



Renewal of Director's Criminal Liability for BUMN Losses Based on Business Judgment Rule

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Abstract

One of the problematic issues in existence of BUMN is the uncertainty in determining whether BUMN is a representation of the state or fully a business entity. This is due to the absence of an understanding of the BUMN's capital originating from separated state assets. This condition in turn has an impact on the uncertainty of the criminal responsibility of the directors if the BUMN suffers a loss associated with The Principle of State Losses and The Principle of Business Judgment Rule as one of the universal principles in company management. Based on this, there are two problems, namely: 1) What is the importance of The Business Judgment Rule Principle in the management of BUMN's in Indonesia? 2) How is the criminal responsibility of the Board of Directors for the loss of BUMN related to the Business Judgment Rule Principle? This study is a normative juridical study conducted through a literature study using legal materials to produce an analytical description in order to answer the problems posed. The results of this study show that The Principle of Business Judgment Rule has an important position in ensuring the protection of directors who run the company based on Good Faith and Condor. The renewal of the board of directors' criminal liability for BUMN losses based on the Business Judgment Rule Principle has the direction (Ius Constituendum) of revising the BUMN Law in the form of reconceptualization and strengthening of The Principles of Good Faith and Good Will through the framework of good corporate governance.

Keywords: Criminal Liability; BUMN Directors; BUMN Losses; Business Judgment Rule

A. Introduction

This article will discuss the importance of the Business Judgement Rule in the management of BUMNs in Indonesia and the criminal liability of Directors for losses to BUMNs in relation to this principle. Juridically, BUMN are still on the “gray” side, whether they are a representation of the state or fully a business entity. This is due to the absence of a single understanding of BUMN capital which comes from separated state assets. Finally, it has an impact on the uncertainty of the criminal liability of directors if BUMN suffers losses when associated with the principle of state losses and the principle of Business Judgement Rule as one of the universal principles in corporate management.

The existence of State-Owned Enterprises (BUMN) as business entities on the one hand and as business entities representing the state is still a problematic issue. This cannot be separated from the debate about the nature and position of BUMNs whether they are purely private or public legal entities. The emergence of this dichotomy regarding the position of legal entities cannot be separated from the role of the state (executive) both in the establishment, management and supervision of BUMN. Law No. 19/2003 on BUMN states that an SOE is a business entity whose capital is partly or wholly derived from separated state assets. The involvement of “state assets” in BUMN is the main issue in seeing the position

of BUMN in the realm of private law or public law, which has implications for the position and function of BUMN administrators, one of which is the Board of Directors.

In its function, the Board of Directors of BUMN is one of the organs of BUMN that manages including making business decisions on behalf of BUMN. The position of the Board of Directors in its function of running the BUMN (executive) is also still debatable, especially if it is related to the position of the BUMN whether as a state organizer or in this case as an employee of a private legal entity. This is what then creates a polemic when the SOE experiences financial losses. The question that arises is whether the BUMN's financial losses caused by the directors' "business" decisions are also state losses that can be charged with Law No. 31 of 1999 as last amended by Law No. 20 of 2001 concerning Corruption Crimes (TPIKOR Law).

A case that illustrates the polemics above can be seen, for example, in the case of former Pertamina CEO Karen Agustiawan, who was charged with corruption in the form of abuse of authority as Pertamina CEO with a state loss of Rp. 558 billion.¹ At the First and Appeal levels, Karen was convicted and sentenced to 8 years in prison. Although in the end at the Cassation level, Karen received an "acquittal" verdict, this set a precedent that the position of directors who run or make business decisions is vulnerable to being brought to criminal (corruption). Another case is the procurement of two Merpati 737 aircraft by Merpati Director Hotasi Nababan, who was acquitted at first instance but found guilty by the Supreme Court at the Cassation level with a sentence of 4 years and a fine of Rp. 200 million for his business decisions.² Both cases are interesting because they relate to business "decisions" made by the board of directors (CEO).

The two cases highlighted by the author can be seen in two principle debates, such as the Business Judgment Rule and the Government Judgement Rule. In the construction of the Business Judgement Rule, directors and commissioners in the event of a loss to BUMN cannot be held legally responsible if they meet the norms of Article 97 paragraph (5) of Law No. 40 of 2007 concerning Limited Liability Companies. Meanwhile, in the construction of the Government Judgement Rule, all BUMN activities cannot be separated from the interests

¹ Arthur Gideon, "Kronologi-Kasus-Eks-Dirut-Pertamina-Karen-Agustiawan-Hingga-Diputus-Bebas @ Www.Liputan6.Com," Liputan6.com, 2020, <https://www.liputan6.com/bisnis/read/4198244/kronologi-kasus-eks-dirut-pertamina-karen-agustiawan-hingga-diputus-bebas>. Accessed 1 Juni 2022

² Hotasi Nababan, "Kronologi-Kasus-Eks-Dirut-Pertamina-Karen-Agustiawan-Hingga-Diputus-Bebas @ Www.Liputan6.Com," Masyarakat Pemantau Peradilan Indonesia (MaPPI) FH UI, n.d., <https://www.liputan6.com/bisnis/read/4198244/kronologi-kasus-eks-dirut-pertamina-karen-agustiawan-hingga-diputus-bebas>. Accessed 1 Juni 2022.

of the state, including if the BUMN experiences losses. This is based on the interpretation of the BUMN Law where there is capital participation from the state sourced from state finances. Thus the formation, management and supervision are intervened by the state.

