

STRENGTHENING THE BUSINESS JUDGMENT RULE IN LEGAL PROTECTION FOR DIRECTORS IN CORPORATE BUSINESS DECISION-MAKING: A COMPARATIVE STUDY BETWEEN INDONESIA AND THE UNITED STATES

FORTALECIMENTO DA BUSINESS JUDGMENT RULE NA PROTEÇÃO JURÍDICA DOS DIRETORES NA TOMADA DE DECISÕES EMPRESARIAIS: UM ESTUDO COMPARATIVO ENTRE A INDONÉSIA E OS ESTADOS UNIDOS

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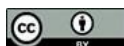
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Abstract

A Limited Liability Company is a legal entity with a strategic economic role, consisting of the GMS, Board of Directors, and Board of Commissioners. The Board of Directors has full authority to manage and represent the company and must make strategic decisions to achieve profit maximization. To support this role, the Business Judgment Rule (BJR) provides legal protection by shielding directors from liability for losses, as long as decisions are made in good faith, with due care, and in the company's best interest. In Indonesia, the BJR is recognized under Article 97 paragraph (5) of the Company Law and is closely linked to fiduciary duty. However, its application remains inconsistent, particularly regarding the burden of proof, which is often imposed on directors, unlike in the

Resumo

Uma Sociedade de Responsabilidade Limitada é uma pessoa jurídica com papel econômico estratégico, composta pela Assembleia Geral de Acionistas (GMS), Diretoria e Conselho de Administração. A Diretoria possui plena autoridade para administrar e representar a empresa, devendo tomar decisões estratégicas para alcançar a maximização dos lucros. Para apoiar essa função, a Business Judgment Rule (BJR) fornece proteção jurídica ao resguardar os diretores de responsabilidade por prejuízos, desde que as decisões sejam tomadas de boa-fé, com o devido cuidado e no melhor interesse da empresa. Na Indonésia, a BJR é reconhecida no Artigo 97, parágrafo (5), da Lei das Sociedades e está intimamente relacionada ao dever fiduciário. No entanto, sua aplicação permanece



United States (Delaware), where it lies on the plaintiff. This may discourage directors from taking necessary business risks.

Keywords: Business Judgment Rule. Legal Protection. Fiduciary Duty. Burden of Proof. Director Liability.

inconsistente, especialmente quanto ao ônus da prova, que frequentemente é imposto aos diretores, ao contrário dos Estados Unidos (Delaware), onde recai sobre o autor. Isso pode desestimular os diretores a assumirem riscos empresariais necessários.

Palavras-chave: Regra da Avaliação Empresarial. Proteção Legal. Dever Fiduciário. Ônus da Prova. Responsabilidade dos Administradores.

1 INTRODUCTION

A Limited Liability Company plays a strategic role in economic development as a legal entity with independent rights and obligations. The company operates through its main organs, namely the General Meeting of Shareholders, the Board of Directors, and the Board of Commissioners. Among these, the Board of Directors holds a central position in managing the company and making business decisions. In carrying out its duties, the Board of Directors is required to take strategic decisions that inherently involve business risks. Therefore, legal protection is essential to ensure that directors can act in the best interest of the company without fear of personal liability. This protection is reflected in the concept of the Business Judgment Rule (BJR), which assumes that directors act in good faith, with due care, and based on adequate information.

In Indonesia, the BJR is normatively recognized under Article 97 paragraph (5) of the Company Law. However, its implementation remains inconsistent in judicial practice, particularly regarding the burden of proof, which is often imposed on directors. This practice contradicts the fundamental principle of the BJR, which places the burden on the plaintiff to prove misconduct. In contrast, the United States, particularly through the Delaware doctrine, applies the BJR consistently by emphasizing the presumption of good faith and limiting judicial intervention in business decisions. This difference highlights a significant gap between Indonesia and the United States in the application of the BJR.

This study addresses the following research question: how can Indonesian corporate law be reconstructed to strengthen the implementation of the Business Judgment Rule based on a comparative analysis with the United States?

