the board of directors who has good faith in carrying out their duties but makes a decision (re-error of) or makes an honest mistake so that the board of directors is not held accountable (Misahardi Wilamarta, 2007).

In Indonesia, there are no laws and regulations that discuss the Business Judgment Rule, but the spirit of the Business Judgment Rule can be found in Article 97 UUPT and article 27 paragraph (1), paragraph (2), and paragraph (2a) of Government Regulation Number 23 of 2022 Regarding Amendment to Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision, and Dissolution of State-Owned Enterprises, the point is that each member of the Board of Directors is personally responsible for the loss of BUMN if the person concerned is guilty or negligent in carrying out his duties, but the Board of Directors is not can be held accountable if the loss is not due to their mistake or negligence, has carried out the Management in good faith and prudence for the benefit and in accordance with the aims and



objectives of the BUMN, does not have a conflict of interest, either directly or indirectly, over the Management actions that resulted in losses; and have taken action to prevent the loss from arising or continuing.

The responsibility of the directors of BUMN is not only limited to civil legal liability, but also criminal liability, this is as stipulated in Article 155 of the Company Law which states that the provisions regarding the responsibilities of the Directors and/or the Board of Commissioners for their mistakes and negligence are regulated in the Law. This law does not reduce the provisions stipulated in the Law on Criminal Law, so that it can also be interpreted as including criminal acts of corruption.

Based on this explanation, it can be seen that the Business Judgment rule is a concept in which the company's directors cannot be held liable in civil or criminal law for the decisions they make, even if the decision causes harm to the company, as long as the decision is made in good faith, purpose, and the right way, rational basis, and prudence.

#### **The Relationship Between Corruption Crimes and the Business Judgment Rule of SOE Directors**

Corruption comes from the Latin word *corruptio* or *corruptus*. Then, corruption appeared in English and French, in Dutch it was *korruptie*, then in Indonesian it was called corruption (Andi Hamzah, 1985). The word *corruptio* has a very broad meaning, but it is often equated with bribery, as stated in the Encyclopedia Grote Winkler Prins 1977 (Andi Hamzah, 2008). In a broader sense, Poerwadar Minta in the General Indonesian Dictionary defines corruption as an act of using power for one's own interests such as embezzling money or receiving bribes (W.J.S Poerwadarminta, 1982). Meanwhile, The Oxford Unabridged Dictionary defines corruption as "deviation or destruction of integrity in carrying out public duties by means of bribery or remuneration". Then, "Webster's Collegiate Dictionary defines corruption as "induction to do wrong in ways that are inappropriate or unlawful such as bribery" (Moh. Masyhuri Na'im, et. al., 2006).

In Indonesia, corruption is regulated in Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes (hereinafter referred to as the PTPK Law). The PTPK Law does not explain the definition of "crime of corruption", however, the PTPK Law has determined the types of corruption that are qualified in 7 (seven) major groups, namely: First, state financial losses or the country's economy (Article 2 and Article 3); Second, bribery (Article 5, Article 11, Article 12 letters a to d, Article 13, Article 16); Third, embezzlement in office (Article 8, Article 9, Article 10); Fourth, extortion or extortion (Article 12 letters e, g, and h); Fifth, fraudulent acts (Article 7, Article 12 letter h); Sixth, the form of interest in procurement



(Article 12 letter i); and Seventh, gratification (Article 12B in conjunction with Article 12C). Based on these articles, it can be interpreted that corruption is an act against the law or abuse of authority, opportunity or means available to him because of his position or position resulting in losses to state finances or the country's economy, including acts of bribery, embezzlement in office, extortion, fraudulent acts, forms of interest in procurement, and gratuities.