Related to the interpretation of 'state assets' separated by the Constitutional Court Decision No. 62/PUU-XI/2013 dated February 03, 2014 has confirmed the status of state assets sourced from state finances and separated from the state budget to be included as capital in BUMN remains part of the state financial regime as stipulated in Law No. 17 Year 2003 on State Finance. However, until now the debate has not ended when it is clashed with views that adhere to the Principle of Autonomy of Private Legal Entities and the Theory of State Financial Transformation.

In legal gap as described above, discussing legal reform, especially in the context of criminal liability for directors of BUMN, is important. The issue of legal reform is synonymous with “development” in which it is also related to the terms / issues of development, reform, guidance, structuring, structuring, re-establishment, review, and evaluation. So it includes the notions of “development, reform, renovation, rebuild, reconstruction, evaluation/re-evaluation”.³ The scope of legal system reform in general in this case can include reform from the aspects of substance, structure and culture.⁴ To limit the problems and limit the discussion on legal reform, it will only be related to reform in the framework of substance (substantial reform) related to the criminal liability of directors in the perspective of the Business Judgement Rule Principle.

Based on this, this paper is prepared to answer 2 (two) problem formulations, such as: 1) How important is the Business Judgement Rule Principle in the management of BUMN in Indonesia? 2) How is the criminal liability of the Board of Directors for BUMN losses associated with the Business Judgement Rule Principle?

B. Research Method

This paper is written through a qualitative research model with a normative legal research type.⁵ Normative legal research is one of the types of legal research where the object of research is the legal norm itself.⁶ The legal norm that is used as an object in this research is

³ Barda Nawawi Arief, *Pembangunan Sistem Hukum Nasional*, Semarang, Penerbit Pustaka Magister (Semarang: Penerbit Pustaka Magister, 2012). Page 9.

⁴ Arief. Page 11.

⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2016).

⁶ Soekanto Soerjono and Sri Mamudji, “Penelitian Hukum Normatif Suatu Tinjauan Singkat” (PT Raja Grafindo Persada, Jakarta, 1995).

the criminal responsibility of BUMN directors. The approach used to analyze the object of research is a statutory approach and a conceptual approach.⁷

Normative legal research using secondary data which includes primary legal materials (laws and regulations) and secondary legal materials (books and scientific research results). In this research, the primary legal materials used are Law No. 19 of 2003 on BUMN, Law No. 31 of 1999 as last amended by Law No. 20 of 2001 on Corruption Crimes, Law No. 40 of 2007 on Limited Liability Companies, Law No. 17 of 2003 on State Finance, and Constitutional Court Decision No. 62/PUU-XI/2013. Collecting legal materials using literature studies by collecting primary legal materials which include laws and regulations and secondary materials which include books and scientific research results. The search for legal materials can be done by reading, hearing, seeing or by searching for legal materials via the internet. Data collection is based on literature books and legislation related to this research, in order to obtain scientific theoretical materials and normative juridical materials as comparisons and guidelines in describing the problems discussed.

C. Results and Discussion

1. The Importance of the Business Judgement Rule in the Management of BUMN in Indonesia

The basic issue of the polemic on directors' liability began when there was still a debate caused by different interpretations. Based on its activities, BUMN are business entities established to achieve certain profits. However, if it is related to the capital structure as mentioned in the State Finance Law, then BUMN cannot be separated from state representation. These two perspectives on the position of BUMN have an impact that is not simple.

To see the form and position of BUMN, we must at least understand the legal basis relating to the establishment of the SOE itself. At least one BUMN is regulated using 3 (three) laws, namely the BUMN Law, the Limited Liability Company Law, and the State Finance Law. Not to mention sectoral laws such as Banking, Mining, Plantation, and others.

From the arrangements in the three laws, two perceptions have developed and caused debate. The first is that BUMN are business entities because their daily management uses the PT Law. This stems from the view that what is seen from BUMN is their function in carrying out core business to achieve profits. Therefore, BUMN, based on their function and

⁷ Marzuki, *Penelitian Hukum*.

management, are pure business entities that cannot be intervened by the state. The second perception is based on the form of business entity and capital structure. Based on this perception, BUMN represent the state, which in its position cannot be separated from state intervention. This perception has complex implications for the status and position of the board of directors, which is considered a state organizer. Because they are state organizers, the accountability of directors is not only limited to the organs of the company but also to the state based on public law provisions. By using this approach, a director of an SOE is very likely to be charged with criminal provisions, for example the provisions on Corruption Crimes because his business decisions or actions have resulted in BUMN losses. Losses suffered by BUMN can be considered as state losses.

The unclear position of BUMN has paradoxical legal consequences. On the one hand, the existence of BUMN and all its organs can be applied to the provisions of public law and on the other hand, the provisions are in accordance with civil law or business law. These two areas of law in fact create uncertainty, especially in terms of seeing the accountability of directors when an SOE suffers losses as a result of its business decisions.

