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THE BUSINESS JUDGMENT RULE AS LEGAL PROTECTION FOR DIRECTORS IN BUSINESS DECISION-MAKING

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Abstract

The Business Judgment Rule (BJR) doctrine is an essential pillar of corporate governance. However, its implementation in Indonesia creates legal uncertainty, particularly for Directors of State-Owned Enterprises (SOEs) who are vulnerable to the criminalization of business decisions as corruption offenses. This study aims to comparatively analyze the implementation of the BJR in Indonesia through an international perspective (Delaware) to identify key challenges. Employing a normative-juridical method with comparative, statutory, and case study approaches, this research maps fundamental differences. The analysis reveals three distinct gaps: (1) A procedural gap, where Indonesia's BJR (Article 97(5) of the Company Law) functions as an affirmative defense rather than a presumption of protection as seen in common law jurisdictions; (2) A functional gap, namely the shift of the BJR's function from the civil realm to a criminal defense (mens rea); and (3) A contextual gap, where SOE business losses are interpreted as "state losses." The contrasting dynamics of court decisions (the case of the former President Director of PT. Pertamina vs. Jiwasraya) highlight the failure of the BJR to distinguish error of judgment from bad faith. Consequently, directors tend to become risk averse. This study recommends legislative clarification, harmonization among law enforcement agencies, and the strengthening of internal governance to restore legal certainty.

Keywords: Business Judgment Rule, Legal Protection, Directors.

INTRODUCTION

The Business Judgment Rule (BJR) doctrine stands as a fundamental pillar of modern corporate governance, serving as a counterbalance between directors' autonomy in decision-making and their accountability to stakeholders. In the international context, particularly within common law jurisdictions such as Delaware, the BJR has evolved as a standard of judicial review that grants directors the discretion to take calculated business risks without the threat of personal litigation. In Indonesia, the implementation of this doctrine faces unique and complex challenges. The BJR principle, which is implicitly embedded in Law No. 40 of 2007 on Limited Liability Companies (*Company Law*), clashes with the corruption criminal law regime. This intersection becomes critical in the context of State-Owned Enterprises (SOEs), where business losses suffered by the company are frequently interpreted by law enforcement officials as "state financial losses." This phenomenon of criminalizing business policies creates a significant climate of legal uncertainty, placing SOE directors in a dilemma between the necessity to innovate and take risks, and the threat of criminal liability. This uncertainty is exacerbated by varying jurisprudence, illustrating the lack of a uniform view among law enforcement regarding the demarcation line between legitimate business risks and criminal acts. Based on this background, this research holds urgency in comparatively analyzing the application of the BJR. The primary focus of the analysis is to address issues regarding the theoretical foundations and fundamental principles of the Business Judgment Rule doctrine from an international legal perspective, specifically the Delaware jurisdiction. Furthermore, this study examines how BJR principles are adapted and implemented statutorily within Indonesia's corporate law framework, particularly through Law No. 40 of 2007 on Limited Liability Companies. The culmination of the analysis is to dissect the dynamics, challenges, and implications of BJR application in Indonesian judicial practice, especially at the intersection of business law and corruption criminal law.

METHOD

This article constitutes a conceptual analysis employing a normative-juridical legal research method. The primary approaches utilized are the statutory approach, comparative approach, and case approach. The analysis is conducted by comparing the BJR framework in the Delaware jurisdiction (United States)—serving as the international benchmark—against the BJR formulation within Indonesia's Company Law. Furthermore, the analysis is deepened by examining key jurisprudence from the Supreme Court of the Republic of Indonesia to identify how this doctrine is interpreted and applied within judicial practice, particularly in cases involving Directors of State-Owned Enterprises (SOEs) and allegations of corruption offenses.