The objective of this study is to reconstruct Indonesian corporate law through comparative legal analysis, identify regulatory gaps, and propose legal recommendations to strengthen the protection of directors under the Business Judgment Rule.

2 THEORETICAL FRAMEWORK

The Business Judgment Rule is a fundamental doctrine in corporate law that provides legal protection to directors when making business decisions. The doctrine is closely related to fiduciary duties, particularly the duty of care and the duty of loyalty. The duty of care requires directors to act with reasonable diligence and prudence, while the duty of loyalty obliges them to prioritize the interests of the company over personal interests. According to Bainbridge (2004), the Business Judgment Rule functions as an abstention doctrine, limiting judicial interference in corporate decision-making processes.

Comparative legal scholars such as Zweigert and Kötz (2011) emphasize that legal comparison should focus on functional equivalence, meaning that different legal systems may adopt different approaches to achieve similar objectives. In this context, both Indonesia and the United States aim to protect directors, but their implementation differs significantly. The inconsistency in Indonesia indicates a gap between normative recognition and practical application, which justifies the need for legal reconstruction through comparative analysis.

3 METHODOLOGY

This research employs a normative juridical method with a functional comparative approach. The study focuses on analyzing legal norms, judicial practices, and doctrinal developments related to the Business Judgment Rule in Indonesia and the United States.

The functional method is used to compare how both legal systems address the same issue, namely the protection of directors in business decision-making. The data used in this research consists of statutory regulations, court decisions, and legal literature.

4 RESULTS AND DISCUSSIONS

4.1 Application of the business judgment rule in Indonesia

Indonesia has recognized the concept of the *Business Judgment Rule* (BJR), a principle that provides legal protection to directors from personal liability for losses arising from business decisions they make. Although not explicitly regulated, this concept is implicitly reflected in Article 97 (5) of *Law No. 40 of 2007 on Limited Liability Companies* (Indonesia, 2007), which stipulates that directors shall not be held liable provided that their decisions are made in good faith and with due care. In the context of insolvency, a similar construction is found in Article 104 (4) of the same law, which allows directors to be relieved from liability if they can prove that the bankruptcy was not caused by their fault or negligence and that they have managed the company prudently, responsibly, and without conflicts of interest (Indonesia, 2007). Furthermore, the BJR principle is also reflected in Financial Services Authority Regulation No. 33/POJK.04/2014, which adopts similar standards within the context of issuers or public companies (Financial Services Authority, 2014).

Directors must observe several requirements to avoid personal liability arising from business decisions. First, business decisions must be made rationally and in accordance with the company's articles of association. Second, directors must act without negligence by ensuring that decisions are based on adequate and reliable information, supported by proper documentation, and undertaken through a transparent decision making process, including consultation with experts where necessary. Third, all decisions must be oriented solely toward the interests of the company and must be free from any conflicts of interest (Sembodo *et al.*, 2022).

Conceptually, the recognition of the BJR in Indonesia is grounded in the notion that directors possess authority to manage the company and make business decisions, as provided under Article 1 (5) of the Company Law (Indonesia, 2007). Since business decisions inherently involve risk, directors require a legally protected sphere of discretion to act in the best interests of the company. Within this framework, directors are bound by fiduciary duties, namely the *duty of care* and the *duty of loyalty* (Sembodo *et al.*, 2022). The *duty of care* requires directors to act prudently, reasonably, and based on adequate

information, including conducting legal and financial due diligence. Meanwhile, the *duty of loyalty* obliges directors to act in good faith solely for the benefit of the company and to avoid conflicts of interest, including self-dealing transactions and the misappropriation of corporate opportunities (Lowry, 2009).