In running the company, the Board of Directors must depart from the foundation that the duties and authorities obtained are based on two principles, namely the Principle of Trust (duty of loyalty) and the principle that refers to the ability of Prudence (duty of care). In other words, fiduciary duty is a relationship between the company and the directors based on good faith and professionalism. This is what is meant as a fiduciary duty relationship.⁸ There is a close relationship between fiduciary duty and the principle of Business Judgement Rule. The basis of company management by directors is fiduciary duty, the implementation of fiduciary duty is a prerequisite for the principle of business judgment rule to be applied to directors. That means the business judgment rule principle can only be applied when the directors implement the principles of trust, good faith, and professionalism in the fiduciary duty relationship with the company.

The doctrine of Business Judgement Rule teaches that the Company's Board of Directors is not liable for losses arising from a decision-making action, if the action is based on good faith and caution. Directors receive legal protection without the need to obtain justification

⁸ Bismar Nasution, "Pertanggungjawaban Direksi Dalam Pengelolaan Perseroan," *Kegiatan Hukum Ekonomi. Artikel Diakses Pada 2* (2007). Presented at the National Day Seminar in order to create Good Corporate Governance in the Management and Development System of PT (Persero) BUMN "Optimizing the Management, Supervision, Development and Accountability System of PT (Persero) in the BUMN Environment in Terms of Legal Aspects and Transparency", organized by Inti Sarana Informatika, Hotel Borobudur Jakarta, Thursday, March 07, 2007, Page 1.

from shareholders or the courts for the decisions they make in the context of managing the company.⁹ The Business Judgement Rule doctrine will protect directors from liability for business decisions that cause losses to the corporation. In the Common Law legal system for the liability of Directors of Corporations can be seen the consideration of the court in the case of *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.* 26 Ohio St.3d 15, 496 N.E.2d 959 (1986):¹⁰

"The business judgement rule is a principle of corporate governance that has been part of the common law for at least one hundred fifty years. It has traditionally operated as a shield to protect directors from liability for their decisions. If the directors are entitled to the protection of the rule, then the courts should not interfere with or second-guess their decisions. If the directors are not entitled to the protection of the rule, then the courts scrutinize the decision as to its intrinsic fairness is rebuttable presumption that directors are better equipped than the courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted with good faith. A party challenging a board of directors' decision bears the burden of rebutting the presumption that the decision was a proper exercise of the business judgment of the board"

In the national legal system, the Business Judgement Rule doctrine has been accommodated in Law No. 40 of 2007 on Limited Liability Companies. Regarding the duties of a director, Article 92 regulated that:

1) *"The Board of Directors shall carry out the management of the company for the benefit of the company and in accordance with the purposes and objectives of the company; 2) The Board of Directors is authorized to carry out the management as referred to in paragraph (1) in accordance with policies deemed appropriate, within the limits set forth in this law and/ or the articles of association"*.

Article 97 further states that:

- 1) *"The Board of Directors is responsible for the management of the company as referred to in Article 92 paragraph (1);*
- 2) *The management as referred to in paragraph (1), must be carried out by each member of the board of directors in good faith and full of responsibility;*
- 3) *Each member of the board of directors shall be personally liable for the losses of the company if he/she is guilty or negligent in carrying out his/her duties in accordance with the provisions as referred to in paragraph (2);*
- 4) *In the event that the board of directors consists of 2 (two) or more members of the board of directors, the responsibility as referred to in paragraph (3) shall apply jointly and severally to each member of the board of directors;*
- 5) *Members of the board of directors shall not be liable for the loss as referred to in paragraph (3) if they can prove: a. The loss is not due to their fault or negligence; b. They have carried out management in good faith and prudence for the benefit of and in accordance with the purposes and objectives of the company; c. They have no conflict of interest, either directly or indirectly, over the management actions that resulted in the loss; and d. They have taken measures to prevent the incurrence or perpetuation of the loss. Has taken measures to prevent the loss from arising or continuing;*

⁹ Erman Rajagukguk, *Nyanyi Sunyi Kemerdekaan: Menuju Indonesia Negara Hukum Demokratis: Erman Rajagukguk, Tetes-Tetes Pemikiran, 1971-2006* (Fakultas Hukum, Universitas Indonesia, Lembaga Studi Hukum dan Ekonomi, 2006). Page 390.

¹⁰ Lewis D Solomon, "Corporations Law And Policy Materials And Problems Third Edition, American Casebook Series, ST," *Paul, Minn: West Publishing Co*, 1994. Page 695.

- 6) *On behalf of the company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may file a lawsuit through the district court against members of the board of directors who, through their fault or negligence, have caused losses to the company;*
- 7) *The provisions referred to in paragraph (5) shall not reduce the right of other members of the board of directors and/or members of the Board of Commissioners to file a lawsuit on behalf of the company".*

From the provisions of Article 97 of the PT Law, a common thread can be concluded that the principle of the Business Judgement Rule has been accommodated in the PT Law, especially in letters b, c, and d, while letter a which explains: the loss is not due to his fault and negligence is a clear provision, and this provision is an addition to the PT Law. Article 97 paragraph (2) of the PT Law states that the management of the company lies in the hands of the board of directors based on good faith and responsibility.

This measure of responsibility and good faith that does not exist. However, it should not be said that it does not exist, because these measures can be interpreted based on Article 97 paragraph (2) and paragraph (3) of the PT Law. So that the Business Judgement Rule will always be based on Fiduciary Duty which is divided into 2 (two), namely: duty of care and duty of loyalty. This limitation is a limitation of good corporate that applies to corporate law, in this case the PT Law. It will be interesting if this provision is juxtaposed with BUMN, which in its position and management has both private and public legal dualism.

