International Journal of Global Community
Volume VII No. 3 (November) 2024

Good Faith In The Business Judgment Rule As Grounds For Erasing The Unlawful Nature

Niwang Pambayun Purbo Raras, Prija Djatmika, Bambang Sugiri

Faculty of Law, Brawijaya University, Malang, Indonesia
Corresponding Author: niwangpambayunpr@gmail.com

Abstract
Article 97 paragraph (5) of Law Number 40 Year 2007 on Limited Liability Company contains vague norm interpretation because it does not explicitly provide limitations on the meaning of good faith as one of the main requirements for the Board of Directors not to be liable for losses due to decisions taken. This research examines the meaning of good faith in the decision-making of the Board of Directors of state-owned companies, and whether good faith in the business judgment rule can be used as grounds for erasing the unlawful nature of corruption in state-owned companies. The research uses normative juridical method with statutory approach, concept approach, comparative approach and case approach. Legal materials are analyzed with descriptive analytical techniques, determining the meaning of legal rules, legal principles, and legal doctrines. The results of the study concluded that good faith in the business judgment rule is an honest and proper management action in the interests of the company that is not against the law and/or is not an act to take the opportunity for personal gain. Good faith in the business judgment rule can be grounds for erasing the unlawful nature of corruption crimes that harm state finances in state-owned companies (SOE), even though it is not explicitly regulated in the Criminal Law. The Indonesian legal system allows norms and principles outside of criminal law to be considered in legal judgment.

Keywords: Good Faith, Business Judgment Rule, Grounds for Erasure, The Unlawful Nature.

INTRODUCTION

In principle, Indonesia places economic development and strengthening as a means to achieve general public welfare. One type of company that plays a role in determining the direction of the national economy is a Limited Liability Company (LLC or PT), (Desak and Ida, 2019: 14). The management of the company is managed by the board of directors, to carry out the management function and be responsible for the interests and objectives of the company. As such, the actions of the board of directors are considered a representation of the company's directing mind and will. The board of directors must be wise in considering risks before taking managerial actions (Hasbullah, 2015: 47). As stipulated in Law Number 40 of 2007 concerning Limited Liability Companies (LLC Law), the role of the board of directors is very crucial, so they must have good faith, prudence, and be responsible for every management of the company.

Directors are expected to create economic value through business decisions, so the LLC Law gives them the highest authority to manage the company (Mulhadi, 2010: 6.). However, directors must also bear personal consequences in the event of losses that exceed the company's limits and articles of association. The decisions of directors in State-Owned Enterprises (SOEs or BUMN), play an important role in public services, balancing the private sector, leading the business sector that affects people's lives (Asep, 2018: 9). In Law Number 19 of 2003 concerning State-Owned Enterprises (SOE Law), SOE capital comes from state assets separated from the State Budget (APBN). The management of (SOEs or BUMN Persero) prioritizes the principles of sound corporate management, not based on the state budget. With at least 51% of shares owned by the government, SOEs are still subject to the SOE Law and the LLC Law. This research focuses on SOEs (BUMN Persero).

However, there are provisions that trigger potential conflicts between norms related to state finances. Based on the Constitutional Court Decision Number 62/PUU-XI/2013, the assets of SOEs are included in state finances. Therefore, any losses of BUMN can be considered as losses of both the state and the company. Article 2 paragraph (1) or Article 3 of Law Number 31 Year 1999 on the Eradication of Corruption as amended by Law Number 20 Year 2001 (Corruption Law) allows directors to be charged. In practice, losses in state-owned enterprises (SOEs) are not always caused by corruption, but can also arise due to poor management or business losses (Muhammad and Firman, 2018: 177). SOE directors are concerned about the legal consequences of often being held responsible for decisions that harm the company (Hendra, 2008: 91). This decision is considered to be contrary to the principle of separation of corporate assets and limiting the liability of the Company's shareholders. Despite the pros and cons, the business judgment rule doctrine still protects directors from legal liability if business decisions are made with care, good faith and in the interest of the company. Directors are not personally liable for losses if the decision is in the interest of the company. The Constitutional Court supported the shift of state supervision from government judgment rules to business judgment rules and authorized policymakers to formulate rules according to this paradigm.

Business judgment rules are reflected in Article 97 paragraph (5) of the LLC Law, as amended by Article 109 Law Number 11 of 2020 concerning Job Creation, which states that, the Board of Directors cannot be held liable for losses as referred to in paragraph (3) if they can prove the matters stipulated in Article 97 paragraph (5) of the LLC Law. However, Article 97 paragraph (5) shows the existence of multiple interpretations (ambiguous) because it does not expressly regulate the limitations of the meaning of good faith as one of the main requirements for the Board of Directors not to be held liable for losses. Vague norm is a condition where the meaning of the law is not firm and causes multiple interpretations, thus hampering law enforcement and weakening the effectiveness of regulations, and can reduce public trust in legal institutions (Niwang, 2023: 70). Any administrative or contractual (civil) action that causes losses to SOEs is potentially considered a corruption crime. Several cases show the uncertainty of legal handling of directors in corruption offenses, as the doctrine is not always applied. However, there are concerns that this doctrine is being misused by directors for personal gain.