Regarding the meaning of "state finance" including its scope, management, and accountability it is stated in Law Number 17 of 2003 concerning State Finance (hereinafter referred to as the State Finance Law), Law Number 1 of 2004 concerning the State Treasury, and Law Number 15 of 2004 concerning Examination of State Financial Management and Accountability (Dwi Ananda Fajar Wati, 2016). The State Finance Law provides a definition of the definition of state finance and the scope of the definition of state finance. The scope of state finances is very broad and is not limited to the state/regional budget, but also includes assets that are separate from state/regional companies. This will be a problem because according to company/private law, state companies in this case both State Owned Enterprises (BUMN) and Regional Owned Enterprises (BUMD) have separate assets, in this case the state cq. government (Dwi Ananda Fajar Wati, 2016).

Further discussing SOEs, Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the BUMN Law) Article 1 point 1 states that "State-Owned Enterprises are business entities in which all or most of the capital belongs to the government through direct investment. originating from separated state assets". In Law Number 9 of 1969, SOEs are classified into three business entities, namely Service Companies (Perjan), Public Companies (Perum), and Limited Liability Companies (Persero). Then the law was repealed and replaced with Law Number 19 of 2003 concerning State-Owned Enterprises, in Article 93 paragraph (1) it is stated that "within 2 (two) years from the time this Law came into effect, all BUMN which is in the form of a service company (Perjan), must have changed its form to Perum or Persero", meaning that currently BUMN is only classified into two business entities, namely Public Companies (Perum) and Limited Liability Companies (Persero), as in Article 9 which states that BUMN consisting of Persero and Perum.

Persero is a BUMN whose capital is divided into shares in which all or at least 51% (fifty one percent) of its shares are owned by the Republic of Indonesia which has the intent and purpose of its establishment to provide high quality and highly competitive goods and/or services and to pursue profits. to increase the value of the business entity. While Perum is a BUMN whose capital is wholly owned by the state and is not divided into shares and the intent and purpose of its





establishment is to run a business aimed at public benefit in the form of providing quality goods and/or services at affordable prices by the community based on the principles of managing a healthy business entity and while pursuing profits based on the principles of corporate management. Based on this explanation, it can be interpreted that Persero has a business nature to seek profit with a minimum capital of 51% owned by the government, while Perum has a business nature, namely serving the public interest and at the same time pursuing profits with capital wholly owned by the state or originating from separated state assets.

With the separation of state assets as BUMN capital, the majority owners of capital or BUMN shareholders in this case are the state. The BUMN organs themselves also have a separation of wealth between capital owners or shareholders and BUMN management. This reflects that BUMN already has the characteristics of a legal entity (Wawan Zulmawan, 2017). In the General Explanation of the BUMN Law it is stated that "Promoting welfare for all the people as mandated in the preamble of the 1945 Constitution which is further regulated in more detail in Article 33 of the 1945 Constitution is a constitutional duty for all components of the nation. In the above context, it is deemed necessary to increase control over all national economic power either through sectoral regulations or through state ownership of certain business units with the aim of providing maximum benefits for the people's prosperity. is one of the economic actors in the national economic system, in addition to private businesses and cooperatives. In carrying out their business activities, BUMN, the private sector and cooperatives carry out a role of mutual support based on economic democracy".

Directors of state-owned enterprises or state-owned enterprises both have a very important role in achieving the company's goals, namely the pursuit of profit. On the one hand, a director through his business decisions or actions carries the mission of managing the company professionally to bring benefits to the company, but on the other hand, a director's business decisions are full of risks and often lead to losses or even bankruptcy of the company.

If this is the case, how to assess the limits of the legal and personal liability of the directors if a business decision results in losses, debt or even bankruptcy of the company (Yafet Yosafet Wilben Rissy, 2020). If this is related to Article 2 paragraph (1) and Article 3 of the PTPK Law regarding losses to state finances, actions of directors or affiliates whose actions result in financial losses for BUMN, then these actions can be said to include criminal acts of corruption, but then what if on the other hand the directors have no intention whatsoever to commit corruption, moreover that BUMN is a business activity that can actually bring profit or vice versa it can suffer losses and even bankruptcy of the company.



