

Relevance of Good Corporate Governance Towards the Principle of Business Judgement Rule for State-owned Enterprises' Corruption Cases: A Legal Perspective

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ABSTRACT

Business judgement rule is often used as one of the principles to determine whether a corporate actor is evidently guilty in various corruption cases. Thus, this study aims to explain the relevance of corporate governance implementation as an additional objective measurement towards the business judgement rule principle in state-owned enterprises corruption cases. Through the juridical-normative approach and qualitative method analysis, it is found that in the middle of ambiguous positions of state-owned corporations in Indonesia, corporate governance must be taken into account in determining the court ruling especially in many corruption cases as a tool to minimize the legal uncertainty. This study also found that the corporate governance standard is able to convince the public in various financial decisions as a parallel example.

Keyword: Business Judgement Rule, Corporate Governance, State-owned Enterprise, Corruption

1. INTRODUCTION

Polemics about State-Owned Enterprise ("SOE") have already become a long debate in Indonesia, especially those related to corruption cases. SOE in Indonesia is regulated under the provisions of Law Number 19 of 2003 concerning State-Owned Enterprise ("**Law 19/2003**"), which defines SOE as a "business entity in which all or most of the capital is owned by the state through direct participation of the separated state assets." This definition indicates an ambiguous position of SOE as an independent business entity that is also owned by the government all at once. This position often blurs the line between public and private entities that provokes contradicting and overlapping regulations about SOE. These overlapping regulations

provide the possibilities for stakeholders to choose and comply with regulations that are more beneficial for their position.

One example that can be pointed out is SOE's overlapping regulations on surveillance. As a business entity, surveillance on SOE should have been regulated under Law Number 40 of 2007 concerning Limited Liability Company ("**Company Law**"). However, as SOE is an entity that gained most or even all of their capital from the state, based on Art. 2(g) Law Number 17 of 2003 concerning State Financial Law ("**Law 17/2003**"), SOE is a part of State Financial that should also comply with Law Number 15 of 2006 concerning the Audit Board of Republic of Indonesia ("**Law 15/2006**"). Art. 6 of Law 15/2006 explicitly mentioned

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that SOE should be supervised by the state's Audit Board. The consequences of these overlapping regulations are not merely on the different body who has the responsibility to monitor SOEs, but it also impacts the principle in assessing and surveilling the SOEs. While Company Law upholds the principle of Business Judgment Rules ("BJR"), Law 17/2003 upholds the principle of Government Judgment Rules ("GJR") that defines a significantly different judgement perspective. While BJR requires directors to act in accordance with the best interest of the company, GJR believes that managerial decisions should be taken for the best interest of the people (public interest). Responsively, in 2013, the Constitutional Court of the Republic of Indonesia ("MK") solved this problem through their ruling Number 62/PUU-XI/2013 ("PMK 62/PUU-XI/2013") which provides that although financially SOE is owned by the state, however the surveillance and liability of SOE should be governed under the BJR paradigm. (Kasim 2017: 449).

BJR is a popular doctrine in corporate law that serves as a protection for directors from liability under their fiduciary duties to act with care and loyalty in making decisions regarding the business operation of a corporation (Varzaly 2017: 436). This protection is given because directors' duties consist principally of overseeing management, establishing corporate policy, and weighing major business decisions, in which the outcome of these decisions cannot be predicted at the time of the decision making as they are prudential judgments that exercise under discretion (Balotti and Hanks 1993: 1342). Understanding that the outcome of the decision cannot be judged until sometime in the future, the justification to activate BJR should only be done through the directors' fiduciary duties (Balotti and Hanks 1993: 1343).