The legal protection given to directors does not guarantee legal certainty. In line with Fernando Manulang's opinion, legal certainty protects citizens from arbitrary actions (E. Fernando, 2016: 2). Law enforcers and SOE practitioners need to understand good faith in the business judgment rule to distinguish between criminal acts of corruption and civil claims, in order to support effective supervision, and encourage investment and economic growth. Therefore, this research is very important to understand what good faith means in the decision-making of directors of BUMN companies, and whether good faith in the business judgment rule can be used as grounds for erasing the unlawful nature of corruption in BUMN companies.

METHOD

This research uses a normative juridical method with a statute appoarch, conceptual appoarch, comparative approarch and case approarch.

This research approach involves the process of searching for legal rules, legal principles, and legal doctrines to answer legal problems (Peter, 2015: 133). The approach involves an assessment of all laws and regulations with reference to views and doctrines related to good faith in the business judgment rule as grounds for erasing the unlawful nature of corruption in BUMN (Zainuddin, 2018: 24). Comparative approach to the regulation of business judgment rule in several countries that have different legal systems to analyzing court decisions. Primary, secondary and tertiary legal materials are traced through literature study and internet access. The analysis technique is qualitative, referring to laws and regulations and court decisions (Zainuddin, 2011: 105). Then analyzed using grammatical interpretation and systematic interpretation.

RESULT AND DISCUSSION

A. The Meaning of Good Faith in the Decision-Making of Directors of State-Owned Companies

The good faith of the Board of Directors in the management of a Limited Liability Company (LLC or PT) is an important aspect that plays a role in the sustainability and accountability of the corporation. Although Law of the Republic of Indonesia Number 40 of 2007 on Limited Liability Companies (LLC Law) as amended through Article 109 of Law Number 11 of 2020 on Job Creation does not discuss in depth the steps and actions of the Board of Directors in carrying out their duties in good faith, this concept is important to ensure integrity and trust in the management of the company (Mahfud, 2014: 8). The Board of Directors must carry out their duties properly and based on proper knowledge so that decisions are in line with the company's business objectives based on good faith (Robert, 2015: 127).

The Board of Directors cannot be held liable for the loss as referred to in paragraph (3) if it can prove the matters stipulated in Article 97 paragraph (5), namely it can prove: the loss is not due to its fault or negligence; it has carried out management in good faith and prudence for the benefit and in accordance with the purposes and objectives of the company; it does not have a conflict of interest and has taken action to prevent the loss from arising or continuing. The implementation of the LLC Law faces obstacles due to the absence of clear standards to measure the good faith of the Board of Directors. In Article 97 paragraph 5 letter (b), there is no definitive measure of when the Board of Directors is considered to be in good faith or otherwise, especially when the company suffers losses due to business decisions. Although the LLC

Law emphasizes the importance of good faith, studies on the limits and practical steps of its application are still minimal, leading to diverse interpretations and legal uncertainty.

Although Article 97 paragraph 5 letter (b) regulates good faith, its application is difficult because it relates to the element of intention *(mens rea)* which is difficult to measure and relates to morals. Companies as risk takers often make speculative business decisions that risk losses, so a good faith standard is needed to ensure that management actions are carried out in the interests of the company (M. Yahya, 2009: 39). The application of the principle of good faith must be consistent to avoid legal uncertainty, and supervision and establishment of standards of conduct to protect shareholders from abuse of authority.

Determining a person's good faith is done by evaluating the conformity of actions with laws, regulations, corporate law doctrines, and internal rules. Directors should refer to Article 97 paragraph (5) of the LLC Law, the articles of association, and the company's SOPs. The combination of good intentions and actions in accordance with regulations is important to ensure legal certainty (Hans, 2016: 114). Gustav Radbruch's legal theory emphasizes that legal regulations must be clear, certain, and logical (Mario and Yuli, 2021: 158). Clarity avoids ambiguity, while logic ensures harmony with other norms. Legal certainty allows for stable and consistent application, unaffected by subjective conditions. This is achieved through clear guidelines in management and the good faith of the Board of Directors, to create prudence in decisions. The founder of MDC Law Office, Mariam Darus, emphasizes the need for more in-depth regulation on good faith (Mariam, 2009: 14). In legislation, good faith should be reflected as a principle (das sollen) in positive law and develop as a legal principle in Indonesia. Siti Jenie Ismijati classifies legal principles into three categories: universal, general, and special (Siti, 2007). An understanding of good faith, both special and general, from various laws is needed to interpret the meaning of regulations regarding good faith.