Despite its recognition, the application of the BJR in Indonesia remains inconsistent in practice. In several cases involving corporations, particularly State-Owned Enterprises (SOEs), corporate losses are frequently classified as state losses and subsequently linked to elements of corruption offences (Lestari, 2015). This reflects a tendency among law enforcement authorities to assess business decisions based solely on their outcomes (*ex post facto*), rather than evaluating the decision-making process. Consequently, the protection intended under the BJR is undermined, exposing directors to potential criminal liability for decisions made within the scope of their authority.

This issue is evident in the case involving Ira Puspawati concerning the acquisition of PT Jembatan Nusantara by PT ASDP. The case revealed that a significant portion of the acquired assets consisted of aging vessels with allegedly overstated book values through accounting mechanisms such as capitalization, revaluation, and affiliated transactions. Notwithstanding these concerns, a dissenting opinion emphasized that the acquisition constituted a legitimate business decision, as it had undergone extensive due diligence involving multiple professional consultants, received multi-layered approvals from the Board of Commissioners, General Meeting of Shareholders, and the Minister of SOEs, and demonstrated no conflict of interest while generating positive business outcomes. However, the majority of judges ultimately found the director criminally liable for corruption. This illustrates the failure to clearly distinguish between legitimate business risks and unlawful conduct, thereby weakening the protective function of the BJR.

From a normative perspective, such conditions raise concerns regarding legal certainty and fairness. Directors require strategic flexibility to develop corporate value and should not be held liable without a proper assessment of good faith and reasonableness (Hartono *et al.*, 2021). In Indonesia, the burden of proof is generally placed on directors to demonstrate that their actions comply with the principles underlying the BJR. While directors may still be held personally liable for misconduct

such as abuse of authority, the absence of consistent standards creates uncertainty in its application.

The legal framework, nevertheless, provides mechanisms to hold directors accountable. Article 155 of *Law No. 40 of 2007* affirms that directors' liability does not exclude the application of criminal law (Indonesia, 2007). Additionally, derivative actions enable shareholders to represent the company in bringing claims against directors for losses incurred, ensuring that accountability mechanisms remain in place (Anandya *et al.*, 2023). Oversight by supervisory bodies, such as the board of commissioners, also plays a crucial role in preventing abuse of authority (Irawan *et al.*, 2022).

A fundamental issue in the application of the BJR in Indonesia lies in the absence of clear normative parameters governing its core elements. The lack of precise definitions of good faith, due care, and adequacy of information creates *normative vagueness*, which in turn leads to divergent judicial interpretations (Sanyoto & Lie, 2025). As a result, the boundary between a *bad business decision* and *legal negligence* becomes blurred. This condition ultimately weakens the effectiveness of the BJR as a legal protection mechanism for directors and contributes to broader legal uncertainty in Indonesia's corporate and criminal law enforcement.

4.2 Application of the business judgment rule in the United States

The Business Judgment Rule (BJR) was first developed in Delaware case law. In *Bryan v. Aikin* (Court of Chancery, 1912), the Delaware court stated *obiter dictum* that as long as directors act in good faith, their authority to manage the corporation cannot be interfered with by the court, except in circumstances involving fraud, personal interest, arbitrary actions, or conscious disregard of the corporation's interests and shareholders' rights (Kershaw, 2018).

Delaware defines the Business Judgment Rule as a presumption that, in making business decisions, directors act on an informed basis, in good faith, and solely in the best interests of the corporation (Velasco, 2021). Delaware further determines that decisions made in bad faith, whether through action or failure to act, may constitute a breach of the *duty of oversight*. However, when a decision results from a careful consideration process

and is carried out in good faith, it remains classified as a business judgment protected under the BJR, even if it results in losses (Keay & Loughrey, 2018).