In Indonesia, the implementation of BJR is recognized in Company Law. Art. 92(1) of Company Law provides discretion for directors to undertake its duty to

manage the company for the interest of the corporation. As long as the directors comply with provisions under Art. 97(5) Company Law, in making business decisions, directors are protected by the BJR. However, the problem with BJR formulation provided in Company Law revolves around the multi interpretation of the words "the interest of the company" in Art. 92(1), and the subjectivity of "good faith" in Art. 97(5). As both of these requirements involve subjective assessments in evaluating the director's decision, BJR tends to be used as a shield by the directors to avoid court sentences.

In several corruption cases in Indonesia, BJR appears to be repeatedly used by the suspects to escape corruption charges, as well as the plaintiffs to criminalize directors. Although in some cases BJR can be used as an instrument to validate those who with good faith, the implementation of BJR in Indonesia has generated inconsistent court rulings. The gravity of the harm is signified by the failure of public prosecutors to prove the malicious intent adhered to the suspect(s). In order to anatomize the malicious intent within a systemic crime like corruption to determine whether there was any act of fraud behind a business decision, the judicial system needs an additional objective mechanism.

Hence, this paper will explain the notion of incorporating corporate governance ("CG") as an additional objective consideration to prove whether the directors have complied with their duties or not in making business decisions. Unlike BJR that was contingent on the ability to prove the malicious intent of the directors, CG relies on more objective measures, such as inspecting the organizational transparency and fairness. In most cases, corruption is intercorrelated with poor transparency, exiguous surveillance, and faulty management. Inspecting a certain corporation using the CG method will help the investigation process on detecting interlacing factors that might lead to the discovery of the camouflaged malicious

intent of corruption. By incorporating CG as an additional method to BJR, corrupters or any other parties will not be able to manipulate the judicial process by taking advantage of the BJR's subjective requirements.

2. LITERATURE REVIEW AND HYPOTHESIS

BUSINESS JUDGEMENT RULE

BJR is a doctrine in corporate law that protects directors in making business decisions, with the presumption that the directors have made such decisions on an informed basis, in good faith, and in the best interests of the company. Under this presumption, when the directors' decisions inflict financial losses for the company, his decisions should not be questioned (Furlow 2009: 1083). Hence, it can be said that the BJR serves as a protection for directors from liability, under their fiduciary duties to act with care, diligence, and loyalty, in decision making and supervision regarding the business operation of a corporation (Varzaly 2017: 436).

Originating from the United States, the BJR was first formally adopted by the Delaware courts in 1960 (Neri-Castratane 2015: 9). According to the courts of Delaware formulation, the BJR is defined as *"a presumption that in making a business decision the directors of a corporation acted (the rule is inapplicable to an omission) on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."* (Aroson v. Lewis) The notion of serving the best interest of the company provides that the directors have made the decision on an informed basis. The courts of Delaware's formulation is complemented with reversed burden of proof that lies on the party challenging the directors' decisions: *"Absent an abuse of discretion, the judgement will be respected by court. The plaintiff has the burden to establish facts rebutting the presumption."* (Aroson v. Lewis) The reversed burden of proof in Delaware case laws strengthens the notion that BJR grants the directors almost

absolute discretion and independence in the matters of managing a company.

The concept of BJR adopted by the Delaware courts has gained popularity both in common law and civil law countries that is applied with each country's own modifications. Thus, the threshold of its applicability varies between each nation. Unlike in common law countries, the BJR is not as popular in civil law countries and it is not generally implemented. The absence of a comprehensive formulation of the BJR causes difficulties for civil law countries to formulate the concept of BJR in the form of a rigid regulation. However, several exceptions can be mentioned, such as Indonesia. Although not explicitly mentioned, the application of the BJR in Indonesia is recognized in Art. 97(5) Company Law, which regulates that:

"directors are not to be held accountable for the company's loss if he can prove that: (a) the loss is not due to his fault or negligence; (b) has managed the corporation in good faith and prudence for the purpose and in accordance with the company's aims and objectives; (c) does not have any conflict of interest either directly or indirectly for the business decision that inflict such loss; and (d) has taken steps to prevent the loss or continuation of the loss."