Good faith is key to the business judgment rule which is a common law principle that protects directors from personal liability if a decision is unfavorable to the company. Roger LeRoy and Gaylod A. Jentz define the business judgment rule as, rule that immunizes corporate management from liability for actions that result in corporate losses or damages if the actions are undertaken in good faith and within both the power of the corporation and the authority of management to make (Siti, 2007).

The business judgment rule originated in the United States in the early 20th century to protect directors from personal liability for decisions made in good faith. Stephen M. Bainbridge states that this rule creates a balance between the power of directors and accountability to shareholders (Siti, 2007). Black's Law Dictionary defines this principle as making business decisions without conflict of interest and with the interests of the company in mind. This principle developed in Delaware as the center of corporate law through legal precedents in various jurisdictions, protecting BODs as long as decisions are made in good faith, reasonable care, and sufficient information. American law provides autonomy for the BOD, without interference from shareholders or the courts, provided there is no evidence of abuse or fiduciary breach. The case of Smith v. Van Gorkom confirms that this rule applies if the decision of the BOD is based on careful and rational consideration.

This principle is adopted in other countries, including the UK and Australia, with different emphases. In the UK, it is not explicitly recognized as a business judgment rule, but by the concepts of duty of care and duty of loyalty contained in Article 172 of the Companies Act 2006, which requires Directors to consider the impact of decisions on employees, the environment, and the welfare of the company. English law recognizes the autonomy of Directors, but actions must be in accordance with the provisions of the law, and the courts may review if there is any indication of abuse of authority or neglect of fiduciary duty (Companies Act 2006 (UK), Section 172). The UK is stricter in its application of jurisprudence regarding directors' actions and does not provide as broad a protection as the US. Whereas in Australia, the business judgment rule is set out in the Corporations Act 2001 (Australia), Article 180(2), which protects Directors from personal liability if they act in good faith and without conflict of interest. Nonetheless, decision-making must follow proper procedures, and the courts can review actions that breach the standard of care, such as the case of ASIC v Rich (2009). In contrast to the US, Australian courts are more cautious in ensuring decisions are made prudently.

In Indonesia, the business judgment rule is regulated in Article 97 paragraph (5) of the LLC Law, which protects the Board of Directors from personal liability for company losses if the decision is made in good faith, does not violate the law, and is in the company's interest. Constitutional Court Decision No. 48/PUU-XI/2013 confirms this protection for Directors and Board of Commissioners who act prudently. Nonetheless, the LLC Law leaves room for the court to interpret this principle in each case. With regard to good faith in this principle, there are several meanings of good faith that can be found in various regulations, expert opinions, and doctrines.

The Civil Code (KUHPerdata) defines good faith in two senses. First, subjective good faith, meaning honesty, is described in Article 530 of the Civil Code onwards, regarding the position of power *(bezit)*. It reflects the inner attitude of a person who takes possession of goods in the belief that the conditions for property rights have been met. Article 1986 states that payments made in good faith to the holder of a letter of credit are valid, even though the recipient is not a creditor, and ignorance of defects also includes good faith (Subekti, 1976: 26). Second, objective good faith, meaning propriety, is regulated in Article 1338 paragraph (3) The civil code, which requires that agreements be executed without deceit and with due regard to mutual interests. According to Wery, objective good faith means behavior in accordance with public opinion, not just personal perception. Wiryono Prodjodikoro adds that honesty in this context lies in action, and aims to maintain a balance of interests in society, so this honesty is static.

M. Yahya Harahap, S.H., states that good faith includes aspects (M. Yahya, 2009: 12):

a. Fiduciary duty, must always be bonafide and honest;
b. Duty to act for a proper purpose;
c. Obligation to obey statutory regulations (statutory duty or duty obedience);
d. Must be loyal to the company (loyalty duty), not using funds and assets for personal interests, must keep all information confidential (confidential duty of information);
e. Must avoid conflict of interest, prohibited from using the company's assets for personal gain, no competition with the company;
f. The duty of due care, the ordinary prudent person with reasonable judgment or reasonable care;
g. Obliged to carry out diligently (duty to be diligent), continuously pay attention to events against the company;
h. Perseverance and tenacity accompanied by skills and expertise (duty to display skills) according to science.

Based on several explanations and related laws and regulations, the meaning of good faith in the LLC Law includes ethical values and moral demands that avoid arbitrary actions in LLC (Hasnati, 2014: 68). To find out the limitations of the meaning of good faith of the Board of Directors in Article 97 paragraph (5) of the LLC Law, it can be studied from several corporate law doctrines as follows.