The Business Judgment Rule protects directors from personal liability for the company's losses only for business decisions that clearly fulfill fiduciary duty and the actions and actions of the directors are included in *intra vires*, against *ultra vires* directors' actions the directors cannot be protected by the doctrine of Business Judgment Rule. Ridwan Khairandy in his book reveals that if the actions of the board of directors that cause losses are not based on good faith, then it can be categorized as a violation of fiduciary duty that gives birth to personal responsibility.¹¹ But basically, fiduciary duty is not just good faith, because even though the directors have performed their duties in good faith but there are errors or omissions or other matters included in the classification of fiduciary duty, the directors are still personally responsible for the losses suffered by the company.

The concept of the Business Judgment Rule has been applied since 170 years ago in the United States and has played a very important role in companies and in business cases. In general, this doctrine is a doctrine that provides protection for directors against the business decisions they make.¹² In addition to the United States and Australia, Germany also adopted

¹¹ Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia* (Yogyakarta: FH UII Press, 2013).

¹² Susan Ellis Wild, *Webster's New World Law Dictionary* (John Wiley & Sons, 2006). Page 58. "*Business Judgment Rule is the legal doctrine that a corporation's officers and directors cannot be liable for damages to stockholders for a business*

the Business Judgment Rule doctrine into their corporate law. Australia in the Corporation Law (Section 180) adopted the Business Judgment Rule, then Germany in the German Corporate Law Act (The first two sentences of 93 part 1).¹³ The rationale of this rule is the recognition by the court that it is in the nature of running a risky business, the directors must be free from the fear of legal traps that may ensnare the directors in the event that the directors take risky business decisions, the fear of the directors in making business decisions will affect the directors' business decisions.

In BUMN Persero, it is a duty for a board of directors to decide to run something that provides maximum or significant results for the company. Business is a risk, in the midst of competitive global economic competition, the efforts of the directors of a persero in driving its business certainly depend on business risks that will not always bring profits but also carry the risk of loss. When a persero experiences losses in its business transactions, it raises a polemic regarding the legal rules of responsibility that must be carried out by the board of directors. Economic conditions that are influenced by various factors result in rapid changes in the business climate, as well as increasingly fierce business competition. Therefore, directors as managers of the company are required to act quickly, if the directors are too slow to make decisions it is not impossible that the company will lose business opportunities that are likely to provide benefits to the company.¹⁴

The Business Judgment Rule provides encouragement to directors to dare to make decisions and take risks in carrying out their duties and obligations to manage the company and not to be afraid and not to be excessively careful of threats that result in directors being personally liable for the company's losses that may arise as a result of the actions and business decisions of the directors.¹⁵

2. Renewal of Directors' Liability for Losses of BUMN in Relation to the Principle of Business Judgement Rule

decision that proves unprofitable or harmful to the corporation so long as the decision was within the officers' or directors' discretionary power and was made on an informed basis, in good faith without any direct conflict of interest, and in the honest and reasonable belief that it was in the corporation's best interest"

¹³ Fred B G Tumbuan, "Pendirian Perseroan Terbatas Dan Pertanggungjawaban Direksi Dan Dewan Komisaris Serta Pihak Terkait Lainnya," in *Seminar Dengar Pendapat Publik Berkenaan Dengan Perubahan Aspek Hukum Perseroan Terbatas*, vol. 3, 2000. Paper presented at the "Seminar Dengar Pendapat Publik Berkenaan Dengan Perubahan Aspek Hukum Perseroan Terbatas", Jakarta, September 24-25, 2001. Page 21.

¹⁴ Stephen W Mayson and Christopher L Ryan, *Mayson, French & Ryan on Company Law* (Oxford University Press, 2016). Page 493.

¹⁵ Mahkamah Konstitusi, Putusan Mahkamah Konstitusi RI No. 48/PUU-XI/2013 (2013).

Based on Article 1 number 1 of the Company Law, it states: “*Limited Liability Company is a legal entity which is an alliance of capital*”. Thus, Persero, which in its regulation refers to the PT Law, is also a legal entity. According to R. Subekti, among others, legal entities are legal subjects like individuals who can have rights and perform legal acts like humans.¹⁶

According to a business law expert from Gadjah Mada University, Yogyakarta, Nindyo Pramono, the nature of the separation of separated state assets, which is used as state investment, is a complete detachment from its parent, namely state assets and state finances. “The state has the status of a shareholder in a persero and the owner of capital in a perum represented by the State Ministry for BUMN”. This means that the Board of Directors of BUMN Persero is not a state organizer, but an organ of BUMN that is subject to the domain of private law. Meanwhile, former Head of the Capital Market Supervisory Agency, Marzuki Usman stated that the losses of BUMN that are associated with state losses make directors not free in making business decisions, this has become a scourge for SOE Directors “. The same thing was expressed by the President Director of PT Perkebunan Nusantara IV, Erwin Nasution. He is afraid every time he wants to make a business decision for fear of being accused of corruption if in the future his decision is considered to have caused state losses. As a result, doubts arise, which causes him to always consult with many parties before making decisions, including the BPKP and Legal Consultants. This results in longer decision-making. Meanwhile, in the business world, directors are asked to make a quick business judgment.¹⁷