RESULTS AND DISCUSSION

1. The Business Judgment Rule Doctrine in an International Legal Perspective

The Business Judgment Rule (BJR) doctrine constitutes one of the primary pillars of modern corporate law, particularly in countries with common law systems. Although frequently referred to as a "rule," a deeper understanding reveals that the BJR is not a rigid set of commands or prohibitions. Rather, it is a complex standard of judicial review, rooted in profound legal and economic policies, designed to balance corporate autonomy with management accountability. This section will elucidate the theoretical foundations of the BJR by referring to its originating jurisdiction, primarily Delaware, United States, which has long been recognized as the global benchmark in corporate law. Essentially, the Business Judgment Rule is not a "rule" in the prescriptive sense containing a list of "dos" or "don'ts" for directors (Branson, 2001). More precisely, it functions as a standard of judicial review, or may even be considered a standard of non-review, which limits the extent to which courts may intervene in a company's internal business decisions (Branson, 2001). This doctrine operates as a legal presumption in favor of the board (Legal Information Institute, 2022). This means the court will commence its analysis with the assumption that the directors have acted properly. This presumption shields directors' decisions from judicial second-guessing, even if such decisions ultimately prove to be detrimental or unwise (State of Delaware, n.d.).

The fundamental objective of the BJR is to create a delicate compromise between two values that are inherently conflicting in corporate governance: authority and accountability (Bainbridge, 2004). On one hand, there is a need to preserve the authority and decision-making discretion of the board of directors. This authority is crucial for the company to operate efficiently, innovatively, and to respond rapidly to market dynamics. On the other hand, there is a need to ensure directors' accountability for decisions made, especially since directors manage assets entrusted by shareholders. The BJR serves as the primary mechanism used by the law to mediate this tension (Bainbridge, 2004). Thus, the BJR consciously creates a standard of review that is more lenient than the standard of conduct ideally expected of a director (Bainbridge, 2004). The standard of conduct demands that directors act with care and loyalty, whereas the BJR standard of review provides immunity from liability for errors of judgment, provided that the decision-making process meets specific fiduciary criteria. This is a manifestation of judicial self-restraint, where courts deliberately refrain from substituting the directors' business judgment with their own (Sharfman, 2017).

Fundamentally, the BJR is not about protecting directors from mistakes, but about the allocation of decision-making power. The doctrine explicitly asserts that the authority to make business decisions—whether good or bad—resides with the board of directors, in accordance with the mandate of corporate statutes. The court's role is limited to that of a process overseer, not an arbiter of the decision's substance. By refusing to review the substance of business decisions (unless there is evidence of procedural or fiduciary duty breaches), the BJR fundamentally affirms that the power to manage the corporation remains with those elected to do so, not with judges. However, the protection offered by the BJR is not unconditional. The presumption that directors have acted properly applies only if the directors have satisfied their fundamental fiduciary duties. To rebut the BJR protection, a plaintiff must be able to provide evidence that the directors have breached one of the following three pillars of fiduciary duties:

a. Duty of Care. This duty demands that directors make business decisions on an informed basis (State of Delaware, n.d.). This implies that directors must make reasonable efforts to obtain and consider all relevant material information before making a decision. However, the standard of proof for a breach of the duty of care in the Delaware jurisdiction is exceptionally high, namely gross negligence, not merely ordinary negligence. Setting this high standard is intentional to encourage directors not to be overly fearful of taking calculated risks, as rational shareholders desire the company to take reasonable risks to maximize returns (State of Delaware, n.d.). Gross negligence may be defined as a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason" (Legal Information Institute, 2022).
b. Duty of Loyalty. This duty requires directors to act in good faith for the best interests of the corporation and its shareholders, and to refrain from conduct that may harm the corporation (State of Delaware, n.d.). The core of the duty of loyalty is the obligation to avoid conflicts of interest. Directors are prohibited from using their positions to advance personal interests (State of Delaware, n.d.). Breaches of this duty may include

self-dealing, usurping corporate opportunities, or other actions placing the director's personal interest above the corporation's. A breach of the duty of loyalty automatically rebuts the BJR protection. Consequently, the burden of proof shifts to the directors concerned to prove that the transaction was entirely fair to the corporation (Legal Information Institute, 2022).

c. Good Faith. Initially, good faith was often regarded as a standalone third pillar of fiduciary duties. However, modern Delaware jurisprudence, particularly through the landmark ruling in *Stone v. Ritter*, has clarified its doctrinal position. The Delaware Supreme Court ruled that good faith is not an independent fiduciary duty but is an inseparable part of the duty of loyalty (Furlow, 2009). The court explained that the absence of good faith (bad faith) can manifest in several forms, including conduct motivated by subjective bad intent, or more relevantly in the modern context, “a conscious disregard for one's responsibilities” (Furlow, 2009).