First, the Good Faith of the Board of Directors is based on the doctrine of fiduciary duty, arising from the interdependent relationship between the board of directors and the company (Wahyono and Ari, 2003: 29). The board of directors has a fiduciary duty to act honestly, carefully and based on the provisions of the law. The meaning of good faith in this case, the Board of Directors must carry out their responsibilities honestly, loyally, and make rational decisions. Management is carried out for reasonable purposes, taking into account the interests of employees and shareholders. Directors are obliged to make decisions based on the norms of propriety and openness, involve conscious judgment, and consult with commissioners or General Meeting of Shareholders (GMS).

Second, the good faith of the Board of Directors is based on the self-dealing transaction doctrine, the meaning of good faith relates to the responsibility of making policies honestly and professionally, in accordance with the objectives in the Articles of Association and Company Regulations. Although it may involve personal interests, decisions must not provide direct benefits (Gde, 2015: 191). This doctrine limits authority and prohibits personal transactions, requiring policies to be carried out honestly, transparently, and accountably without partiality or personal gain.

Third, the good faith of the Board of Directors is based on the doctrine of corporate opportunity, emphasizing that Directors or employees of the company should not seek personal gain from actions that should be taken by the company. This doctrine prohibits the use of positions and information to gain benefits that harm other parties. In addition to profit orientation, this doctrine demands compliance with the articles of association and applicable regulations, as well as professionalism and consideration for the interests of the company.

Fourth, the good faith of directors based on the doctrine of piercing the corporate veil requires directors to carry out their duties in accordance with the articles of association and regulations. Violations can result in civil and criminal liability. Integrity in the management of the company is very important, with supervision through the GMS. The law will be applied if provisions are violated.

Fifth, the good faith of the Board of Directors based on the doctrine of good corporate governance includes the structure of the company, the division of duties and responsibilities and relationships with stakeholders. This relationship is not based on an agreement, but on the LLC Law (Wibowo, E., 2010: 138). Based on SOE Decree No. 23/M-PM BUMN/2000, good corporate governance is a healthy corporate principle to safeguard the interests of the company. The Organisation for Economic Co-operation and Development (OECD) emphasizes transparency, fairness, accountability, and corporate social responsibility. From a legal perspective, this balance reflects honest and proper good faith in a dynamic sense (M. Yahya, 2009: 12).

Sixth, the good faith of the BOD is based on the principle of statutory duty of good faith as an unlawful act of management. This principle requires the BOD not to take personal advantage if the opportunity should be given to the company, in line with the fiduciary duty. The principle of fiduciary duty is applied not eliminates the applicability of the statutory duty of good faith. Thus, it is not necessarily possible to interpret good faith in Article 97 of the LLC Law as an action that does not have a conflict of interest, but must be interpreted "as long as the management actions of the board of directors are not unlawful and/ or are not actions to take the opportunity to benefit themselves, if in fact the opportunity can be given to LLC.

Directors' good faith in the management of the company involves loyalty and rational attention, including legal risk management. Risk management helps BODs identify strengths, weaknesses, opportunities and threats, and facilitates responses to risks (Walter, 1998: 212). Successful risk management depends on planning, communication with commissioners and the GMS, and evaluation of the company's activities (Gillies, 2001: 543). BODs must make value-oriented decisions and consult with commissioners before entering into contracts with third parties. Obligations include duty of loyalty, prohibiting the use of company funds for personal gain and maintaining the confidentiality of information, and duty of care, requiring caution in the performance of duties. Violations of these principles may result in legal action. The relationship between the BOD and the company is based on trust, loyalty and care. Directors show good faith by managing the company honestly, complying with regulations, and not using company assets. The duty to prevent conflicts of interest, act prudently, and rely on knowledge and consultation with other management. Directors who carry out management outside the statutory provisions, the Articles of Association, and the principles of the LLC Law become ultra vires, resulting in civil and criminal liability (Subekti, 1996: 21). The meaning of good faith of the Board of Directors in management is reflected through compliance with the principles of good corporate governance in accordance with the principles of good corporate governance, Law, Articles of Association, and Company Regulations drafted collaboratively (Gunawan, 2006: 20).

The Directors good faith in the management of the company includes compliance with laws and regulations, including the Articles of Association. Directors are required to carry out their duties with honesty and propriety, interact without deceit, and consider the interests of all parties in the company. This honesty is not just an inner attitude, but is reflected in real actions that are in accordance with the trust of the GMS. This principle is rooted in efforts to maintain a balance of various interests in the legal system for the common good (Chatamarrasjid, 2001: 12)

Good faith has developed into a legal principle in the company. Directors who implement good corporate governance function to maintain a balance between the company's organs, reflecting good faith in the sense of propriety and honesty (Walter, 1998: 212). This good faith underlies the legal relationship with the GMS and the company. If the Directors know their actions are unlawful or careless, it is considered a tort. Thus it can be concluded that good faith in the business judgment rule is an honest and proper management action in the interests of the company that is not unlawful and/or is not an act to take an opportunity for personal gain.