Based on the definition of BUMN itself and the provisions in the Company Law, where BUMN in the form of a persero is a legal entity, the assets of the persero and the assets of the state are separate things. With the separation of wealth, this means that losses experienced by BUMN cannot be equated with state losses. BUMN losses will only be the losses of the BUMN itself. Thus it is clear that the state that invests in BUMN does not suffer losses with the existence of losses in BUMN to run its business.¹⁸

Based on the Constitutional Court Decision No. 48 and 62/PUU-XI/2013 read out on September 18, 2014, has confirmed the status of state assets sourced from state finances and separated from the state budget to be included as capital in BUMN remains part of the state financial regime. According to the Constitutional Court judges in the case, they considered that their decision had ended the debate over the phrase “state assets separated from

¹⁶ S H R Subekti, *Pokok-Pokok Hukum Perdata* (PT. Intermasa, 2021). Page 21.

¹⁷ Tumbel Ridel S, “KAJIAN HUKUM TANGGUNG JAWAB DIREKSI TERHADAP KERUGIAN PERUSAHAAN PERSEROAN (PERSERO),” *Jurnal Hukum Unsrat* 2, no. 1 (2014): 16–31.

¹⁸ Ridel S.

state/regional companies” in Article 2 letter g of Law No. 17/2003 on State Finance, which is one of the elements of state finances. Although the law has explicitly placed the assets separated in BUMN as part of state finances, the provision is often clashed with views that adhere to the principle of autonomy of private legal entities and the theory of state financial transformation.

The legal responsibility of the board of directors of a Limited Liability Company (PT), is based on the principle that each member of the board of directors is fully personally liable for the company's losses if the person concerned is guilty or negligent in carrying out his duties. If the board of directors consists of 2 or more members of the board of directors, the responsibility as intended, applies jointly and severally to each member of the board of directors. Members of the board of directors cannot be held liable for losses, if they can prove that:

“a) The loss is not due to his/her fault or negligence; b) Has carried out management in good faith and prudence for the interests and in accordance with the purposes and objectives of the company; c) Has no conflict of interest either directly or indirectly over the management actions that resulted in the loss; d) Has taken measures to prevent the occurrence or continuation of the loss.”

As a legal entity, BUMN Persero applies all the provisions and principles that apply to PT in general, as contained in Law No. 40 of 2007 concerning Limited Liability Companies. Persero BUMN are legal entities, so the company's assets and state assets are separate things. With the separation of wealth, this means that losses experienced by BUMN cannot be equated with state losses. SOE losses will only be a loss for the SOE itself.

However, this has been refuted by the Constitutional Court Decision No. 48 and 62/PUU-XI/2013 dated September 18, 2014. In its legal considerations, as follows:

“a) By changing the legal form of an SOE into a PT Persero, the status of state assets sourced from the separation of state finances in BUMN which in the SOE Law is said to no longer be subject to the principles of APBN management, as if it is no longer touched by the BPK supervision system on the use of money sourced from the APBN. This view forgets that supervision of the use of state finances from the APBN included as capital / shares in BUMN is only carried out specifically on the flow of state finances. The State has an interest in securing state money that enters the BUMN treasury through the mechanism of subsidies and equity participation; b) In the theory of state financial law, the existence of the principle of completeness (volgheid beginsel) has guaranteed that there should be no gray loopholes that allow the flow of state finances to escape the parliamentary oversight system through BPK audits. BPK in the constitution is affirmed to have an attribution of authority as a high state organ with an auditive function. In addition, with the principle of “state preference rights”, the state should not lose its supervisory authority over the use of state finances that must always be accounted for through the APBN management cycle.”

The dependence between the legal entity (PT) and the management is the reason why fiduciary duties are born between the legal entity and the management. Where this obligation is the obligation of the management always as a trusted party to act and use its authority only

for the benefit of the company and this can arise when one party does something for the benefit of the other party by putting aside his own personal interests. In addition to obligations based on fiduciary duties, directors still have other obligations, such as:¹⁹

- a) Duty of Care, directors in running the company based on existing authority and must always be vigilant and act with careful calculation. In relation to Duty of Care, directors are held legally responsible;
- b) Duty of Loyalty, the loyal attitude that must be shown by directors in the company is an attitude based on rational and professional considerations;
- c) Duty of Skill, the ability or expertise to manage the company is a requirement that must be owned by directors and commissioners;
- d) Duty to Act Lawfully, directors who are given trust by shareholders are obliged to lead the company based on applicable law.

The theory of fiduciary duty is an obligation established by law for a person who utilizes another person, where a person's personal interests are taken care of by another person, which is only a momentary superior-subordinate relationship. People who have this obligation must carry it out based on a standard of duty that is the highest in accordance with what is stated by law. While this fiduciary is someone who holds the role of a representative (trustee) or a role that is equated with something that acts as a representative, in this case the role is based on trust and confidence which in this role includes scrupulousness, good faith, and candor. Fiduciary includes relationships such as administrator or manager, supervisor, representative or guardian, and guardian, including a lawyer who has a fiduciary relationship with his client.²⁰

In the management of a company or company, members of the board of directors and commissioners as one of the vital organs in the company are fiduciaries who must behave like trust holders. In this case, the board of directors has a fiduciary position in the management of the company and the relationship mechanism must be fair. According to Common Law experience, the relationship can be based on the theory of Fiduciary Duty.²¹ The Fiduciary Duty relationship is based on trust and confidence, which in this role includes scrupulousness, good faith, and candor. In understanding the fiduciary relationship, the

¹⁹ Khairandy, *Pokok-Pokok Hukum Dagang Indonesia*.