If it is studied further regarding criminal acts of corruption, it will be very interesting if it is linked between the criminal acts of corruption in BUMN and the Business Judgment Rule. The Business Judgment Rule is one of the existing doctrines in company law which provides protection for company directors not to be responsible for losses arising from a consequence if the actions of the directors are based on good faith and prudence. The Business Judgment Rule actually concerns the division of responsibilities between the company and the organs that manage it, especially the directors and shareholders in the event of a loss that befalls the company due to human error (Sartika Nanda Lestari., 2015).

Based on the explanation above, it can be understood that if there is a loss of a BUMN due to a decision of the directors, then it should be suspected that the BUMN directors have committed a criminal act of corruption because BUMN capital comes from separated state assets so that a Business Judgment Rule is needed as an umbrella for BUMN directors to protect from personal liability, both civil and criminal, for decisions that result in losses, as long as it can be proven that the directors of the BUMN have exercised good faith and prudence.

The implementation of the good faith and prudence of the Board of Directors can be reflected in the actions of the Board of Directors in implementing the principles of good corporate governance. Good corporate governance is definitively a system that regulates and controls companies to create added value for all stakeholders. There are two things emphasized in this concept. First, the importance of the rights of shareholders to obtain correct (accurate) and timely information. Second, the company's obligation to make accurate, timely and transparent disclosures of all company performance, ownership and stakeholder information from the company (H. Sri Sulistyanto dan Haris Wibisono, 2003). From these two definitions and referring to the previously formed definition of corporate governance, it appears that good corporate governance is a system that controls and coordinates various participants in running the company's business so that the company's business operations can facilitate the company to :

- Demonstrates accountability and responsibility;
- Guaranteeing a balance between the various interests of stakeholders (providing fair treatment for all stakeholders), including respecting the rights of shareholders to obtain information correctly (accurately) and in a timely manner;
- Disclose and be transparent in all information (such as information about company performance, ownership and stakeholders), including transparency in making decisions (Edi Wibowo, 2010).



**Business Judgment Rule as a reason for criminal write-off in the Indonesian Supreme Court Decision Number 121 K/Pid.Sus/2020**

Cases of corruption related to the business judgment rule occurred in the case of Ir. Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan who is a former Director of PT Pertamina (Persero). Karen Agustiawan was charged with committing a criminal act of corruption when PT Pertamina invested in the Basker Manta Gummy (BMG) Block in Australia in 2009. The decision to invest in a participating interest (PI) in the Australian BMG block was allegedly without prior discussion or review and approval without due diligence. Apart from ignoring the existing investment procedures at PT Pertamina, Karen Agustiawan also did not carry out a risk analysis which was then followed up with a process of signing a sale purchase agreement without the approval of the commissioners and the company's legal department. Based on PT Pertamina's 2009 work plan budget, Rp 1.77 billion was allocated for the acquisition of the Oil and Gas Block. For the implementation of the acquisition, PT Pertamina then formed a team with Karen as chairman. However, without any analysis and research on the block to be invested, Karen Agustiawan and Finance Director of PT Pertamina Frederick Siahaan gave orders to forward the offer from ROC Ltd which Pertamina received to Bayu Kristanto as PT Pertamina's merger and acquisition manager. Karen is alleged to have neglected the investment procedures in force at PT Pertamina, resulting in an estimated state loss of Rp 568 billion (Arthur Gideon, 2022).

Based on the Decision of the Central Jakarta District Court Number 15/Pid.Sus/TPK/2019/PN Jkt.Pst. Jo. Decision of the Corruption Crime Court at the DKI Jakarta High Court Number 34/Pid.Sus-TPK/2019/PT.DKI which states that the Defendant Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan has been proven to have committed the crime of Corruption together as stated in Article 3 Jo. Article 18 paragraph (1) letter b PTPK Law Jo. Article 55 Paragraph (1) 1st Criminal Code. Then, Karen Agustiawan filed an Cassation which ultimately resulted in the Indonesian Supreme Court Decision Number 121 K/Pid.Sus/2020 dated March 9 2020 which canceled the Tipikor Court Decision at the DKI Jakarta High Court Number 34/Pid.Sus-TPK/2019/PT. DKI on September 24 2019, namely stating that the Defendant Karen Agustiawan was proven to have committed the act as charged in the Public Prosecutor's indictment, however this action was not a crime because what was done was not out of the scope of the Business Judgment Rule thus releasing Defendant Karen from all lawsuits (*ontslag van alle rechtsvervolging*).

