



## Legal reconstruction of business judgment rule as reason for deleting personal criminal liability of limited company directors in making loss business policies based on justice value

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### Abstract

The purpose of this research is to find out the weaknesses of BJR as a reason for eliminating personal criminal liability for Liability Company (PT) directors in making Business Judgment Rule (BJR) that cause losses to PTs in Indonesia and how to reconstruct it based on the value of justice. This study uses a constructivist paradigm, a type of socio-legal research that is descriptive in nature, uses a statutory approach, a conceptual approach, a comparative approach, and a legal system approach, using primary data obtained from interviews and secondary data obtained from primary legal sources. Secondary and tertiary, primary data collection techniques through field studies and secondary data through library research, and using qualitative data analysis.

The results of the study show that BJR regulations in Article 97 Paragraph (5) Law 40/2007 as the reason for eliminating the personal criminal responsibility of PT Directors in making business policies that cause losses to PTs in Indonesia in article 97 Paragraph (5) of Law 40/2007 which is not clear whether it is criminal or civil liability and whether it is personal or corporate responsibility; then there is a weakness in legal culture because the understanding of BJR is not evenly distributed and not the same among law enforcers and there is inconsistency in the implementation of good corporate governance in the business world. therefore the legal reconstruction can be done by reconstructing Article 97 Paragraph (5) of Law 40/2007 to "Members of the Board of Directors cannot be held personally liable both civilly and criminally for the losses referred to in paragraph (3) if they can prove: .... etc...." so that legal certainty and justice are contained in the form of non-personal responsibility of the Board of Directors both civilly and criminally, and not corporate criminal responsibility; and developing a new BJR theory that has justice as an excuse for eliminating the personal criminal responsibility of PT Directors in making business policies that cause harm to PTs outside the Criminal Code.

**Keywords:** legal reconstruction, BJR, loss, justice value

### Introduction

In the Indonesian legal system, the BJR doctrine or concept is accepted as a legal norm and obtains regulation as a source of positive law as well as one of the content materials which are strictly and clearly regulated in Law number 40/2007.

The business judgment rule is closely related to the ability of the directors of a limited liability company to manage the risks of and against a limited liability company's business transactions conducted by the directors, both those that have occurred and the risks that are likely to occur.

BJR is an instrument for measuring the decision-making process, not merely measuring the results of a decision by the Board of Directors, so that the Board of Directors can be more courageous in making strategic and profitable business decisions for the limited liability company they manage (Mcmillan, 2013) <sup>[5]</sup>.

In the implementation of BJR in Indonesia, law enforcers tend to ignore the business judgment rule, as seen from the attitude of the Supreme Court and the general judiciary under it, making the system polarized into 2 (two) patterns (Toebagus, 2022) <sup>[8]</sup>.

In the first pattern, there is a decision of the Court of First Instance which accepts and applies the business judgment rule as a reason for eliminating the personal crime of the directors of a limited liability company for losses to the limited liability company, which ultimately acquits the

Defendant, but the decision is ultimately annulled by the Supreme Court at the cassation level, at the request of cassation filed by the Public Prosecutor.

One of the decisions of the Court of First Instance which accepts and applies the business judgment rule as a reason for eliminating the personal crime of the directors of a limited liability company in making business policies that cause harm to the limited liability company is the Corruption Crime case at the Central Jakarta District Court Number 36/Pid.B/TPK/ 2012/PN.Jkt.Pst. on behalf of Hotasi D. P. Nababan or also known as the Merpati Airplane Rental security deposit case which occurred in December 2006, where at the First level, the Corruption Crime Court at the Central Jakarta District Court handed down a pure acquittal (Vrijspraak), because the Defendant's actions were not an Act against Legal and it is not proven that the limited liability company suffered a loss, but in the end the acquittal was canceled by the Supreme Court at the cassation level, becoming a criminal decision, with a 4 (four) year prison sentence, and a judicial review examination (PK), the Supreme Court rejected the PK application Hotasi Nababan.

The attitude of the Supreme Court in the Hotasi Nababan case, canceling the First Instance Court Decision which accepted the argument of the business judgment rule as the reason for eliminating the personal crime of the directors of a limited liability company in making business policies that

caused harm to the limited liability company, this means that the Supreme Court rejects the business judgment rule as legal protection for the personal criminal liability of the directors of the limited liability company for the loss of the limited liability company.