B. Good Faith in Business Judgment Rule can be used as Grounds for Erasing the Unlawful Nature of Corruption Crime in State-Owned Companies

The management of SOEs is carried out by the Board of Directors, which has management and representation functions. The BOD's relationship with the company is fiduciary, based on trust and regulated by law. Fiduciary duties include the responsibilities of the BOD, and breaches thereof may result in personal liability. However, the BOD can use the principle of business judgment rule to defend itself against such violations. Article 11 of the SOE Law states that state-owned enterprises follow the provisions of the Company Law, which allows the application of the business judgment rule principle. This principle allows directors of SOEs to defend their business decisions based on fiduciary duty. However, as Law No. 17/2003 on State Finance and the SOE Law state that SOE assets are part of state assets, the application of this principle is limited. Losses of SOEs that affect state finances may be considered state losses, and if caused by the misconduct of the directors, they may be charged under the Law on the Eradication of Corruption Crimes (Tipikor Law), as they are considered to have harmed state finances as a corruption crime.

The implementation of the business judgment rule doctrine against directors of SOEs faces uncertainty due to differences in interpretation of the law. Cases of BUMN losses that are considered corruption offenses reflect Legal uncertainty in understanding the good faith protected by the business judgment rule in Article 97 paragraph (5) of the PT Law. Losses from indirect transactions should be considered as losses of limited liability companies. If the state feels aggrieved, a civil lawsuit can be filed. Article 61 paragraph (1) and Article 97 paragraph (6) give shareholders the right to sue if the company's actions are considered unfair or exceed the limits set by the resolutions of the

GMS, Board of Directors, or Board of commissioners. Crimes can only be imposed if there is an abuse of authority or other criminal acts such as bribery.

The case of Emirsyah Satar, former President Director of Garuda Indonesia, demonstrates the application of the business judgment rule in the context of corruption. Emirsyah was involved in the procurement of Bombardier CRJ1000 aircraft and Rolls-Royce aircraft engines for Garuda, which were deemed to provide no benefit to the company and harmed the state (Corruption Court Decision at the Central Jakarta District Court Number 121/Pid.Sus/TPK/2019/PN.Jkt.Pst dated May 8, 2020, Corruption Court Decision at the DKI Jakarta High Court Number 19/Pid.Sus/TPK/2020/PT.DKI, Supreme Court Decision Number 4792 K/Pid.Sus/2020 dated December 23, 2020, Supreme Court Decision Number 1234 K/Pid.Sus/2022 dated December 28, 2022). Although aircraft procurement can be considered part of business policy, the conflict of interest found due to bribery and gratuities nullified the good faith that is the main requirement of the business judgment rule. The decision was not made for the benefit of the company, but for personal gain. Emirsyah's actions harmed state finances and undermined the integrity of public companies. Emirsyah was charged with Article 2 paragraph (1) and Article 3 of the Tipikor Law and sentenced to 8 years in prison and a fine of IDR 1 billion, as well as the obligation to pay compensation of IDR 8.8 billion because he was proven to have harmed the state. The court ignored the defense of the business judgment rule because there was a conflict of interest and abuse of authority for personal gain as an illegal act.

The business judgment rule also could not be considered in the case of Hotasi Nababan (former President Director of PT Merpati Nusantara Airlines), related to corruption in aircraft procurement and abuse of authority that harmed the company (Corruption Court Decision at the Central Jakarta District Court Number 36/Pid.B/ TPK/2012/PN.Jkt.Pst dated February 19, 2013, Supreme Court Decision Number 417 K/Pid.Sus/2014 dated May 7, 2014, Supreme Court Decision Number 41 K/Pid.Sus/2015 dated September 4, 2015). This case related to the security deposit for the lease of Merpati aircraft in December 2006. The first decision applied the business judgment rule because the decision was deemed to be based on good faith and in the interest of the company, without any evidence that the action was unlawful. However, on judicial review, the Supreme Court sentenced the defendant to four years' imprisonment because it found evidence that the decision was influenced by personal interests, not based on good faith, and gratuities, which undermined the business judgment rule defense.

In contrast to the case of Karen Agustiawan (Former President Director of PT Pertamina) related to the Basker Manta Gummy (BMG) Block project in Australia, where the business judgment rule was successfully applied and the judge declared a release verdict *(Ontslaag Van Alle Rechtsvervolging)* (Corruption Court Decision at the Central Jakarta District Court Number 15/Pid.Sus TPK/2019/PN.Jkt.Pst dated June 10, 2019, Corruption Court Decision at the DKI Jakarta High Court Number 34/PID.TPK/2019/PT.DKI dated September 24, 2019, Supreme Court Decision Number 121 K/Pid.Sus/2020 dated March 9, 2020). At the first level and the High Court, Karen was charged with abuse of authority and the decision was considered detrimental to the company's finances with a prison sentence of 8 years. However, the Supreme Court later overturned this conviction, accepting the business judgment rule as a reason for criminal acquittal because it considered that the decision was made in the interest of the company and was not against the law.