The evolution of the understanding of the good faith doctrine is not merely a change in terminology. It represents a significant judicial response to major corporate scandals (such as Enron and WorldCom) in the early 2000s. These cases highlighted that the greatest failures of boards often lay not in active erroneous decisions, but in passive failures to exercise adequate oversight. Cases such as *In re Caremark* and *Stone v. Ritter* focus on the “failure of oversight” (Furlow, 2009). Delaware jurisprudence subsequently categorized this “conscious disregard” of oversight duties as conduct that is “disloyal” to the corporation. The implications are profound: directors now possess an affirmative duty to ensure that the company has adequate internal reporting and control systems. Systematic failure to do so is now considered a breach of loyalty—a violation far more serious and more difficult to indemnify under directors' insurance policies than a mere breach of the duty of care. This shift significantly elevates the standard of director accountability in performing their oversight functions.

Furthermore, behind the legal construction of the BJR, there are strong public policy reasons justifying its existence. These rationales explain why courts are willing to grant such broad latitude to directors:

a. Encouraging Risk-Taking and Innovation. Business is inherently about taking calculated risks. Progress, innovation, and profitability are often born from decisions with uncertain outcomes. The BJR allows directors to take such risks without being haunted by the fear of personal liability litigation if a decision made in good faith turns out to fail (Bainbridge, 2004). Without this protection, directors would tend to be overly conservative, which would ultimately harm shareholders and the company's competitiveness.
b. Preventing Hindsight Bias. Courts must not judge a business decision based on information that becomes available only after the decision has been made and the results are known (hindsight). It is easy to criticize a decision when the outcome is proven bad. The BJR explicitly prohibits courts from “second-guessing” directors' decisions which, at the time they were made, were based on reasonable information and rational consideration (Bainbridge, 2004).
c. Recognizing Limitations of Judicial Competence. This policy is also grounded in the honest recognition that judges are not business experts. The board of directors, with its experience, expertise, and access to information, is in a far better position to make complex business decisions. The BJR prevents situations where judges lacking business expertise substitute directors' judgment with their own (Bainbridge, 2004).
d. Respecting Corporate Autonomy and the Statutory Role of Directors. Corporate statutes, such as the Delaware General Corporation Law (DGCL) § 141(a), explicitly vest the authority and responsibility for managing the corporation in the board of directors, not in shareholders or courts (Practical Law Corporate & Securities, 2023). The BJR respects this statutory mandate by protecting the board's decision-making authority from undue judicial intervention (Sharfman, 2017).

Nevertheless, the protection provided by the BJR is not absolute. This presumption can be rebutted if the plaintiff successfully proves that the decision taken by the directors was tainted by one of the following conditions:

a. Fraud or Bad Faith. If the decision is based on malicious intent, fraud, or intentional dereliction of duty, the BJR protection will not apply (Legal Information Institute, 2022).
b. Conflict of Interest (Self-Dealing). When a director or a majority of the board has a personal financial interest in a transaction, the BJR cannot be applied. In such situations, the burden of proof shifts to the directors to demonstrate that the transaction was “entirely fair” to the corporation (Legal Information Institute, 2022).
c. Illegality. Decisions that knowingly direct the company to violate positive law will not be protected by the BJR, even if such illegal acts are economically calculated to be profitable (Uebler, 2008). The law will not protect a decision to violate the law.
d. Ultra Vires Acts. Decisions exceeding the authority granted to the company or directors by the company's articles of association will also not receive BJR protection (Egan, 2009).

e. Gross Negligence. As previously discussed, if directors fail completely to obtain information regarding crucial aspects of a decision, then such directors have breached the duty of care under the standard of gross negligence, and the BJR will not apply (Legal Information Institute, 2022).
f. Abdication of Duty. BJR protection also does not apply if the board of directors makes no decision at all or fails to exercise any business judgment (e.g., passively approving all management proposals without consideration) (Egan, 2009).