Comparing this formulation to that in the United States, both concepts of BJR are similar and hence, Indonesia implicitly recognized the application of BJR.

Furthermore, the concept of BJR in Art. 97(5) *mutatis mutandis* applicable to the board of commissioners as the supervisor of the management of a company done by directors (Art. 114 (5) and Art. 115 (3) Company Law). This application, however, is not recognized in common law countries as both managing the company and supervision are the directors' responsibilities. This is due to the difference of corporate structure in civil law and common law countries. Common law countries adopt the one-tier board structure, while the civil law countries

adopt the one-tier board structure. The difference between both systems relies on the presence of a supervisory board. In the one-tier system, the supervision towards the managerial board is directly executed by the shareholders. In the two-tier structure, the supervisory board is elected by the shareholders to represent their interests. It could be from the shareholders group itself or from a labor representative. The supervisory board is mandated to monitor the performance of the managerial board, including to revoke themselves from the position, and to ensure the going-concern of the corporation (Jungmann, 2006), pp. 426-474). Thus, the BJR that protects directors' supervisory function in common law countries also protects the independent supervisory board in civil law countries.

It is notable that the implementation of BJR should be assessed by whether the directors and the board of commissioners have managed the company in accordance with their fiduciary duties. This is due to the concept of BJR that allows the directors and the board of commissioners to take calculated risks without fear of incurring personal liability, by preventing courts from reviewing the substance of the decisions that are believed to be made based on good faith and in the best interest of the company (Furlow 2009: 1083). Therefore, in order to challenge the board's decisions, it must be proved that the decisions are made in violation of their fiduciary duties.

The concept of fiduciary duty was first recognized in common law countries, primarily consisting of duty of care and duty of loyalty. The duty of care requires the director to act on an informed and good-faith basis, adequately deliberate the relevant risks, as well as to understand the consequences that result from each decision before making a decision (Block & Gerstner 2016: 12). It is crucial for the director to exercise "substantive due care" as the BJR protects them from incurring liability. Whereas the duty of loyalty mandates

the director to manage the company in the best interest of the corporation and its shareholders exempt from any self-interest possessed by a director.

Similar concept is adopted by Company Law which provides that the directors' fiduciary duties are to manage the corporation in good faith, in the best interest of the company and in accordance with the company's aims and objectives (Art. 92 (1) and Art. 97 (1) Company Law). Furthermore, as regulated in Art. 97(2), a director must conduct its fiduciary duties (a) in good faith, (b) fulfilling the proper purpose, (c) freedom with responsibility, and (d) has no conflict of personal duty and interest (Fuady 2003: 82). The same duties are also imposed for the board of commissioners in supervising the directors' works in good faith and on an informed basis (Art. 114 (2) Company Law). Thus, based on Company Law, if a business decision that inflicts loss to the company is made in violation of the directors or the board of commissioners fiduciary duties, the BJR cannot be invoked as a protection for their personal losses.

In enforcing the BJR, it is often found that shareholders are not satisfied with the directors' decisions, especially those that inflict losses, and thus seek court's intervention to review the decision. However, based on the BJR formulation, the multi-interpretation of "the best interest of the company" and the subjectivity of "good faith" are difficult to be proved as all involve subjective assessments. Hence, BJR tends to be used as a shield for directors to avoid court proceedings, as well as shareholders plaintiffs to criminalize honest directors, particularly in the case of corruption. Corruption is a systemic crime and the culprit's malicious intent does not always appear to be visible. In Indonesia's SOE corruption cases, the BJR is oftentimes used as a shield for an accused corruptor to not be held criminally liable due to the judges inability to verify those subjective considerations.

Corporate Governance

This particular section will be divided into two major parts: *First*, this study will briefly explain the definition of CG and the philosophical reasoning behind it, which includes the CG principles based on several sources such as the Organization for Economic Cooperation and Development ("OECD") and National Committee on Governance ("KNKG"). *Second*, this study will also provide relevant theories in CG.