²⁰ Nasution, "Pertanggungjawaban Direksi Dalam Pengelolaan Perseroan." Quoting from Henry Campbell Black, p. 625.

²¹ Nasution.

Common Law recognizes that fiduciaries naturally have the potential to abuse their authority. Therefore, the fiduciary relationship must be based on high standards.

Fiduciary duties in a PT are essentially related to the position, authority and responsibility of the board of directors. Violation of fiduciary duties results in the personal liability of the directors. Meanwhile, for the defense of directors in a company, the principle of Business Judgment Rule can be used. This principle of defense of directors (Business Judgment Rule) can be measured based on fiduciary duties. Business Judgment Rule measured by fiduciary duty in a PT, when associated with Article 11 of Law No. 19 of 2003 concerning State-Owned Enterprises and its Explanation, the Directors of BUMN Persero can use Article 97 paragraph (5) of the Company Law (Business Judgment Rule) measured by fiduciary duty as a defense if they are sued by Shareholders (the State) for the policies and business decisions they make. The doctrine or principle of fiduciary duty can be found in Article 97 paragraphs (1) and (2) of the Company Law, which states that: “*The Board of Directors is responsible for the management of the Company as referred to in Article 92 paragraph (1)*”. Paragraph (2), states that: “*The 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*”. Violation of this can cause the Board of Directors to be fully personally liable if they are guilty or negligent in carrying out their duties.

To impose liability on the director or management of the corporation, it must be proven that there is a violation of the authority of the authority obligations it has. The corporate management in this case must be proven to have violated the good faith entrusted to it in running the corporation or company, as stipulated in the principle of fiduciary duty. Thus, the duties and obligations of the Board of Directors and Board of Commissioners of BUMN Persero must be carried out in “good faith” and “full responsibility”. Neither the Explanation of Article 97(2) nor the Explanation of Article 114(2) of the Company Law explains or provides a benchmark of what is meant by good faith. In relation to the provisions of Article 99 paragraph (1) letter b. of the Company Law, the Board of Directors has bad faith if, among other things, the member of the Board of Directors knows that in performing his/her actions, he/she has a conflict of interest with the Company". Meanwhile, according to the Explanation of Article 97 paragraph (2) of the Company Law, what is meant by “full responsibility” is to pay careful and diligent attention to the Company.²²

²² Sutan Remy, “Tanggung Jawab Pribadi Direksi Dan Komisaris (Hukum Perseroan),” *Jurnal Hukum Bisnis* 14, no. 3 (2001). p. 23.

Based on the descriptions above, every Board of Directors of a Persero SOE incorporated as a limited liability company can be defended using Article 97 of the Company Law when sued by shareholders (the State) or the board of commissioners regarding the policies they have taken. However, in the proof, the Board of Directors of the Persero SOE must prove that in making the decision they have adhered to the principles of fiduciary duty, namely duty of care and duty of loyalty.

This is a measure for the Board of Directors of BUMN Persero to run the company in good faith and responsibility. A Persero SOE is not always profitable for shareholders, but it can make losses. However, this cannot be arbitrarily blamed on the Board of Directors. If the Board of Directors of BUMN Persero in making these decisions has used common sense, and the losses incurred are less than making other decisions. For example, if at the time before the policy was implemented by the Directors of BUMN Persero, the company's loss was Rp. 250 million, but after the policy was taken by the Directors of BUMN Persero, the company's loss decreased to Rp. 50 million. So, in this case, the Directors of BUMN Persero are correct in taking action and need to be rewarded for their achievements. The advantages of a Board of Directors of BUMN Persero are not only measured by the profits it makes but also measured by how capable the Directors of BUMN Persero are in solving problems by minimizing the company's losses.

Criminal liability to the Board of Directors is closely related to the decisions issued as a policy in running/managing the company. In the business dimension, the decision of a Board of Directors is very important and strategic that will determine the direction of a company's progress. On the other hand, due to its great authority in making decisions, the Board of Directors is also at risk of abuse of authority for personal gain. That is why the limitations on the decisions of the Board of Directors must rely on good faith and based on the business judgment rule.

Directors' decisions or policies, especially in BUMN, are often faced with complicated situations and require quick and precise decisions. Business dynamics require that decisions made by directors are not only correct but can also have an impact on the company. In situations like this, in addition to skill, it also requires trained sensitivity in reading the existing business dynamics situation. Douglas M. Branson, in his free translation, argues that business decisions often use touch and feelings that cannot be proven by systematic analysis, and are often not palpable or understandable. Business decisions are either instinctual visions or transformed into forecasts about the state of market competition, cost structures, and the

direction of industrial and economic growth. Ultimately, he argues that business decisions are a matter of touch and feel that do not easily lend themselves to systematic analysis.²³

In a limited liability company, every decision taken by the board of directors is a decision of the company, and for the sole benefit of the company, and in accordance with the goals and objectives of the company as stated or related to the articles of association. The authority of the board of directors cannot be intervened or interfered with by shareholders or other parties, because the element of ownership has been clearly separated from the authority of the board of directors. In fact, the decision must be made independently, without any influence from anyone, including the personal interests of each member of the board of directors. Since the Company Law stipulates that the responsibility of the board of directors is collegial, then the decision of the board of directors can be said to be a group decision, which indicates the consensus of all members of the Board of Directors.