The assessment under the BJR does not emphasize the substantive standard of business decisions but instead focuses on evaluating the decision-making process undertaken by directors (Hill, n.d.). Delaware courts apply the *rational belief test*, affirming that directors' decisions will be upheld as long as they can be linked to a rational business purpose. This principle is illustrated in *Benihana of Tokyo Inc v. Benihana Inc.*

In deciding *Benihana of Tokyo Inc v. Benihana Inc.*, the Delaware court evaluated business decisions based on three main aspects: whether the board was independent, whether the directors acted in good faith, and whether the decision-making process was conducted with due care. Based on this framework, the court concluded that there was no personal interest influencing the decision. Furthermore, the court found that the board acted in good faith. The equity financing decision was considered the best option to support the company's development and renovation plans and was aligned with corporate interests. After examining the decision-making process, the court held that the decision was made with due care. As all three elements were fulfilled, the court affirmed the validity of the board's decision (Seenacherry, 2020).

There are two main models of the Business Judgment Rule in the United States: the Delaware doctrine and the American Law Institute (ALI) approach as formulated in the *ALI Principles of Corporate Governance*. The ALI provides that a director's business decision shall not be interfered with by the court if: (a) the director has no personal interest in the decision; (b) the director acts based on information reasonably considered sufficient; and (c) the director believes that the decision is in the best interests of the corporation (Chia, n.d.).

Although the Delaware and ALI approaches share similar elements, they differ in terms of the burden of proof. Delaware places the burden of proof on the plaintiff, whereas under the ALI approach, directors must prove that their decisions meet the required standards to obtain BJR protection (Andriola, 2014). The ALI approach allows courts to conduct substantive reviews of business decisions, which may increase directors' liability risks. Therefore, the United States predominantly adopts the Delaware approach, as it better reflects the doctrine of *judicial abstention* consistent with the fundamental concept of the Business Judgment Rule (Chia, n.d.).

Under Delaware law, the Business Judgment Rule applies to all corporations and limited liability companies. Delaware law allows corporations to include provisions in their articles of incorporation limiting directors' liability for breaches of the *duty of care*. In addition, limited liability companies may regulate exceptions to fiduciary duties through operating agreements. However, such limitations only apply to breaches of the *duty of care* and do not extend to the *duty of loyalty*, including conflicts of interest and bad faith conduct (Badawi, 2023).

The Delaware system emphasizes innovation and encourages directors to take business risks by providing flexibility in personal liability, as long as their actions do not involve fraud or disloyalty to the corporation. Furthermore, the United States continues to develop the Business Judgment Rule through judicial decisions. The U.S. Supreme Court has articulated key principles of the BJR, including that decisions must be business-oriented, based on careful consideration supported by reliable information, made in good faith, exercised with due care, free from fraudulent intent, not involving unlawful transactions, and grounded in the directors' discretion as regulated in corporate governance rules (Santiago, 2024).

4.3 Comparative analysis between Indonesia and the United States

Indonesia and the United States share a common recognition of the Business Judgment Rule as a doctrine that functions to protect directors from legal liability. This similarity arises from the fact that both jurisdictions acknowledge that directors possess the authority to manage the corporation, including representing the company in making business decisions. In Indonesia, there is no specific statutory regulation that explicitly governs the provisions of the Business Judgment Rule. Instead, the doctrine is implicitly accommodated within several statutory provisions. In contrast, in the United States, the Business Judgment Rule holds a strong position due to its common law legal system, in which judicial precedents constitute the primary source of law (Lewis, 2021). This indicates that within U.S. law, the Business Judgment Rule has been consistently and uniformly applied in cases related to corporate governance. Meanwhile, Indonesia is less familiar with the explicit application of the Business Judgment Rule, as it adheres to a civil law system where statutory law serves as the primary source of law, and judicial

decisions function merely as persuasive authority in adjudicating similar cases (Lewis, 2021). The absence of a specific and comprehensive statutory regulation on the Business Judgment Rule has led to varying interpretations regarding its application.