Firstly, the definition of CG. The OECD set up 6 principles of CG, ranging from the right of shareholders that is differentiated into individual and institutional investors, role of stakeholders, transparency and disclosure, as well as the responsibility of the board (OECD, 2015). The OECD provides three main points to define CG. First, CG is a structure that regulates the relationship among the shareholders, board of directors (managers), and other stakeholders. Thus, CG is important to ensure the congruence of each role. Second, CG also ensures the connectivity of each role in order to achieve balance in the system. Third, CG ensures the corporation's transparency towards not only shareholders, but also to relevant stakeholders through various ways. For example, CG regulates the voluntary disclosure issues and sustainability report. In Indonesia, CG principles are regulated by the KNKG. KNKG sets up 5 principles

of CG, known as TARIF (Transparency, Accountability, Responsibility, Independency and Fairness).

The philosophical reasoning behind the implementation of CG relies on its purpose where companies have the obligation to ensure stakeholder's satisfaction (Bhandari, 2018: 229). According to one definition, CG means a certain corporation needs to establish long-term strategic objectives and proper management structure (organization, systems, and people) is in place to achieve those objectives, while at the same time making sure that the structure functions to maintain the corporation's integrity, reputation, and responsibility to its various constituents (Gopal, 1998:12). According to another definition, the concept of CG primarily hinges on complete transparency, integrity, and accountability of the management where there is also an increasingly greater focus on investor protection and public interest (Chakham, 1994). Bear in mind that CG is originally a philosophical concept, thus it is not bound to a quantitative or numerical standard. The following numerical or quantitative analysis is just a tool to provide evidence and to convince the stakeholders in regard to the CG implementation.

Secondly, this research provides two analyses of the most common theories in the CG discussion: the agency theory

Table 1. **Principles of Corporate Governance by KNKG**

PRINCIPLE	EXPLANATION
Transparency	Emphasizing the aspect of disclosure. It includes the accessibility of the stakeholders to access the necessary information of the company.
Accountability	Ensuring a clear duty of each function. Moreover, a company has to be responsible for their activities transparently and fairly
Responsibility	Emphasizing on the compliance of the company to the existing regulations, and do business activity responsibly towards the stakeholder
Independency	The company must be run independently, without any conflict of interest, interference, and excessive dominance among the functionaries.
Fairness	Equal opportunity for the stakeholders in the operational activities, and giving fair information towards the shareholders.

Source: KNKG

and the stewardship theory. The agency theory explains the difference between interests and motivations due to the separation of ownership and control between shareholders and directors. The shareholders as the owners, act as the principal, while the directors that control the day-to-day operational activities, act as the agent (Berle and Means, 1932). The agent is mandated by the principal to execute the operational activities and receive salary as the compensation. In this circumstance, the agent may have better knowledge than the principal and thus, it creates skepticism from the principal towards the agent whether they have fulfilled their duty for the best interest of the principal. However, based on the precautionary principle in agency theory, the agents may have their own personal interests that result into opportunistic behaviours and falling short of congruence between the principal's interest and agent's pursuits. These differences cause asymmetric information where the agents have more knowledge than the principal. Asymmetric information may result in two problems: 1) *Moral hazard*, where the agents act not accordingly to the principal's interest, and 2) *Adverse selection*, where the agents have more information than the principal and thus, the principal cannot be assured that the agents have made decisions in the best interest of the company. Moral hazard is a 'post-decision' situation, while adverse selection is a 'pre-decision' situation that happens because of the asymmetric information. As a result of the principal's vulnerability to the agents, the principal needs to accept the 'agency cost'. Agency cost is the resources needed to create incentives or sanctions that will align the interest of shareholders and the directors, such as external audit costs (Roberts, 2005). In conclusion, the agency theory emphasizes the asymmetric information as one of the consequences of separation of duty in corporate structure that may result in the agency cost.