The court ruling in this case demonstrates the difficulty in determining when Directors are liable for business decisions. Although the act of acquisition is considered detrimental to the company and unlawful, it is considered a business risk. Losses incurred by the decisions of SOE directors are not necessarily detrimental to state finances. The KPK states that to prove state losses, there must be evidence of intent against the law. The liability of SOE directors depends on whether the management of the company complies with the company's regulations and principles, as well as the presence of the most important element, namely, good faith.

Hans Kelsen's theory of legal liability analyzes the responsibility of individuals or legal entities that commit unlawful acts that harm others. This theory is important to explain the relationship between the responsibility of the Board of Directors and its authority under the Company Law. If decisions are made without good faith and prudence, and are detrimental to the company, directors may be subject to criminal sanctions and considered to have violated the law. If these elements are met, the directors must be held accountable for their actions. In the context of criminal liability under Articles 2 and 3 of the Tipikor Law, actions that harm state finances must fulfill the elements of unlawfulness and bad faith. Although directors have the right to make decisions, they may be subject to criminal sanctions if the actions harm the state, contravene regulations, and are carried out without good faith or abuse of authority. Thus, the right to make decisions do not absolve individuals from criminal liability if found to have violated the law. Criminal liability relies on proof of good faith in decision-making.

Good faith means honest and proper management actions in the interest of the company that are not against the law and/or are not actions to take opportunities for personal gain. Directors must comply with regulations and carry out their duties with honesty, propriety, and rationality in making business decisions. Good faith is a key element that can remove the unlawful nature of corruption. The business judgment rule provides protection to directors if business decisions are made in good faith, do not violate the law, and are not driven by personal interests. This good faith assessment parameter can be used as a reason to remove the unlawful nature of corruption crimes.

Article 51 paragraph (2) of the Criminal Code states that a person cannot be convicted if the act is the exercise of a lawful obligation or right under the Act. Unlawful acts can be understood in two dimensions: formal, i.e. contrary to the law, meaning that the elimination of unlawfulness is specified in the law and material, not only contrary to the law, but also contrary to social norms of society and the elimination of this nature is not in the law, but also outside the law. Material tort can be divided into two schools: positive and negative (Niwang et al, 2023: 101). The positive school argues that matters outside the law, such as social or ethical norms, can be used to establish unlawful acts, for example corruption in business practices. While the negative school argues that matters outside the Act can only be used to remove the unlawful nature, such as if the act is done in good faith or based on a legitimate legal obligation, even if it is detrimental.

Thus, rules outside the Criminal Law can be used to remove the unlawfulness, especially if they provide protection or legitimate justification for the actions taken. The business judgment rule in the Company Law is used to justify directors' decisions taken in good faith and without conflicts of interest, even if they are related to corruption. Positive law theory supports the use of norms from various sources of law, including Company Law, to justify actions taken in the context of criminal law. In addition, the principle of transitoriness explains that changes to the Law are not only understood from the new text, but also in relation to other relevant provisions of the Law. As such, changes to the Criminal Law may reflect a broader understanding, including how provisions outside of the criminal law may contribute to assessing conduct that is considered unlawful. As in Karen's case, the business judgment rule can influence legal interpretation in corruption cases.

In this case, good faith in the business judgment rule can remove the nature of criminal law and provide immunity to directors of SOEs from corruption charges. If the directors can prove that the decision was taken in good faith, in the interests of the company, without abuse of authority or personal gain, and in accordance with the law, then the action is not against the law. The business judgment rule provides legal certainty and protects directors from legal liability, allowing them to make strategic decisions without fear of legal consequences, as well as encouraging innovation and creating a positive corporate management environment.

Thus, good faith in the business judgment rule can be a reason for removing the unlawful nature of corruption that harms state finances in SOEs, even though it is not explicitly regulated in the Criminal Law. The Indonesian legal system allows consideration of norms and principles outside of criminal law, such as corporate law and business ethics, in assessing the actions of the Board of Directors. If a decision of the BOD is detrimental to the company but taken in good faith and within the framework of a legitimate policy, then it is considered not unlawful. This principle is in line with the transitoir principle, which states that changes to the law should not only be seen in the new text, but also in other related provisions. Changes can be in other laws, as long as they are related to the Criminal Law it must be recognized as a reason to remove the unlawfulness. This shows that the law is not a separate entity, but integrated with other applicable norms and principles, which influence each other in the assessment of law and criminal liability.