In conclusion, the international framework of the BJR demonstrates a sophisticated and nuanced doctrine, designed to protect the legitimate decision-making process, not to provide absolute immunity for every action of directors.

2. Implementation of the Business Judgment Rule within the Indonesian Corporate Law Framework

The process of adopting legal principles from one system to another, known as "legal transplantation," often presents complex challenges. This is particularly true when a flexible, jurisprudence-based doctrine like the Business Judgment Rule—born from the common law tradition—is implemented into a codified civil law framework like Indonesia's. This section will analyze this adaptation process, focusing on how the essence of the BJR is translated into Law No. 40 of 2007 on Limited Liability Companies (*Company Law*), as well as identifying potential gaps and fundamental interpretative differences.

The Business Judgment Rule is a doctrine that is historically and philosophically deeply rooted in the United States common law system (Anandya et al., 2023). Its implementation in jurisdictions outside the U.S., particularly in civil law countries, can pose significant challenges and even yield unintended consequences (Gurrea-martínez, 2017). One primary reason is that the BJR was traditionally built upon the assumption of a corporate model aimed at shareholder value maximization (Gurrea-martínez, 2017). Although this model is globally influential, the legal, social, and economic contexts in other countries, including Indonesia, may place different emphases, for instance, by considering broader stakeholder interests.

A key characteristic of Indonesia's civil law system is its high reliance on statutory texts as the primary source of law. Unlike the common law system where judge-made law plays a central role in developing doctrines, in Indonesia, the legal basis must be found explicitly, or at least be strongly interpretable, from written regulations. Therefore, the absence of an explicit mention of the phrase "Business Judgment Rule" in the Company Law creates a vast interpretative space for law enforcers, practitioners, and courts, which in turn leads to legal uncertainty.

In the Indonesian context, although the Company Law does not mention the term "Business Judgment Rule" verbatim, Indonesian legal scholars widely agree that the essence and principles of this doctrine are implicitly embedded in several of its articles (Wijayati et al., 2025). The provision considered the most concrete manifestation of the BJR is Article 97 paragraph (5) of Company Law. This article specifically regulates the conditions under which a member of the Board of Directors can be released from personal liability for losses suffered by the company. Article 97 paragraph (5) of the Company Law states that:

> *"Members of the Board of Directors cannot be held liable for losses as referred to in paragraph (3) if they can prove: a. the loss was not due to their fault or negligence; b. they have performed management in good faith and with prudence in the interests of the Company and in accordance with the Company's purposes and objectives; c. they have no conflict of interest, either directly or indirectly, regarding the management action that resulted in the loss; and d. they have taken measures to prevent the occurrence or continuation of such loss."*

These four conditions are cumulative, meaning that directors must be able to prove the fulfillment of all such conditions to obtain protection (Anandya et al., 2023). Besides Article 97 paragraph (5), traces of the BJR can also be found in other provisions serving as the foundation of directors' duties. Article 92 paragraph (1) obliges directors to manage the company "for the benefit of the company and in accordance with the company's purposes and objectives." Meanwhile, Article 97 paragraph (2) asserts that such management "must be undertaken by each member of the Board of Directors in good faith and with full responsibility" (Akram & Fanaro, 2019). Some legal scholars even extend this interpretation to include Article 69 paragraph (4) and Article 104 paragraph (4) of the Company Law as provisions reflecting the spirit of BJR protection (Farhan et al., 2025). To deeply understand how this legal transplantation alters the nature of the BJR, a direct comparison between the protection elements in the Delaware framework and the Indonesian Company Law is crucial. Despite overlaps in substance (such as good faith and absence of conflict of interest), there are fundamental differences in the procedural approach and the allocation of the burden of proof.