Aside from the agency theory, the stewardship theory also provides a good

approach in understanding CG. While the agency theory laid on skepticism between shareholders and management (principal and agent), the stewardship theory believes that the relation between supervisory and managerial board is based on trust. The stewardship theory argues that self-actualization is the key motivation for the employees to perform, rather than financial factors. The stewardship theory seems to be strongly rooted in organisational psychology and sociology. Conclusively, although both theories explain the relationship between principal (shareholders) and agent (management), however these different approaches may result in various perspectives on CG.

3. METHODS

This study uses a qualitative method with juridical-normative approach. Taking the perspective of Indonesia SOE's situation, this research uses study-case analysis as its foundation. In this regard, juridical-normative research is conducted through researching library materials or secondary data through relevant regulations and literature (Soekanto & Mamudji, 2001). Since this is a juridical normative research, this study incorporates primary legal sources and secondary data. The primary legal sources capture the following legal instruments in Indonesia: Law Number 19 of 2003 concerning State-Owned Enterprise, Law Number 31 of 1999 concerning Anti-Corruption, Law, Law Number 40 of 2007 concerning Limited Liability Company, Law Number 17 of 2003 concerning State Financial Law, Law Number 15 of 2006 concerning Audit Board of the Republic of Indonesia, and Constitutional Court of Indonesia Judgement Number 62/PUU-XI/2013. The secondary data is obtained through library research and desktop review by acquiring relevant information in the regulations, supporting literature, data from government institutions, reports and news updates. The obtained data will then be analyzed through a qualitative approach. In pertaining to this, the phases of qualitative approach includes issuing

the indicators of comparison as a focus of research towards the *status quo* by trying to analyse the importance of corporate governance towards a legal consideration pertaining to the Business Judgement Rule in Indonesia.

4. RESULT AND DISCUSSION

Although the BJR doctrine is widely implemented, several issues can be identified from its original formulation. Indonesia, as one of the countries that implicitly recognized its application, also faces similar complications. According to the Company Law, in order to invoke the BJR as a shield, directors and board of commissioners must prove that they have managed and supervise the management of the corporation in good faith and prudence for the purpose and in accordance with the best interest of the company. However, an issue can be identified from this particular requirement, which is the definition of “good faith”.

Unlike the duties of care and loyalty, good faith does not define conduct, rather it defines state of mind (Furrow 2009: 1069). Directors can be told to be careful and loyal, but they cannot be told to be “good faith” as their minds are not one that can be controlled. However, the function of good faith is not perfectly clear as it is not defined in statutory regulations nor in judicial precedent (Griffith 2005: 4). Most good faith definitions mentioned in commercial law context include some common definitions, such as demanding honesty, lack of ill-intention, fairness, full-disclosure, and sincere attempts to execute obligation (Nowicki 2007: 454). In fiduciary context, good faith does not only mean “no intention to harm”, but also “the obligation to protect the interests of the person being served”, which in this context is the shareholders as the owner of the companies (Nowicki 2007: 454).

Furthermore, judicial precedents have suggested that good faith has elements of each traditional fiduciary duties given by the shareholders to the directors (Elkins; Stone v. Ritter). The duty of loyalty

requires directors to make decisions in the best interest of the company. However, because directors are not expected to know the future or the outcome of the decision, the law allows directors to base their decisions on their good faith beliefs about the possibility of its outcome. Alternately, the duty of care implicates that the directors’ beliefs that a decision will benefit the corporation is developed by gathering reliable information. Good faith is the belief, the state of mind, that animates the decision. Therefore, it is reasonable to conclude that good faith in the BJR formulation can be defined as making decisions in accordance with the best interest of the company.