In contrast to the attitude of the Supreme Court which accepts and grants the business judgment rule as legal protection for the personal criminal responsibility of the directors of a limited liability company for losses to a limited liability company can be seen in the decision of the cassation level examiner on behalf of Ir. Galaila Karen Kardinah alias Karen Galaila Agustiawan alias Karen Agustiawan, as seen in Decision of the Corruption Crime Court at the DKI Jakarta High Court Number 34/PID.TPK/2019/PT.DKI, September 24 2019, who accepted and granted Karen's cassation request, based on legal considerations basically accepting the business judgment rule as the reason for the personal criminal write-off of the directors of a limited liability company in making business policies that cause losses to the limited liability company.

Exploring the provisions governing the business judgment rule as legal protection for the personal criminal liability of the Directors of a Limited Liability Company for alleged losses to the Limited Liability Company and also tracing and examining current Indonesian court decisions in implementing the business judgment rule as the reason for eliminating the personal criminal liability of the Directors of a Limited Liability Company against losses of Limited Liability Companies in examining, adjudicating and deciding cases of criminal acts of corruption, it is interesting to do.

From the description above, it is interesting and necessary to conduct an assessment regarding the regulatory provisions and consistency of the current Indonesian courts in applying the business judgment rule as a reason for eliminating the personal criminal responsibility of the Company's Directors for losses to Limited Liability Companies in examining, adjudicating and deciding cases of corruption.

Based on the existence of weaknesses in business policy rules (business judgment rule) as a reason for eliminating the personal criminal liability of the Directors of a Limited Liability Company for the losses of Limited Liability Company, the author intends to conduct a study titled "*Legal Reconstruction Of Business Judgment Rule As Reason For Deleting Personal Criminal Liability Of Limited Company Directors In Making Loss Business Policies Based On Justice Value*" where the authors raise 2 (two) main issues as follows:

1. What are the weaknesses of the regulation of Business Judgment Rule As Reason for Deleting Personal Criminal Liability of Limited Company Directors In Making Loss Business Policies in Indonesia currently?
2. How to realize the Legal Reconstruction Of Business Judgment Rule As Reason For Deleting Personal Criminal Liability Of Limited Company Directors In Making Loss Business Policies Based On Justice Value?

### Method of Research

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is

observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020) <sup>[7]</sup>.

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010) <sup>[2]</sup>:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

### Research Result and Discussion

#### 1. Weaknesses of The Regulation of Business Judgment Rule as Reason for Deleting Personal Criminal Liability Of Limited Company Directors in Making Loss Business Policies in Indonesia Currently

The Business Judgment Rule Doctrine is a legal doctrine that in its use is interpreted as a measure for judges to refuse to evaluate decisions made by the directors. Therefore, the use of BJR has consequences for the claimant to prove in the decision-making process that the Board of Directors did not apply BJR procedures.

To resolve this problem, Article 138 of Law 40/2007 has explained the flow of settlement when the Company suffers a loss as a result of a business decision, namely by first conducting an examination of the Company which is carried out by an Expert. Examination of the Company is conducted to find out whether unlawful or ultra-viral acts have occurred in the process of making business decisions or not. This examination of the Company is carried out to find out and determine the appropriate form of responsibility to be borne by the Directors for losses that occur in the Company so that the settlement flow is carried out after losses due to business decisions occur and before the Directors are held accountable. The results of an examination of the Company can also be used as a guideline for parties who feel

aggrieved to determine their attitude on whether to sue the Board of Directors through criminal or civil matters.

Article 138 of Law 40/2007 provides direction to Shareholders, Companies, and/or interested third parties (hereinafter referred to as Stakeholders) to carry out audits of the Company when stakeholders suspect or suspect the Board of Directors has committed ultra-viral or violated the law in making business decisions (Harris, 2010) <sup>[3]</sup>.

Examination of the Company can be carried out in the event that there is an allegation that the Directors or Commissioners have committed an unlawful act that is detrimental to the Company, Shareholders, or third parties.