The most striking difference with the greatest implication is the nature of the doctrine itself. In Delaware, the BJR is a presumption that automatically attaches to directors' decisions. The burden of proof lies with the plaintiff to rebut or overturn the presumption by demonstrating a breach of fiduciary duty (Legal Information Institute, 2022). Conversely, the construction of Article 97 paragraph (5) of the Company Law positions the BJR as a ground for exemption from liability or an affirmative defense. This means that the burden of proof lies on the directors' shoulders to actively prove that they have fulfilled the four cumulative conditions stipulated in the article (Anandya et al., 2023). This shift in the burden of proof fundamentally weakens the strength of BJR protection in Indonesia. In Delaware, a director enters the courtroom shielded by the BJR presumption, and the plaintiff must work hard to refute that protection. In Indonesia, based on the construction of Article 97(5), a director enters the courtroom in an "unprotected" position and must struggle to prove that they are entitled to such protection. Consequently, directors in Indonesia are in a defensive position from the start. Directors are required to proactively build and document every detail of the decision-making process, not only to ensure good decisions but also to prepare for future defense. This can encourage bureaucratic behavior and risk aversion—an outcome that ironically contradicts the original purpose of the BJR to foster innovation and bold business risk-taking (Gurrea-martínez, 2017). The following table visualizes these crucial differences:

Table 1. Comparison of Protection Elements Business Judgment Rule: Delaware Framework vs. Company Law Art. 97 Paragraph (5)

Protection Element	**Delaware Framework (Common Law)**	**Law No. 40 of 2007 (Civil Law)**	**Burden of Proof**
Nature of Doctrine	Presumption protecting directors.	Ground for Exemption from Liability (Affirmative Defense) that must be proved.	Delaware: On the Plaintiff to rebut the presumption. Indonesia: On the Directors to prove conditions are met.
Good Faith	Acting with honest belief that the action is in the best interest of the corporation. Absence of good faith is a breach of duty of loyalty.	Explicitly stated in Art. 97(5)(b): *"performed management in good faith"*.	Both are requirements, but the proof mechanics differ.
Prudence / Informed Basis	Standard of Gross Negligence. Directors must inform themselves reasonably.	Explicitly stated in Art. 97(5)(b): *"and with prudence"*. The exact measure is not clearly defined in the Law.	Delaware: Plaintiff must prove gross negligence. Indonesia: Directors must prove they were prudent.
Absence of Conflict of Interest	Core of the Duty of Loyalty. Presence of personal interest rebuts the BJR presumption.	Explicitly stated in Art. 97(5)(c): *"no conflict of interest, either directly or indirectly"*.	Both are absolute conditions.
Preventive Measures	Not a separate element but falls within the scope of duty of care and good faith.	Explicitly stated as the fourth condition in Art. 97(5)(d): *"taken measures to prevent the occurrence or continuation of such loss"*.	A specific additional requirement in Indonesian law.

Beyond the shift in the burden of proof, the fourth element under Article 97(5)(d) of the Company Law—namely the obligation to prove that directors "have taken measures to prevent the occurrence or continuation of such loss"—poses a distinct challenge. This requirement, which lacks a direct equivalent in the Delaware BJR formulation, is highly susceptible to hindsight bias. The assessment of whether an action was "sufficient" to "prevent" the loss is almost invariably conducted after the loss has materialized. A judge, armed with the knowledge that the loss has occurred, can easily arrive at the conclusion that the preventive measures taken by the directors must have been "insufficient," simply because the loss occurred, nonetheless. This creates a nearly impossible standard of proof to meet and indirectly compels the court to engage in second-guessing regarding the effectiveness of directors' decisions, a practice that stands in direct contradiction to the fundamental philosophy of the BJR (Rosenberg, 2009).