If we return to the context of the question of whether SOE directors can be punished if the SOE suffers losses? Basically, after knowing about the business decisions of BUMN directors, BUMN losses are closely related to the “interpretation” of state finances in BUMN. The debate arises when there is no clear view on the status of state finances in BUMN. With the condition and nature of state finances as such, an analogy is then drawn that if the SOE loses, it results in a loss to state finances so that it is included in corruption crimes. In fact, if we go back to the previous description, the state assets in BUMNs are “separated” state assets.

One of the basic elements in the crime of corruption is the existence of state financial losses. Before determining the existence of state financial losses, it is necessary to clarify the juridical definition of 'State Finance'. Article 1 point 1 of Law No. 17 of 2003 concerning State Finance defines: “State finances are all state rights and obligations that can be valued in money, as well as everything in the form of money and in the form of goods that can be used as state property in connection with the implementation of these rights and obligations”. Meanwhile, Article 1 paragraph (1) of Law No. 19 of 2003 concerning BUMN states: “State participation constitutes separated state assets”. The understanding of this article is that when state assets have been separated, the assets are no longer in the realm of public law but in the realm of private law. The State Finance Law positions Persero BUMN in the realm of public law. On the other hand, Article 11 of the SOE Law states “The

²³ Stephen M Bainbridge, “The Business Judgment Rule as Abstention Doctrine,” *Vand. L. Rev.* 57 (2004): p. 83.

management of Persero BUMN is carried out based on Law No. 1 of 1995 concerning Limited Liability Companies and its implementing regulations". This means that the UUPT is in accordance with the *Lex Specialis Derogat Lex Generalis* principle that applies to BUMN Persero. Thus, if there is a loss in a BUMN Persero, the loss is not a state financial loss but a company loss or commonly referred to as business risk as a private legal entity.

"Separated state assets" in BUMN are physically in the form of shares held by the state, not the assets of the SOE. A person can only be charged with corruption under the law if he/she intentionally embezzles securities by unlawfully selling the shares that he/she keeps in his/her position or allows the shares to be taken or embezzled by another person or assists in the commission of such an act (Article 8 of Law No. 20 of 2001 on the Amendment to Law No. 31 of 1999 on the Eradication of Corruption). However, in current practice, corruption charges are also imposed on the actions of the Directors of BUMN in transactions that are argued to be detrimental to state finances. It can be said that there has been a misunderstanding and application of what is meant by state finances.

Based on the descriptions above, legally, the assets of BUMN Persero cannot be categorized as state finances, because the assets of BUMN Persero are separated state assets derived from separated state finances.

- a) SOE assets cannot be said to be state assets because: BUMN as legal entities separate the assets of the owner and the assets of the legal entity and its management. This is because the reference in the management of BUMN is the PT Law and the SOE Law;
- b) There is still confusion in the definition of state finances in several regulations, namely in the Explanation section of the State Finance Law with the definition in the Anti-Corruption Law and the definition of "state finances" in the State Finance Law itself. 1) Losses on transactions in BUMN (Persero) are not state losses, this refers to the Company Law and prevailing business practices. 2) Losses above the government (shareholders) in BUMN Persero can file civil or criminal charges against the Directors/Commissioners and cannot be categorized as state losses. 3) The interpretation of state losses is returned to the understanding of state losses regulated in the State Treasury Law.

Although BUMN are part of state finances based on the Constitutional Court Decision No. 48 and 62/PUU-XI/2013, however, the Business Judgment Rule can still be used for the defense of SOE Directors in terms of decision making. This reason alone is justified because the Directors of BUMN who make such decisions cannot be counted by a single

transaction, but rather, must be counted from one financial year. In criminal law, the use of the Business Judgment Rule is used as an excuse, because if it is an excuse, then the actions of the SOE Directors are wrong in the eyes of the law, and the law forgives them. Therefore, the Business Judgment Rule can be used and applied in the defense of SOE Directors when making business decisions who are suspected of committing corruption.

The Business Judgment Rule is the same as what is regulated in Article 97 paragraph (5) of the Company Law. In essence, every business decision taken must contain losses. In relation to determining whether the finances of BUMN Persero are state finances, then based on the Constitutional Court Decision No. 62/PUU-XI/2013 dated February 03, 2014 whose decision rejected the petition of the Petitioners, in fact, the Panel of Judges of the Constitutional Court who examined, tried and decided the case should accept the petition. This is in line with the dissenting opinion submitted by one of the Judges, namely Judge Harjono, who said that the finances of BUMN Persero are not state finances because BUMN Persero is a limited liability entity, therefore, associated with the determination of state losses conducted by the Audit Board (BPK), the BPK should apply the principles of financial governance audit based on the principles of limited liability companies in accordance with applicable laws and regulations.