CONCLUSION

Good faith in the business judgment rule provides protection to Directors who make decisions in good faith. Pursuant to Article 97 of Law No. 40 of 2007 on Limited Liability Companies, the Board of Directors may not is liable for losses if it can prove that the decision was made in good faith, prudence, for the benefit of the company, without conflict of interest, and with efforts to prevent further losses. Although the PT Law has not provided a clear standard for assessing good faith, this can be explored through legal rules, principles and doctrines. Thus, it is concluded that good faith in the business judgment rule is an honest and proper management action in the interests of the company that is not against the law and/or is not an act to take the opportunity for personal gain.

Good faith in the business judgment rule can be a reason for removing the unlawful nature in corruption cases that harm state finances in BUMN, even though it is not directly regulated in the Criminal Law. The Indonesian legal system allows for the consideration of norms and principles outside of criminal law, such as corporate law and business ethics, in assessing the actions of the Board of Directors. If a decision of the BOD is detrimental to the company but is taken in good faith and within the framework of a legitimate policy, it is considered not unlawful. This principle is in line with the transitoir principle, which states that changes to a law should not only be seen in the new text, but also in other related provisions. Changes can be in other laws, as long as they are related to the Criminal Law it must be recognized as a reason to remove the unlawfulness. This shows that the law is not a separate entity, but integrated with other applicable norms and principles, which influence each other in the assessment of law and criminal liability. To realize legal certainty in the protection of Directors, good faith in business judgment rule must be considered in law enforcement related to corruption crimes that harm state finances in BUMN. Norms and principles outside of criminal law, including changes to relevant laws, need to be considered in legal assessments. Changes can be in other laws, as long as they are related to the Criminal Law, they must be recognized. The law must be integrated into the process of legal assessment and criminal liability.

REFERENCE

Asep N. Mulyana, (2018), Business Judgment Rule Judicial Practices Against Irregularities in the Management of SOEs/BUMDs, Gramedia, Jakarta.

Chatamarrasjid Ais, (2001), Fiduciary Duty as a Standard for Directors in Performing Their Duties, Law and Development, Volume 31, Number 1, 1-15.

Companies Act 2006 (UK)

Constitutional Court Decision Number 48/PUU-XI/2013.

Constitutional Court Decision Number 62/PUU-XI/2013.

Corporations Act 2001 (Australia)

Corruption Court Decision at the Central Jakarta District Court Number 121/Pid.Sus/TPK/2019/PN.Jkt.Pst dated May 8, 2020, Corruption Court Decision at the DKI Jakarta High Court Number 19/Pid.Sus/TPK/2020/PT.DKI, Supreme Court Decision Number 4792 K/Pid.Sus/2020 dated December 23, 2020, Supreme Court Decision Number 1234 K/Pid.Sus/2022 dated December 28, 2022.

Corruption Court Decision at the Central Jakarta District Court Number 36/Pid.B/TPK/2012/PN.Jkt.Pst dated February 19, 2013, Supreme Court Decision Number 417 K/Pid.Sus/2014 dated May 7, 2014, Supreme Court Decision Number 41 K/Pid.Sus/2015 dated September 4, 2015.

Corruption Court Decision at the Central Jakarta District Court Number 15/Pid.Sus TPK/2019/PN.Jkt.Pst dated June 10, 2019, Corruption Court Decision at the DKI Jakarta High Court Number

34/PID.TPK/2019/PT.DKI dated September 24, 2019, Supreme Court Decision Number 121 K/Pid.Sus/2020 dated March 9, 2020.

Decree of the Ministry of State-Owned Enterprises Number 23/M-PM BUMN/2000.

Desak Nyoman Alit Gunatri and Ida Ayu Sukihana, (2019), Legal Consequences of Acquit Et De Charge Arrangement Against the Company's Board of Directors, Kertha Semaya, Volume 7, Number 3, 1-15. https://doi.org/10.24843/KM.2019.v07.i03

E. Fernando M. Manullang, (2016), An Overview of the Legal System in Indonesia, Kencana, Jakarta.

Gde Subha Karma Resen, (2023), Regulation of Regional-Owned Enterprises Based on Good Governance and Good Corporate Governance: A Juridical Review of Regional-Owned Enterprises as Business Entities, Dissertation, Yogyakarta.

Gillies Peter, (2001), Business Law, 10th ed. Annandale, The Federation Press, New South Wales.

Gunawan Widjaja, (2006), Lon Fuller, Lawmaking and Legal Interpretation," Law Review, Volume 6, Number 1, 20. https://doi.org/10.20885/PLR0.

Hans Kelsen, (2016), Pure Legal Theory: The Foundations of Normative Legal Science, Nusa Media, Jakarta.