3. Application of the Business Judgment Rule in Indonesian Judicial Practice

While an analysis of statutory texts provides a glimpse into the formal legal framework, the true comprehension of how a legal doctrine operates lies in its application within judicial practice. In Indonesia, the interpretation and application of the Business Judgment Rule, particularly by the Supreme Court, have demonstrated significant dynamics. By dissecting key contrasting rulings, this section will illustrate how the BJR is interpreted dynamically by judges, often resulting in unpredictable verdicts and highlighting the fundamental debate between legitimate business risks and criminal acts. A prime example is the case involving the former President Director of PT Pertamina (Persero), which can be considered a landmark decision in BJR jurisprudence in Indonesia. This case centered on PT Pertamina's investment decision to acquire a participating interest in the Basker Manta Gummy (BMG) Block in Australia, which ultimately resulted in financial losses for the company (Kuswandi et al., 2022). After being found guilty of corruption offenses at the district court and appellate court levels, the Supreme Court, at the cassation level, overturned the verdict and granted the former President Director a release from all legal charges (*ontslag van rechtsvervolging*) (Kuswandi et al., 2022).

The legal reasoning of the Supreme Court in Cassation Decision No. 121 K/Pid.Sus/2020 is crucial. The Supreme Court fundamentally argued that the actions committed by the defendant did not constitute a criminal offense (Kuswandi et al., 2022). The primary rationale was that the investment decision was a pure business risk falling within the realm of the BJR (Anandya et al., 2023). The Supreme Court explicitly elaborated that BJR protection applies because the public prosecutor failed to prove the existence of negative elements that could rebut such protection, namely the absence of evidence regarding: a. Fraud; b. Conflict of Interest; c. Unlawful Acts; d. Wilful Misconduct or malicious intent (mens rea) (Kuswandi et al., 2022). The Supreme Court assessed that the actions of Pertamina's directors were based on a legitimate business purpose—specifically, the effort to increase oil and gas reserves for the company's benefit—and had undergone a due diligence process by both internal and external teams (Kuswandi et al., 2022). The resulting loss was deemed a consequence of the inherent risks in the oil and gas industry, not the result of malicious intent to enrich oneself or others. This ruling serves as a historical milestone as, for the first time, the Supreme Court explicitly and detailedly utilized the BJR as a basis to release an SOE director from corruption charges, simultaneously drawing a clear demarcation line between business risk and criminal offenses (Siltor, 2025).

As a crucial counter-jurisprudence, the corruption case shaking PT Asuransi Jiwasraya (Persero) demonstrates the strict boundaries of BJR protection. In this case, the former directors of Jiwasraya also attempted to employ the BJR as a defense argument regarding the company's investment policies that resulted in state losses amounting to trillions of rupiah. The directors argued that investment decisions in high-risk stocks were part of a collective business strategy (Farhan et al., 2025). However, diametrically opposed to the aforementioned Pertamina case, the court summarily rejected the BJR defense and sentenced the directors for corruption offenses. The judges' primary consideration was that the directors' actions were palpably conducted in bad faith and the investment policies blatantly violated fiduciary duties (Farhan et al., 2025). Specifically, the court found evidence that the directors were involved in investment schemes violating capital market regulations, including stock price manipulation practices. With the presence of evidence of bad faith and violations of positive law, one of the fundamental conditions for BJR application was not met; thus, the doctrine could not serve as a legal shield (Farhan et al., 2025).