In criminal law theory, there are reasons for criminal abolition. According to Topo Santoso, reasons for abolishing a crime are facts and circumstances that abolish the punishment of

a perpetrator of an act, which can be divided into justification reasons/ *rechtvaardigingsgrond*/ *onpersoonlijk* and reasons for forgiveness/ *schulduitsluitingsgronden*/ *persoonlijk* (Topo Santoso, 2023). According to Didik Endro Purwoleksono, the justification is the reason that erases the unlawful nature of the crime, so that the defendant's actions become appropriate and correct, while the excuse is the reason that erases the defendant's guilt, so here the defendant's actions are still a crime, but cannot be punished, because no errors (Didik Endro Purwoleksono, 2014). The National Criminal Code has accommodated the reason for the abolition of this crime, while the justification reasons can be found in Articles 31 to.d. Article 35, while the reasons for forgiveness can be found in Articles 41 to. 44 of the National Criminal Code.

If the Ruling of the Supreme Court of the Republic of Indonesia Number 121 K/Pid.Sus/2020 is linked to the reason for abolishing a crime, then the Defendant Karen Agustiawan is proven to have committed a criminal act but his criminal responsibility has been erased so that he cannot be convicted because he did not leave the realm of the Business Judgment Rule marked by the absence of an element of error as considered by the court decision on page 38, which means that no errors were found on the part of the Defendant so that it can be understood that there were reasons for forgiving other than those stipulated in Articles 41 to.d. 44 of the National Criminal Code, namely the Business Judgment Rule.

### **The Urgency of Setting Business Judgment Rules in Indonesian Laws and Regulations**

The Board of Directors as an organ of the company is in charge and fully responsible for carrying out the management of the company. In other words, the directors are the personification of the company itself. The Board of Directors has two functions, namely a representative function and a management function (Hasbullah F. Sjawie, 2017). When carrying out the representative function, the directors act as company agents when interacting with third parties or external parties, while when carrying out management functions, the directors act as leaders of the company organization. This means that there is a relationship of trust or fiduciary relationship between the directors and the company. The appointment or appointment of a person or several persons to become directors is basically based on the trust of the shareholders, through the GMS procedure. A person or several people who have been appointed or appointed as directors in a board of directors by shareholders are believed to have the intellect, integrity, professionalism and skills in managing the company for the continuity and profitability of the company. The Board of Directors in managing the company must have good faith and full responsibility (Putu Anantha Pramagitha dan A.A. Ketut Sukranatha, 2019).

In running a BUMN business, it is not always profitable, sometimes there are times when



you experience losses. However, these losses are categorized as state losses, so it is not uncommon for decisions made by the board of directors which ultimately have an impact on the company's losses and can be charged with criminal acts of corruption. Regulations regarding state finances in identifying or interpreting business losses are still unclear. This causes the directors of BUMN in making investments or transactions in order to obtain revenue and company growth are faced with a dilemmatic situation which creates doubts in making decisions (Prasetio, 2014).

Decision of the Supreme Court of the Republic of Indonesia Number 121 K/Pid.Sus/2020 against the defendant Karen Agustiawan as director of PT Pertamina which in his considerations is a fact (*notoire feiten*) that Oil Companies are full of risks because there are no definite parameters to determine the success or failure of an exploration so what happened in the Australian BMG Block as experienced by all world oil and gas companies is commonplace so the no risk, no business adage applies more clearly and what was done by the Defendant and other PT Pertamina Directors was solely in the context of developing PT Pertamina namely seeks to increase oil and gas reserves so that the steps taken by the Defendant as the Main Director of PT Pertamina and the Main Commissioner of PT Pertamina Hulu Energi do not depart from the realm of the Business Judgment Rule, marked by the absence of elements of fraud, conflict of interest, acts against the law and intentional errors. So that in the decision of the Supreme Court of the Republic of Indonesia stated that the Defendant was proven to have committed the act as charged in the Public Prosecutor's indictment, but the act was not a crime and released the Defendant from all lawsuits (*ontslag van alle rechtsvervolging*).