Stakeholders who feel aggrieved and suspect that there has been an unlawful act may submit a request under certain conditions. These requirements are cumulative, meaning they must be fully met, as follows:

- a. Submit a written request containing reasons, namely by explaining what form of unlawful act occurred, supported by known facts, such as what kind of ultra viral act occurred, also explaining what form of loss was experienced, and so on.
- b. Requests for inspection of the Company can only be submitted by shareholders or more who represent at least 1/10 of the total shares with voting rights. Before a shareholder submits a request to the PN, the shareholder must try to request data or information from the Company at the GMS, other parties who have legal standing, and the attorney general's office for the public interest.
- c. Must contain clear reasons and be based on good faith.

In Indonesia, unfortunately, there is no uniformity in understanding among law enforcers regarding the application of the Business Judgment Rule doctrine. Even though Article 97 paragraph (5) of Law 40/2007 has provided conditions for the application of the Business Judgment Rule, it does not explain the benchmarks for compliance with each provision. In this case, of course, the law will be determined from the facts revealed in court.

Many legal experts say that the above article is the a quo clause which is considered the embodiment of the business judgment rule. Understanding the implementation of the business judgment rule is inseparable from the principle of fiduciary duty (Shafira, 2022) <sup>[6]</sup>, which is carried out in good faith and with full responsibility for the directors as stated in Articles 97 and 99 of Law No. 40 of 2007 concerning Limited Liability Companies.

The above articles, especially Article 97 paragraphs 1 and 5 emphasize the fiduciary duties of the board of directors, but in fact, it is from these articles that conclusions can be drawn about the applicability of the business judgment rule doctrine. Article 97 paragraph 1 and paragraph 2 of the Limited Liability Company Law indicates that the Limited Liability Company Law applies the business judgment rule doctrine. From the provisions of Article 97 paragraph 2 and Article 92 paragraph 1, it can be concluded that the actions of the directors against the company must be carried out by fulfilling the three juridical requirements, namely good faith; full responsibility, and for the benefit of the company (proper purpose).

According to Bismar Nasution, generally, the business judgment rule only applies to business decisions. In Law 40/2007 concerning Limited Liability Companies, this principle only applies to company management which is a

broader aspect compared to business decisions. This means that the directors can be released from their responsibilities not only in terms of the business decisions they make but also in the management aspect of the company as well as the directors can prove the five elements above.

The Limited Liability Company Law does not explain what measure is used so that a director can be classified as having made mistakes and negligence. To be able to make a more focused opinion, it is necessary to understand the meaning of the words "error" and "negligence" and the measurement used as a benchmark to assess whether the directors' policies are classified as wrong or negligent (Widodo, 2019) <sup>[10]</sup>.

As it is known that article 1365 of the Civil Code requires an element of guilt (schuld) for an unlawful act. It has been a general interpretation in the science of law that an element of error is deemed to exist if it fulfills one of the 3 (three) conditions, namely there is an element of intent, there is an element of negligence (negligence, culpa) and there is no excuse for forgiveness (rechtvaardigings-grond), or a state of overmacht., self-defense, insane, and others (Widodo, 2018) <sup>[9]</sup>.

In terms of the severity of the degree of guilt of the perpetrators of unlawful acts, then compared to unlawful acts committed with elements of negligence, unlawful acts committed with an element of intent have a higher degree of guilt. If someone intentionally harms another person (whether for his own interests or not), it means that he has committed an act that violates the law in a very serious sense rather than just doing it by negligence.

The absence of a clear definition of error and negligence will make it very difficult to prove that there is no element of error or negligence in a business or management decision without clear parameters regarding what can be categorized as an error or omission. In an increasingly complex corporate structure, it is not uncommon for the Directors to delegate their authority to their subordinates who may abuse this authority. The same thing happens when it comes to business decisions. In an increasingly competitive business climate, it is not uncommon for the Board of Directors to make speculative decisions to be able to compete with its competitors. If later the decision results in a loss, the Board of Directors can be considered wrong or negligent.

From the definition above, it is clear that behind errors and omissions, there is an understanding of unlawful acts. Unlawful acts are interpreted broadly given the many existing regulations.

There are several provisions that must be guided by the directors in carrying out their duties, including the following (Kurniawan, 2014) <sup>[4]</sup>:

- a. Applicable laws and provisions under them
- b. Company's articles of association. In the AD/ART, rights, obligations, authorities, and the vision and mission of the company are usually listed
- c. Standard operating procedures (SOP) that regulate the steps that must be carried out in processing a job from start to finish.
- d. Agreements that have been ratified both bilaterally and multilaterally
- e. The prevalence is usually recognized and applied as best practice

At the level of positive law, such as Law No. 40/2007 concerning Limited Liability Companies, it is not found to be explicitly and clearly related to the business judgment

rule doctrine. However, when examined carefully, the business judgment rule doctrine has actually been accommodated in the provisions of Article 92 and Article 97 of Law 40/2007.