Based on this definition, in determining whether the BJR can be invoked to protect the directors against bad business decisions, the judges should be able to understand the directors’ state of mind and the best interest of a company. However, it is often found that judges in court have minimal corporate expertise and thus, cannot be relied on to understand the mind of businessmen when making business decisions (Ponsford 2016: 3). Furthermore, even by adopting the above definition of good faith, there’s no concrete formulation on which situation can be considered as acting in accordance with the best interest of the company. Without a concrete definition, arguments based on good faith can be easily manipulated by both shareholder plaintiffs and director defendants. For plaintiffs, good faith is often used as a last resort to criminalize directors after failing to prove violation of duty of care and/or loyalty (Disney). On the contrary, good faith is also used by defendants to justify bad analysis and not reliable information used in decision making. Inadequate knowledge on corporate practice results in questionable deliberation and thus, judgement, when assessing the directors’ good faith decision.

In corporation corruption cases, particularly, the state of mind of the directors are key in determining the existence of corrupt intention behind a

business decision. Corruption is a white collar crime that is systematically arranged to hide the culprit's malicious intent. Without proper definition of good faith, and without adequate corporate expertise, it can be concluded that court judgement in invoking BJR based on arguments of good faith in corruption cases is not reliable as it can be easily manipulated by either the plaintiffs or the defendants.

Although determining whether an actor is evidently guilty is the main objective in BJR, this study argues that it cannot be the only requirement *per se*. In the explanation above, it is stated that BJR is a subjective matter that can be easily manipulated by the directors and/or the shareholders. In order to decrease the possibility of manipulation, an additional objective consideration is needed. This research recommends CG as the objective evidence for the board of directors to prove whether or not they have fulfilled their duty based on good faith. In cases where malicious intent of the actor cannot be proved, the CG consideration must be assessed as the next layer of objective consideration. This is due to the failure to detect a malicious intent in a corporation is contingent to the system attached to the corporation. For example, if the company's system fails to record the transactions that happened in a certain period, there is a possibility that the evidence of fraudulent actions cannot be found. As illustrated in *Century Bank Case* (2008), the fraud or malicious intent was not found adhered by a certain individual who possessed the control, but instead the fraud was found systematically embedded in the system which made the Case a corporate fraud. According to the investigation report, it was found that Century Bank's financial situation was in massive wreckage which later led to the discovery of corruption and malfeasance.

CG implementation provides a more quantifiable reasoning due to the several reasons. First, the consistency of a corporation in implementing CG is recorded by publicly-acknowledged independent

institutions through indices. For example, Indonesia acknowledges two prominent CG assessments: the CG Perception Index released by the Indonesian Institute of Corporate Governance ("IICG") and ASEAN Corporate Governance Scorecard. There are various aspects assessed through both indices as mentioned below.

Those parameters are measured and standardized by academic experts and practitioners. Although most of them are subjective, it is acknowledged by the public as a reliable parameter that is able to shape the market perception and corporate performances. For instance the CGPI awardees have better operational performances (Fahlevi and Juhandi, 2019; Cahyaningtyas and Hadiprajitno, 2015; Prasinta, 2012). Companies that have a high CG score tend to have a higher stock price in the market (Jhandir, 2012). Moreover, companies that have a more comprehensive disclosure tend to have a higher trade volume and stock price (Mohamed and Elewa, 2016, pp. 27-44). Therefore, if the CG indices are able to give confidence to the public in various aspects, it should be considered in the court proceedings as a part of public accountability.

However, the pendulum of a court judgement is constantly oscillating between the desire to render a rigid judgement fully based on regulation (legal certainty) and the desire to be more flexible (or conform) influenced by community development. It is impossible to have absolute certainty or flexibility in the law system and thus, courts are required to render a balanced decision between certainty and flexibility (Coudert 1905: 367-368), including in the corporate law regime. The concept of BJR serves as a flexibility in corporate law between the board's authority and judicial accountability. It protects the authority of the directors to govern the corporation without having to be questioned for accountability in court (Griffith 2005: 12). This flexibility hangs on the basis of good faith, as one of the aspects of BJR (Griffith 2005: 13).