The defendant Karen Agustiawan as the director of PT Pertamina can be said to be very lucky because this court decision is the only release decision (*ontslag van alle rechtsvervolging*) against the accused of corruption with the consideration of the "Business Judgment Rule", because there are so many corruption cases similar to the defendant BUMN directors who received a criminal court decision proven and convincingly committed a criminal act of corruption, namely among others:

1. Court decision No. 33/Pid.Sus-TPK/PN Jkt.Pst, dated 9 October 2020, which was read out at the hearing on 12 October 2020 with the Defendant SHW. Investment in shares and Mutual Funds PT Asuransi Jiwasraya (AJS, Persero) with the case position as follows:
  - Defendant SHW as Head of Investment Division of PT AJS 2008-2014 And as general manager of finance and production of PT AJS 2015-2018 ex officio as Investment Committee of PT AJS 2008-2018, HR (carried out a separate prosecution) as President Director of PT AJS ex officio as Chairman of the Committee Investment PT AJS 2008-



2018, and HP (subject to separate prosecution) as Director of Finance of PT AJS ex officio as Deputy Chairman of the Investment Committee of PT AJS 2008-2018, have committed or participated in committing acts with HH as the owner of PT Maxima Integra Investama (MII) and PT HD Capital Tbk concurrently as the President Commissioner of PT Trada Alam Minera (TAM) Tbk, BTS as the Main Director and concurrently Commissioner of PT Hanson International Tbk concurrently as the party that regulates and controls the investment management of shares and mutual funds of PT AJS, and JHT as the Director of PT Inti Agri Resources (IAI) as well as an advisor at PT MII (each of which was prosecuted in a separate case file), committed acts of corruption in the management of finances and investment funds at PT AJS in the 2008-2018 period, unlawfully trusting the defendant SHW and other people others, namely HR, HP, HH, and BTS or a corporation. Or the defendant SHW, HR, and HP have committed or participated in committing an act with HH, BTS, and JHT with the aim of benefiting the defendant SHW and other people, namely HR, HP, HH, and BTS. Or a corporation, abusing the authority of an opportunity or facility that belongs to him because of his position or position.

- The actions of SHW et al have caused losses to state finances amounting to Rp. 16.8 trillion as stated in the "Report on Investigative Examination Results in the Context of Calculation of State Losses on the Management of Money and Investment Funds of PT AJS for the 2008-2018 Period" Number: 06/LHP/XXI/03/2020 dated March 9, 2020 from the Indonesian Supreme Audit Agency (BPK RI).
- Actions are carried out in ways including:
  1. The defendants SHW, HRR, and HP managed the investment in PT AJS shares and mutual funds which were not transparent and unaccountable by entering into an agreement without being determined by the Directors of PT AJS, namely an agreement with JHT, HH, and BTS to arrange transactions for placement of shares and mutual funds, in cooperation in managing 21 mutual funds with 13 investment managers.
  2. Defendants SHW, HR and HP have managed investment in stocks and mutual funds, without analysis based on objective data and professional analysis in the NIKP (Head Office Internal Memorandum) but the analysis was only made as a formality
  3. The defendants SHW, HRR and HP had purchased BJBR, PPRO and SMBR shares even though the ownership of these shares exceeded the provisions stipulated in the





investment guidelines, namely a maximum of 2.5% of outstanding shares.