The substance of Article 97 paragraph (5) of Law 40/2007, states that members of the board of directors cannot be held responsible for the losses of a company, if they can prove that: (a) the loss was not due to their mistakes 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) has no conflict of interest, either directly or indirectly, over management actions that result in losses, and (d) has taken action to prevent the loss from arising or continuing.

In addition to providing protection for the Company's Directors, it seems that the provisions of Article 115 paragraph (5) of Law 40/2007 have also accommodated the business judgment rule doctrine for members of the Board of Commissioners when a company goes bankrupt. The principle of 'good faith' stated in Article 97 paragraph (2) of Law 40/2007 contains the 'soul' and 'spirit' of the business judgment rule doctrine therefore the directors cannot be blamed for their decision as long as the decision does not contain an element of personal interest, is decided based on information they believe, by the right circumstances and rationally, and is the best decision for the company because Indonesia's legal culture is still not good enough because there are still many people who are unfamiliar with the law. Even though there is already the fiction of law principle, law education in society is still an important thing to do.

## **2. Legal Reconstruction of Business Judgment Rule As Reason for Deleting Personal Criminal Liability of Limited Company Directors in Making Loss Business Policies Based on Justice Value**

Business judgment rule as a reason for the elimination of private crimes of the directors of a limited liability company in making business policies that cause harm to the limited liability company based on fair and balanced values by providing protection for the directors of a limited liability company who have good faith in carrying out their duties and authorities in managing the company must be in accordance with the activities the company's business in order to achieve the company's goals in the future. So in order to create legal certainty and the value of justice for the parties related to the personal criminal liability of the directors of a limited liability company for losses to the limited liability company arising as a result of the implementation of the directors' business policies in managing the company in accordance with the company's business activities in order to achieve the company's goals.

From a criminal law perspective, whether or not the defense of company directors is accepted or not based on the argument of the business judgment rule in Article 97 Paragraph (5) of Law 40/2007, if possible, the directors of the company concerned can prove:

- a. The loss was not due to his fault or negligence;
- b. Has conducted 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 already taken action to prevent the loss from arising or continuing.

Elements of letters a, b, c, and d of Article 97 paragraph (5) of Law 40/2007 serve as protection (immunity) for the directors of a limited liability company in making business policies that cause harm to the company concerned both in civil lawsuits on the grounds of unlawful acts as well as criminal charges on the basis of unlawful acts that harm the company concerned, the burden of proof lies with the Directors of the company concerned. Consequently, it is the Board of Directors of the company in question who must prove the argument for their defense using the argumentation of the business judgment rule in Article 97 paragraph (5) of Law 40/2007, by proving each element of the business judgment rule in letters a, b, c and d of Article 97 paragraph (5) Law 40/2007.

Elements of sub-a of Article 97 paragraph (5) of Law 40/2007, the loss is not due to errors or negligence which can be interpreted as and related to the elements of error in a criminal act relating to blame or not being blamed by a maker for actions, and It also relates to the type of error whether it is intentional (*dolus*) or negligence (*culpa*).

Elements of sub-a Article 97 paragraph (5) Law 40/2007, the loss is not due to mistakes or negligence can also be interpreted, if the limited liability company in question suffers losses as a result of the actions of the Board of Directors who take a limited liability company business policy not intentionally or not because the negligence of the directors themselves, the directors still cannot be held personally criminally responsible, because there is no malicious intent on the part of the directors (*mens rea*) in the form of intentional or negligence.

Elements of letter sub b of Article 97 paragraph (5) of Law 40/2007, the directors of the limited liability company concerned have managed it in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company, can be interpreted as the sub-element of good faith means that the directors in managing the limited liability company concerned must be trusted (*fiduciary duty*), must carry out management for a reasonable purpose (*duty to act for a proper purpose*), must comply with laws and regulations (*statutory duty*), must be loyal to the company (*loyalty duty*), and must avoid conflicts of interest (*avoid conflicts of interest*). Meanwhile, the directors' prudence sub-element, before deciding to adopt a business policy in the context of managing the limited liability company concerned, has received and collected various information and everything related to the subject and object as well as the risks and opportunities of the business policy to be decided. and determined by the relevant directors. Or in short, the prudence sub-element of the directors in element sub-b of Article 97 paragraph (5) of Law 40/2007 relates to processes, systems, and procedures that have been taken or that must be taken before a decision is made and the business policy of the company concerned is decided.