The sharp contrast between the cassation ruling of the former President Director of PT Pertamina and the Jiwasraya case ruling, coupled with the discrepancy between the lower courts and the Supreme Court in the Pertamina case itself, vividly illustrates the dynamics, interpretative variations, and even inconsistencies in BJR application among law enforcement officials and judges in Indonesia. This phenomenon creates a climate of significant legal uncertainty, particularly for SOE directors whose operations directly intersect with the concept of "state finances" (Farhan et al., 2025). This uncertainty is a symptom of a not-yet-fully-mature "legal transplantation" process. BJR principles, which in their country of origin were developed through hundreds of jurisprudential cases over centuries, must be interpreted in Indonesia from a few statutory clauses. Consequently, the understanding of this doctrine's nuances has not been uniformly internalized across all levels of the judicial system, opening space for varying interpretations depending on case facts, judicial understanding, and the narrative constructed by the public prosecutor. If analyzed deeper, the contrast between the Pertamina and Jiwasraya cases is not merely a reflection of inconsistency, but rather the Supreme Court's effort to affirm a judicial demarcation line. The BJR exists to protect directors from risky decisions that turn out wrong—which is an error of judgment—but this doctrine will never and must not protect decisions based on bad faith or those that knowingly violate positive law (illegality). In the Pertamina case, the Supreme Court focused its analysis on the legitimate business purpose and the existence of due diligence, despite the detrimental outcome. This was categorized as "business risk" (Kuswandi et al., 2022).

Conversely, in the Jiwasraya case, the judges' focus was on evidence of stock price manipulation and systematic violations of the Capital Market Law. This was categorized as "bad faith" and "breach of fiduciary duty" (Farhan et al., 2025). Thus, the Supreme Court did not apply different standards, but rather applied the same standard to two fundamentally different sets of facts. One case is about poor judgment, while the other is about bad faith. Furthermore, this jurisprudence highlights the powerful influence of "framing" by the public prosecutor in determining the final outcome. How a case is framed—whether as a "business policy causing state loss" or as a "criminal conspiracy to enrich oneself/others"—has a tremendous impact on judicial perception. In the first and appellate levels of the Pertamina case, the prosecutor's framing that Pertamina's loss constituted a state loss due to corruption successfully convinced the judges (Kuswandi et al., 2022). However, at the cassation level, the defendant's legal team succeeded in re-framing the narrative into one of reasonable business risk, which was then accepted by the Supreme Court. In the Jiwasraya case, the framing of a massive and structured capital market fraud scheme was so strong from the outset that it could not be countered by the pretext of "investment risk." This indicates that legal battles in such cases are often not just battles of evidence, but also battles of narratives.

4. Challenges in Applying the BJR at the Intersection of Business Law and Corruption Criminal Law

The Indonesian context presents unique and critical challenges for the application of the Business Judgment Rule, namely its sharp intersection with the corruption criminal law regime. In many countries, the BJR primarily functions within the realm of civil law to protect directors from shareholder lawsuits. However, in Indonesia, particularly in the State-Owned Enterprises (SOEs) sector, this doctrine has evolved into a primary shield against the threat of the criminalization of business policies. This section will explore the friction between the protection of legitimate business decisions and the often-aggressive enforcement of corrupt criminal laws. One of the greatest sources of legal tension in Indonesia is the interpretation regarding the financial status of SOEs. Business decisions taken by SOE directors, which inherently entail risks, are frequently—if they fail and result in financial losses—automatically categorized by law enforcement officials as "state financial losses" (Habonaran et al., 2024). This categorization serves as the entry point for the application of the Law on the Eradication of Corruption Crimes.

There is a fundamental disharmony between various statutory regulations. On one hand, the Company Law and corporate law principles view SOE (*Persero*) as an independent legal entity, where state assets contributed as capital have been separated (*afgescheiden*) from the State Budget (APBN) and have become corporate assets. According to this view, losses suffered by an SOE are corporate losses, not direct state losses. On the other hand, the Law on Corruption Eradication and the Law on State Finance explicitly define "state finances" as a scope that also includes separated assets within state companies/SOEs (Habonaran et al., 2024). This juridical dilemma places SOE directors in a highly vulnerable position. Every risky business decision, which is an inevitability in the business world, can be interpreted as a criminal offense if the outcome does not meet expectations. This "climate of fear" poses a serious challenge to sound and dynamic corporate governance in SOEs.