4. The defendants SHW, HRR, and HP had collaborated with HH and BTS through JHT to carry out buying and or selling transactions of BJBR, BPRO, SMBR and SMRU shares with the aim of inventorying prices which ultimately did not provide investment returns and were unable to meet liquidity needs to support activities. operational.
5. Defendants SHW, HRR, and HP have collaborated with HH and BTS through JHT to arrange and control 13 Investment Managers by establishing a special mutual fund product for PT AJS, so that JHT can control the management of financial instruments which are the underlying mutual funds of PT AJS.
6. The defendants SHW, HRR, and HP agreed even though they knew the purchase/sale of financial instruments that were the underlying for the 21 mutual fund products managed by 13 investment managers controlled by JHT which is an affiliated party with HH and BTS which in the end did not provide investment returns and could not meet liquidity needs to support the company's operational activities.
7. The defendants SHE, HER and HP have received money, shares and facilities from HH and BTS through JHT and a company that cooperates with PT AJS.
8. For his actions, the charges against the defendant were Primair Article 2 paragraph (1) Article 18 paragraph (1) PTPK Law Jo. Article 55 paragraph (1) 1st of the Criminal Code and or Subsidiary Article 3 Jo. Article 18 paragraph (1) PTPK Law Jo. Article 55 paragraph (1) 1st of the Criminal Code.
9. The Panel of Judges considered, among other things:
  - a. When the defendant SHW made an internal note at the head office that was independent even if there was intervention from the witness HP, the defendant SHW had the ability to control himself to refuse this intervention, because the defendant SHW knew that the consequences of his actions could harm PT AJS. The defendant SHW had the ability to prevent the consequences of his actions but the defendant SHW did not.
  - b. It has been proven that the intention (*mens rea*) of the defendant SHW and other parties with the same will is to carry out their respective roles to invest in PT AJS. Therefore the defendant SHW was proven to be a person who participated in the crime (*medepleger*). thus, the element of "who did, who ordered to do



and who participated in doing" has been fulfilled and proven.

1. The ratio decidendi is related to Business Judgment Rule principles as follows:
  - a. The Business Judgment Rule protects every business decision which is a corporate transaction as long as it is carried out within the limits of authority with full care and good faith.
  - b. In Law Number 40 of 2007 concerning Limited Liability Companies, the principles of the Business Judgment Rule are contained in article 97, namely:
    - 1) The Board of Directors is responsible for managing the company as referred to in Article 92 paragraph (1).
    - 2) Management as referred to in paragraph (1) must be carried out by each member of the board of directors in good faith and with full responsibility.
    - 3) Each member of the board of directors is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions referred to in paragraph (2).
    - 4) In the event that the board of directors consists of two members of the Board of Directors or more, the responsibility as referred to in paragraph 3 applies jointly and severally to each member of the board of directors.
    - 5) Members of the board of directors cannot be held accountable for losses as referred to in paragraph (3) if they can prove:
      - a. The loss was not due to error or negligence
      - b. Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company
      - c. Does not have a conflict of interest, either directly or indirectly, for management actions that result in losses; and
      - d. Have taken action to prevent the loss from arising or continuing.
  - a. Considering that based on Prof. Nindya's expert that faith consists of two, namely subjective good faith and objective good faith, subjective good faith is measured from the inner attitude of the person who will carry out the investment decision or action. If it is a company, then of course it is carried out by the directors for the benefit of the company and not for the purposes of other people or personal interests. Good faith is objectively measured in the same or



similar corporate community in the context of making investment decisions, whether the decision-making considers internal regulations, articles of association and good corporate governance (GCG).