The Elements of sub-c in Article 97 paragraph (5) of Law number 40/2007, states that not having a direct or indirect conflict of interest over management actions that result in losses, can be construed before the business policy of the company concerned is decided and established by the directors of the company concerned or on when implementing the company's business policies that have been decided and determined by the directors of the

company concerned, it can be proven that there is no conflict of interest, either directly or indirectly, with the implementation of the company's business policies that have been decided and determined by the directors of the company concerned.

Elements of letter sub d Article 97 paragraph (5) Law 40/2007, having taken action to prevent the loss arising or continuing, can be interpreted by the board of directors in carrying out actions in managing the company in the form of deciding and establishing company business policies solely for the best interests of the company. the company and to prevent losses arising or continuing for the company. Elements of sub-paragraphs a, b, c, and d of Article 97 paragraph (5) of Law 40/2007 related to the directors of the limited liability company concerned so that from a criminal law perspective it can be qualified as unlawful in nature relating to the subject (person) or a subjective element (mens rea) in the form of the inner attitude of the Board of Directors of the company concerned before and at the time of deciding and establishing the business policy of the company concerned, while unlawful behavior related to objective objects or elements (res actus) is related to what is contained in the body of Article 97 paragraph (5) of Law 40/2007, namely the act of adopting a company business policy that causes harm to the limited liability company concerned.

The elements of sub-paragraphs a, b, c, and d of Article 97 paragraph (5) of Law 40/2007 are cumulative in nature and not alternative, one alone is not proven or cannot be proven by the directors of the company concerned, then the directors of the company concerned are personally responsible whether for civil lawsuits for unlawful acts that harm the company as well as for criminal charges due to the company's board of directors taking policies that harm the company.

Thus based on the theory of business judgment rule based on the value of justice, the BJR regulation in Article 97 Paragraph (5) of Law 40/2007 can be qualified as a reason for forgiveness as a reason for eliminating personal criminal liability for the Directors of a limited liability company for losses of a limited liability company arising as a result of taking and implementation of the business policies of the directors of the company outside the Criminal Code, in order to achieve substantive justice for the directors of the limited liability company concerned.

### Conclusion

Based on the results of the research, the following conclusions can be drawn:

1. The Weaknesses in the legal substance are in the form of unclear formulation of legal norms (vague norm), multiple interpretations (ambiguous) in Article 97 Paragraph (5) of Law Number 40 of 2007 Concerning Limited Liability Companies as amended under Article 109 of Law Number 11 of 2007 2020 Concerning Job Creation, where before being reconstructed Article 97 Paragraph (5) of Law Number 40 of 2007 Concerning Limited Liability Companies as amended pursuant to Article 109 of Law Number 11 of 2020 concerning Employment Creation that states that "Members of the Board of Directors cannot be held responsible for the losses referred to in paragraph (3) if it can prove: .... etc...." Because in the formulation of Article 97 Paragraph (5) of Law Number 40 of 2007 concerning

Limited Liability Companies as amended pursuant to Article 109 of Law Number 11 of 2020 concerning Job Creation, the scope of responsibility of the Directors is not clear whether it is a criminal responsibility or civil liability and also not explicitly states the type of responsibility of the Board of Directors whether it is a personal responsibility or corporate responsibility So that in the end, it creates injustice and legal uncertainty.

2. The Legal Reconstruction as mentioned by the author can be done by reconstructing Article 97 Paragraph (5) of Law 40/2007 to "Members of the Board of Directors cannot be held personally liable both civilly and criminally for the losses referred to in paragraph (3) if they can prove: .... etc...." so that legal certainty and justice are contained in the form of non-personal responsibility of the Board of Directors both civilly and criminally, and not corporate criminal responsibility; and developing a new BJR theory that has justice as an excuse for eliminating the personal criminal responsibility of PT Directors in making business policies that cause harm to PTs outside the Criminal Code.

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