As previously stated, according to Barda Nawawi Arief, legal reform is synonymous with "development", in which it is also related to the terms/issues of development, reform, guidance, structuring, restructuring, re-establishment, review, evaluation." So it includes the notion of "development, reform, renovation, rebuild, reconstruction, evaluation/re-evaluation. The scope of legal system reform in general in this case can include reform from the aspects of substance, structure and culture. In this case, if the scope of national legal reform/development is seen as a "development program" then the scope can be in the form of various programs related to the field of law.²⁴

Based on the Bangkumnas Repelita VI workshop (1994-1999) the development of legal substance consists of 14 (sectors), two of which are the economic law sector and the criminal law sector. This is very reasonable considering the development and complexity of law in the criminal and economic sectors require responses. The development of corporate law as contained in the provisions of Law No. 19 of 2003 concerning State-Owned Enterprises (BUMN) and Law No. 40 of 2007 concerning Limited Liability Companies is a substance in

²⁴ Arief, *Pembangunan Sistem Hukum Nasional*.

the economic sector that needs attention for the sake of legal reform. Legal reform here in terms of the responsibility of BUMN directors.

From what has been described above, it shows that there is still a paradoxical situation and multiple interpretations related to the accountability of BUMN directors. This is because BUMNs stand on two legs, namely public law legs and private law legs. The direction of renewal carried out on the liability of directors according to the author can be done through an integralistic approach rather than particularistic.

Integralistic or integrative legal thinking is associated with the subject matter of science and thought, which can be understood as a scientific approach (thinking) of law, a pattern of legal thinking (construction of legal thinking or style of thought in various legal issues.²⁵ Thus integral/integrative thinking means thinking thoroughly/contextually, balanced thinking or contextual/holistic thinking and is the opposite of partial or fragmentary thinking. Approaching the renewal of the liability of directors of BUMN, we should then do so in an integral/integrative manner. This means that the problem of liability is not seen dichotomously between civil (corporate law) and criminal.

Indeed, in my opinion, from the development of understanding after attending several seminars related to the theme of the liability of directors of BUMN that have suffered losses, business law circles, criminal law circles, administrative law circles and even practitioners (both prosecutors and lawyers) agree that the limitations for the application of the business judgment rule are that there must be good faith from the directors in running the company and there must be no conflict of interest. In addition, they also agreed that BUMN must be built based on the principles of good corporate government, which includes accountability and transparency.

However, the debate began to emerge when discussing the parameters of good faith and conflict of interest, especially from business/corporate law circles and criminal/prosecutorial law circles. For business law, the criteria of good faith and conflict of interest can be determined by the General Meeting of Shareholders (GMS) and the visibility study. However, this is not the case for criminal / criminal law circles, that good faith and conflict of interest have not only formal but material meanings that are proven in court. Having a material meaning means that the decision taken by the GMS is not a series of evil conspiracies of the

²⁵ B Nawawi Arif, "Ilmu Hukum Pidana Integralistik (Pemikiran Integratif Dalam Hukum Pidana," *Semarang: Pustaka Magister*, 2017. P. 10-12.

company's organs, in this case the Board of Directors and the Board of Commissioners. At this point, each of them stands alone and the BUMN Law does not provide clear boundaries.

In short, the idea of renewing the liability of directors for BUMN losses based on the Business Judgement Rule principle has a direction (*ius constituendum*), namely: First, the directors still have creativity / are not giddy in running BUMN; Second, it guarantees the implementation of company management in good faith and good corporate government; Third, it does not eliminate the function of the state when a corporate crime is committed due to a series of “evil conspiracies” of its corporate organs. That is why the idea of privatizing BUMN on the grounds that it makes management easier, especially in terms of the accountability of directors, according to the author, is not the right offer of reform.

D. Conclusion

The position of the Business Judgement Rule is important in company management, especially for BUMN. The existence of the Business Judgement Rule will ensure the protection of directors and commissioners for a company dynamic arising from their business decisions as long as it is carried out based on the principle of fiduciary duty. The fiduciary duty relationship is based on trust and confidence, which in this role includes scrupulousness, good faith, and candor in the process of managing an SOE.

The importance of the Business Judgement Rule is applied and implemented in the development of corporate law in Indonesia because not all business decisions taken by directors are the personal responsibility of the directors. This is because Article 97 paragraph (5) of the Company Law requires directors who do not want to be blamed as a result of the business decisions they make to prove themselves before the court that: a) The loss is not due to their fault or negligence; b) They have carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company; c) They have no conflict of interest, either directly or indirectly, over the management actions that resulted in the loss; and d) They have taken measures to prevent the loss from arising or continuing.

Law No. 19 Year 2003 on BUMN does not clearly regulate the debates and dilemmas associated with the criminal liability of directors of BUMN in the context of state representation or pure business entities. In such a dilemma, the fundamental thing is that the mitigation of business risks carried out by the Board of Directors, including complying with the principles of good corporate governance (professionalism, efficiency, transparency, independence, accountability, responsibility, and fairness), can save directors from personal

liability and legal liability. Unfortunately, the interpretation of good faith and good will in the framework of good corporate governance is still diverse and causes disparity, which has an impact on ineffective criminal law enforcement.

The renewal of the criminal liability of directors for BUMN losses based on the Business Judgment Rule principle has the direction (*ius constituendum*) of the revision of the BUMN Law in the form of reconceptualization and strengthening of the principles of good faith and good will through the framework of good corporate governance. With this, it is expected that there will be a strengthening of the state's function in monitoring BUMN for corporate crimes committed due to a series of “evil conspiracies” by their corporate organs. That is why the idea of privatizing BUMN on the grounds that it makes management easier, especially in terms of the responsibility of the directors, according to the author, is not the right offer of reform.

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