- b. Considering, that it appears that the defendant SHW had bad intentions in managing investment in shares and mutual funds owned by PT AJS, these actions were proven to be contrary to the provisions of the laws and regulations and internal regulations of PT AJS itself. Whereas judging from the substance of the actions of the defendant SHW were not based on a good level and put forward the precautionary principle to really make PT AJS healthy, it turned out to have caused even greater losses, namely:

- Entered into non-transparent and unaccountable stock and mutual fund investment management agreements to measure and control stock and mutual fund placement transactions. this is contrary to article 1 number 2 and article 4 of the decision of the Board of Directors of PT AJS (Persero) Number 004 A.SK.U.012004 dated 9 January 2004 concerning PT AJS (Persero) Investment Guidelines;
- The Defendant SHW had managed investment in stocks and mutual funds without analysis based on objective data and professional analysis in the NIKP (Head Office Internal Memorandum), but the analysis was only a formality. This act violated the provisions of article 58 of the Financial Services Authority Regulation (Otoritas Jasa Keuangan) Number 73/POJK.05/2016 dated 23 December 2016 concerning good corporate governance for insurance companies. So the Panel of Judges considered that the actions of Defendant SHW could not be categorized as a business judgment rule and should be set aside.

1. Court decision Number 49/Pid.Sus-TPK/2016/PN.PLK. dated 3 January 2017 jo. Supreme Court Cassation Decision No. 1164 K/Pid.Sus/2017 dated 26 July 2017 with the defendant RA regarding investment in buying corn cobs and selling airplane tickets with the following chronology:

- The defendant as the director of PD Agrotama Mandiri has obtained regional capital participation (PMD) for the company's activities worth IDR 6 billion in two terms, namely February 12 2009 and June 18 2009.
- The equity participation is used for and with the results of:

- a. The corn commodity business carried out in 2009-2011 suffered a total loss of Rp. 2.4 billion. The defendant RA knew that buying corn on cobs would be detrimental to PD Agrotama Mandiri, but he still made the purchase at that price and the defendant RA should have made the decision not to continue this business without going through/making a government investment plan. This violated Government Regulation Number 1 of 2008 concerning Government Investment. contained in articles 14 and 30.
- b. Airline ticket sales cooperation business with PT Aleta Danamas. This business suffered a loss of Rp. 754 million and is considered not to be the type of business of PD Agrotama Mandiri based on Regional Regulation Number 12 of 2008. However, to obtain this business, regional regulations have been amended 2 times and the implementation of this aviation business was not based on a business feasibility study from the start and was carried out spontaneously.
- c. The loan to Iskandar's brother (Distanak) of IDR 10 million and the loan to the defendant RA on behalf of IDR 60 million has nothing to do with the work of PD Agrotama Mandiri.
- d. Whereas the defendant RA in administering and managing the capital of PD Agrotama Mandiri originating from the regional revenue and expenditure budget of Kotawaringin Barat district for the 2009 fiscal year had violated Law Number 17 of 2003 concerning State Finance contained in article 3 paragraph (1) which reads: "State finances are managed in an orderly manner, in compliance with laws and regulations, efficiently, economically, effectively, transparently and responsibly by taking into account the sense of justice and propriety."
- Whereas Rp. 6 billion should have been used by the defendant RA as director of PD Agrotama Mandiri for plantations with oil palm and rubber commodities, nurseries, cultivation, product processing, marketing and other plantation business fields. However, the defendant used these funds to cooperate with PT Aleta Danamas, loaned it to witness I (Distanak), borrowed by Defendant RA, purchased corn from farmer groups.
- For these actions the defendant was charged with primary indictment Article 2 paragraph (1) Jo. Article 18 of PTPK Law Jo. Article 55 paragraph (1) 1st of the Criminal Code and the subsidiary charges of Article 3 Jo. Stake 18 PTPK Law Jo. Article 55 paragraph (1) 1st of the Criminal Code.