The similarities and differences in the application of the Business Judgment Rule in Indonesia and the United States reflect the distinct ways in which each legal system conceives the necessity of legal protection for directors in business decision-making. In this regard, the Company Law, which regulates the structure, duties, authority, and liabilities of corporate organs, plays a central role in reinforcing the application of the Business Judgment Rule. In order to ensure the effective enforcement of the doctrine in Indonesia, the Company Law should be harmonized with judicial practice. Such harmonization is needed to align statutory norms with their application in court, including with respect to the allocation of the burden of proof in cases involving corporate losses (Lestari, 2015). In this way, the judiciary can contribute to the development of a consistent jurisprudential standard, while the Company Law provides a clear legal framework, thereby enabling the Business Judgment Rule to operate more effectively and provide adequate protection for directors in the exercise of their management functions (Wildayanti and Kasjim Salenda, 2022).

In Indonesia, the implementation of the Business Judgment Rule is confronted by several challenges arising from regulatory inconsistency and divergent understandings among law enforcement authorities. The insufficient application of the doctrine in law enforcement practice is evident in cases involving state-owned enterprises, where corporate losses are frequently presumed to constitute corruption without a prior assessment of the directors' decision-making process (Hartono *et al.*, 2021). Moreover, the burden of proof is placed on the directors, who are required to prove that their conduct satisfies the standards of the Business Judgment Rule (Rissy, 2020). This allocation of the burden of proof significantly weakens the doctrine's protective function and is inconsistent with its underlying rationale.

The United States also faces various challenges in implementing the Business Judgment Rule. However, the U.S. legal system has successfully overcome these challenges by strengthening judicial and institutional mechanisms. First, the doctrine of *stare decisis* has been reinforced to ensure that court decisions regarding the Business Judgment Rule serve as precedents for similar cases (Bainbridge, 2004), thereby

clarifying the standards of directorial prudence and the limits of judicial intervention. Second, Delaware courts emphasize the presumption of good faith, assuming that directors have acted in good faith and on the basis of adequate information, as directors are deemed trustworthy (Velasco, 2021). The burden of proof is placed on the plaintiff, such that courts will not second-guess the substance of a decision unless there is evidence of bad faith, gross negligence, or conflicts of interest. Third, U.S. jurisprudence has developed clearly defined "safe harbors," such as the "rational belief" test or the entire fairness standard in cases of conflicts of interest. These developments place emphasis on judicial assessment of the decision-making process rather than the substance or outcome of the decision, ensuring that business losses are not automatically treated as legal violations (Chia, n.d.).

Thus, although Indonesia has adopted the Business Judgment Rule, its implementation remains inconsistent with the doctrine's core essence as developed in the United States. In the United States, the Business Judgment Rule guarantees directors' freedom to innovate and take risks, whereas in Indonesia, the doctrine is not fully understood and is often disregarded in judicial proceedings. Consequently, Indonesian directors are hindered in managing the company due to concerns over risks arising from business decisions that are otherwise reasonable.

Indonesia can adopt U.S. practices in enforcing the Business Judgment Rule to establish legal certainty for director protection. Indonesia should strengthen the principle of presumption of good faith as practiced in Delaware, ensuring that directors are not presumed guilty and that the burden of proof is not entirely placed on them. Furthermore, Indonesia needs to formulate more concrete parameters for the standards of duty of care and duty of loyalty, as developed through U.S. precedents. To more effectively enforce the Business Judgment Rule, Indonesian courts should consider the doctrine in cases involving directors, thereby generating clear guidelines through judicial consistency in deciding similar cases. In addition, it is essential to reaffirm the distinction between business risk and bad faith, particularly in state-owned enterprises, following U.S. practices that distinguish between bad faith claims and good faith actions that unintentionally result in losses (Badawi, 2023).

5 CONCLUSION

The study concludes that although Indonesia has recognized the Business Judgment Rule normatively, its implementation remains inconsistent due to weak regulatory structure and varying judicial interpretations. In contrast, the United States applies the doctrine consistently through strong judicial precedents and the presumption of good faith.

Therefore, Indonesia needs to strengthen the implementation of the Business Judgment Rule by clarifying legal parameters, adjusting the burden of proof, and harmonizing judicial practices. Such reforms are essential to ensure legal certainty and effective protection for directors in corporate decision-making.

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