Hasbullah F. Sjawi, (2015), Directors and Corporate Liability, Kencana, Jakarta.

Hasnati, (2014), Independent Commissioner and Audit Committee: Company Organs that Play a Role in Realizing Good Corporate Governance, Absolute Media, Yogyakarta.

Hendra Setiawan Boen, (2008). Bianglala Business Judgement Rule, Tatanusa, Jakarta.

Law of the Republic of Indonesia Number 1 of 1946 concerning Criminal Law Regulations (Criminal Code), State Gazette of the Republic of Indonesia of 1946 Number 8, additional State Gazette Number 8.

Civil Code, State Gazette of the Republic of Indonesia Year 1847 Number 23, additional State Gazette Number 12.

Law of the Republic of Indonesia Number 31 of 1999 Concerning the Eradication of Corruption, as amended by Law Number 20 of 2001, State Gazette of the Republic of Indonesia of 2001 Number 134, additional State Gazette Number 4401.

Law of the Republic of Indonesia Number 17 of 2003 concerning State Finance, State Gazette of the Republic of Indonesia of 2003 Number 47, additional State Gazette Number 4286.

Law of the Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies, State Gazette of the Republic of Indonesia Year 2007 Number 106, additional State Gazette Number 4734.

Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation, State Gazette of the Republic of Indonesia of 2020 Number 245, additional State Gazette Number 6573.

Mahfud Md, (2014), Legal Politics in Indonesia, Raja Grafindo Persada, Jakarta.

Mariam Darus Badrulzaman, (2009), Compilation of Security Law, Mandar Maju, Bandung.

Mario Julyano and Aditya Yuli Sulistyawan, (2021), Understanding the Principle of Legal Certainty through the Construction of Legal Positivism Reasoning, Journal of Law, Volume 12, Number 2, 150-165. https://doi.org/10.14710/crepido.1.1.13-22.

Muhammad Zainul Arifin and Firman Muntaqo, (2018), The Application of the Detournement De Pouvoir Principle to the Actions of SOE Officials Resulting in State Losses According to Law Number 17 of 2003 concerning State Finance," Journal of Nurani, Volume 18, Number 2, 177-194. https://doi.org/10.19109/nurani.v18i2.2741.

Mulhadi, (2010), Corporate Law, Ghalia Indonesia, Bogor.

M. Yahya Harahap, (2009), Limited Liability Company Law, Sinar Grafika, Jakarta.

_______________, (2017), Limited Liability Company Law, Sinar Grafika, Jakarta.

Niwang Pambayun Purbo Raras, Bambang Sugiri, and Alfons Zakaria, (2023), Necessary Defence (Noodweer) Not as The Ground for Enquiry Dismissal, RechtJiva Journal, Volume 1, Number 1, 66-149. https://doi.org/10.24014/je.v5i1.22332.

Niwang Pambayun Purbo Raras, (2023), Necessary Defence (Noodweer) Not as The Ground for Enquiry Dismissal, Thesis, Faculty of Law, Brawijaya University Malang.

Peter Mahmud Marzuki, (2015), Legal Research Revised Edition, PT Kharisma Putra Utama, Bandung.

Robert Paryoko, (2015), The Doctrine of Business Judgement Rule: Its Application in Modern Corporate Law, Graha Ilmu, Yogyakarta.

Roger LeRoy and Gaylord A, (2018), Jentz, Business Law Today, Text and Cases, Antoni Siregar Translation, Gramedia, Jakarta.

Siti Ismijati Jenie, (2007), Good Faith Development from a Special Legal Principle to a General Legal Principle in Indonesia (inaugural speech

of professor, Faculty of Law, Gadjah Mada University), accessed on August 10, 2024, https://ugm.ac.id/id/?page=riil&artikel=927.
Smith v. Van Gorkom, (1985), 488 A.2d 858, Del.
Subekti, (1976), Aspects of Bond Law, Alumni, Bandung.
______, (1996), Principles of Civil Law, PT Intermasa, Jakarta.
Wahyono Darmabrata and Ari Wahyudi Hertanto, (2003), Implementation of Good Corporate Governance in Addressing Forms of Deviation of Fiduciary Duty of Directors and Commissioners of Limited Liability Companies, Journal of Business Law, Volume 22, Number 6, 25-35.
Walter Woon. Company Law. Singapore: Longman Singapore, 1998.
Wibowo, E., (2010), Implementation of Good Corporate Governance in Indonesia, Journal of Economics and Entrepreneurship, Volume 10, Number 1, 138.
Zainuddin Ali, (2018), Legal Research Methods, Sinar Grafika, Jakarta.
_________, (2011), Legal Research Methods Third Print, Sinar Grafika, Jakarta.

RIKSAWAN INSTITUTE®