The Palangkaraya Panel of Judges considered that the actions of Defendant RA were proven



to have violated Article 3 Jo Article 18 paragraph (1) letter b, paragraph (2) paragraph (3) of the PTPK Law Jo. Article 55 paragraph (1) 1st of the Criminal Code, as in the subsidiary indictment. Among the considerations of the Panel of Judges in deciding the RA case, namely:

- There was a loss in the business of buying corn on cobs, but the Panel of Judges was of the opinion that the loss was not due to the mistake or negligence or the intention of Defendant RA, so that it was not included in the realm of public law (but rather the realm of private law).
- The Defendant RA has conducted the management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company and the Defendant has no conflict of interest either directly or indirectly for any actions that result in loss, so that the loss is a business risk. In this case the defendant has taken action to prevent further losses by proposing to the Regional Government that there should be a government subsidy for the price of corn but there has been no response to date.
- With regard to the collaboration with PT Aleta Danamas, the Panel of Judges was also of the view that the defendant AR had acted in good faith by trying to collect the remaining Rp 754 million ticket sales collaboration debt to PT Aleta Danamas by working with the State Attorney. Thus this activity is not included in the realm of public law (but private law).
- The Panel of Judges considered that the problem was that the defendant AR had used the regional company's money totaling Rp. 60 million for the benefit of the defendant AR which could not be properly accounted for, the money came from the working capital of the company PD Agrotama Mandiri.
- The Panel of Judges disagreed with the opinion and calculations of Dahlim Banjarnahor SE, MSi, as an auditing expert on calculating state/regional financial losses, that the state loss in this case amounted to Rp. 3.3 billion.

In the 2 (two) cases mentioned above, they were almost similar to the case of the defendant Karen Agustawan as the director of PT Pertamina, however, due to the absence of clear and firm laws and regulations governing the Business Judgment Rule, differences in the views of the Panel of Judges themselves arose regarding Business Judgment. Rule so it is quite reasonable to say that there is an urgency to regulate the Business Judgment Rule in Indonesian laws and regulations.

The application of excuses as a reason for writing off a crime in a criminal case is the authority of the Panel of Judges, as is the case with deciding whether a corporate decision of the Directors of a BUMN that results in a loss is seen as a criminal act of corruption or the Business



Judgment Rule, this is the authority of the Panel of Judges so that Business Regulations The Judgment Rule in Indonesian laws and regulations is more precisely formulated in the form of a Supreme Court Regulation (part of Indonesia's laws and regulations as stipulated in Article 8 of Law Number 12 of 2011 concerning Formation of Legislation).

Apart from the fact that the application of excuses is the authority of the Panel of Judges, the formulation of the Business Judgment Rule in the form of a Supreme Court Regulation can become an objective basis for the Panel of Judges in deciding a case of BUMN corruption that occurred as a result of the actions of the Directors of BUMN because it has passed the procedural stages of equality in before the law where both the Public Prosecutor (who proves a case of corruption) or the Defendant and Legal Counsel (who proves the actions of the BUMN Directors entered the realm of the Business Judgment Rule), have been equally given the opportunity to prove their arguments material truth before the trial so that the Panel of Judges in rendering their decision has been based on material truth and complete legal arguments from the Public Prosecutor and the Defendant/Legal Counsel, which is not only based on proving the elements of the article on corruption being charged, but also refers to Business Judgment Rule indicators that are clear and firm are listed in a Supreme Court Regulation and thus legal certainty, legal justice and legal benefits can be realized for SOE directors in making corporate decisions.

#### **4. CONCLUSIONS**

The principle of the Business Judgment Rule is a rule that provides immunity or protection for the management of the company from any responsibility that arises as a result of activities or transactions carried out by the directors with the limits of authority and power given to them, with the consideration that the activity is carried out in good faith and caution. BUMN Directors are protected by the principles of the Business Judgment Rule in making business decisions. Business decisions that are protected by the principles of the Business Judgment Rule are business decisions taken based on good faith and the principle of prudence. This principle is needed by the board of directors to be confident in making business decisions because the principle of the Business Judgment Rule serves as an excuse if in the future there are things that must be accounted for by the directors. There is a need for legislation in the form of a Supreme Court Regulation (PERMA) so that it is hoped that there will be uniformity of thought regarding the realm of the Business Judgment Rule which is an excuse for abolishing crimes. With this regulation, it is hoped that it can provide legal certainty, legal justice, and legal benefits for BUMN directors in making corporate decisions.





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