In facing this threat of criminalization, the BJR undergoes a "functional shift" in Indonesia. Its original function in common law jurisdictions is as a corporate law tool to protect directors from civil monetary damages claims by shareholders (State of Delaware, n.d.). However, in Indonesia, the greatest threat to SOE directors is not lawsuits from shareholders (in this case, the state), but rather criminal prosecution (threat of imprisonment) from the public prosecutor (Habonaran et al., 2024). Consequently, the BJR is adapted and utilized as a ground for eliminating criminal liability. This doctrine becomes the primary argument for defense teams to prove the absence of malicious intent (mens rea) in criminal law (Kuswandi et al., 2022). The BJR is used to assert that the director's action was purely a rational business decision at the time, despite the detrimental outcome, and not a malicious act intended to commit corruption. The success of the BJR defense in the cassation ruling of the former President Director of Pertamina demonstrates its potential effectiveness as a defensive shield (Kuswandi et al., 2022). However, the total failure in the Jiwasraya case also highlights its clear risks and limitations (Farhan et al., 2025). In many cases, the BJR becomes the last resort for directors facing corruption charges, shifting the realm of litigation from a debate on business negligence to a debate on the presence or absence of malicious intent (Kuswandi et al., 2022).

This threat of criminalization of business policies, even with the BJR as a potential defense, carries significant negative impacts on corporate governance and the overall investment climate. Instead of encouraging reasonable risk-taking, this threat may create a "reverse moral hazard." The original objective of the BJR is to encourage directors to take informed and calculated risks for the company's advancement (Bainbridge, 2004). However, when the consequence of business failure is not only financial loss for the company but also the potential loss of personal liberty (imprisonment) for the director, the risk calculation becomes unbalanced. Catastrophic personal losses far outweigh potential professional gains.

As a rational response to this strong disincentive, SOE directors may tend to become excessively prudent and reluctant to take risks necessary for growth, innovation, and company competitiveness (Kuswandi et al., 2022). SOE directors might opt for "safe" but sub-optimal projects or spend excessive resources on various feasibility studies and legal opinions from external parties (Gurrea-martínez, 2017). The goal is no longer purely to achieve the best substantive decision, but to build layers of bureaucratic documentation as preparation for future legal defense. This behavior, which is a form of paralysis due to fear, ultimately undermines firm value and harms national economic interests. A paradox where law enforcement efforts to protect "state finances" cause SOEs to become inefficient and uncompetitive.

CONCLUSION

Based on the preceding elaboration of the Business Judgment Rule (BJR) doctrine from an international perspective and its implementation in Indonesia, a complex conclusion can be drawn regarding legal transplantation and functional adaptation. The doctrine, which in its country-of-origin functions as a civil law counterbalance between authority and accountability, has evolved in Indonesia into a primary defensive bulwark at the intersection of corporate law and corruption criminal law. The analysis reveals three fundamental gaps between the international BJR and the reality of its implementation in Indonesia, comprising procedural, functional, and contextual gaps. The most fundamental gap is the procedural gap, wherein the Indonesian BJR (Article 97 paragraph (5) of the Company Law) functions as an affirmative defense placing the burden of proof on directors, unlike the international BJR which operates as a presumption of protection. This is exacerbated by the functional gap, namely the shift of the BJR function from a civil law instrument to defend against claims for monetary damages to a defense argument against criminal charges (*mens rea*). Furthermore, there is a contextual gap, where the principle of shareholder value maximization conflicts with the dilemma of State-Owned Enterprises (SOEs) whose assets are deemed "state finances," rendering business losses vulnerable to being interpreted as state losses with criminal implications. Overcoming these gaps and uncertainties requires a multi-dimensional approach. Amendments to the Company Law or the issuance of Government Regulations are necessary to adopt the "presumption" model and to clarify the standard of care. Furthermore, harmonization among law enforcement agencies and the government is imperative to align perceptions regarding the boundaries between business risks and corruption offenses. These efforts must be supported by judicial and law enforcement capacity building regarding the philosophy of the BJR, as well as the strengthening of internal corporate governance mechanisms as the first line of defense through the active roles of the Board of Commissioners and the Audit Committee.

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