Table 2. Parameters which are used by CGPI and ASEAN CG Scorecard

CG Perception Index			ASEAN CG Scorecard
Commitment	Transparency	Accountability	Right of Shareholders
Responsibility	Independency	Competency	Disclosure and Transparency
Fairness	Leadership	Cooperation	Role of Stakeholders
Vision, Mission, and Corporate Values	Policy and Strategy	Business Ethics	Equitable Treatment of Shareholders
Risks Culture			Responsibilities of the Board

Source: Data Processing

Good faith, having similar notion with “*opzet*” in criminal law, is a subjective requirement to be fulfilled in corruption cases. Van Hattum defined *opzet* as “...the will to perform or not to carry out actions as prohibited or required by law” (Lamintang 2016). According to Indonesia Anticorruption Law, that ‘intent’ or ‘*opzet*’ specifically refers to an individual’s motive to enjoy something unlawfully or enjoy something without the right to enjoy (Hamzah 2005). Since *opzet* is a “will to perform”, it requires the prosecutors to prove the suspect’s intention of committing a crime. Similarly, in the BJR doctrine, good faith is the state of mind of the directors behind a business decision that needs to be proved whether the decision is influenced by unfavorable intention. This causes considerable degree of uncertainty as it gives room for subjectivity assessment. Thus, requirements to prove the intention or the state of mind behind a director’s decision often become the barrier of criminalizing the suspects.

Accordingly, in order to minimize such failure, CG should be applied to serve legal certainty. Presently, CG is enforced as a reliable means to provide confidence for the shareholders, stakeholders, and other relevant parties (Stanwick and Stanwick 2002). Supported with dependable parameters of CG provided by CGPI and ASEAN CG Scorecard that uphold transparency and accountability, CG may help prosecutors and judges to rely on a more objective consideration in finding the malicious intent of corrupters suspects. As will be discussed in the next section, this paper will explain the possible application of CG in corruption cases.

STUDY CASES

In *Hotasi Nababan Case (PT Merpati Nusantara Airlines 2013)*, the suspect has fulfilled the principle of good faith by ensuring the transparency in every single transaction that he made, with clear evidence that the suspect had never taken any personal advantages from the leasing agreement (Pertiwi & Sitompul, 2013:17). However, in 2014, the Supreme Court decided that Hotasi Nababan still had to serve 4 years in prison without considering the company’s CG evaluation. This case illustrates the urgency to include CG as one of the judges’ assessments in corruption cases in order to protect directors that have acted in transparency. If the judges did not solely focus on the loss incurred by the corporation, but also take into account the transparency as a part of CG, there may be a difference in the judge’s ruling.

On the other hand, other cases such as the *ECW Neloe Case (Bank Mandiri Tbk Case 2005)* showed that BJR was successfully used as an escape mechanism for the suspect to escape the criminal charges. The South Jakarta District Court eventually released ECW Neloe in 2006, even when it was proven that ECW did not provide adequate transparency (Akbar, 2016:10). Fortunately, he was still found guilty by the verdict of the Supreme Court that cost him 10 years in prison. The same pattern was repeated in *Fachrudin Yasin and Roy Ahmad Ilham Case (2010-2014)*, in which there were strong indications that both suspects had been non-compliant towards the banking regulation that was enforced at that time. However, since the public prosecutor failed to prove the malicious intent adhered to both Fachrudin and Roy,

the South Jakarta District Court and the Supreme Court (Extraordinary Appeal/*Peninjauan Kembali*) released both suspects on the basis of BJR.

At the time that these cases occurred, PT Bank Mandiri was starting to incorporate CG into their system by instilling the core values of Governance Commitment, Structure, and Mechanisms (PT Bank Mandiri Annual Report 2017: 396). The corporate's culture began its positive transformation in 2005 and was given excellent CGPI predicate. Since its noteworthy achievement in implementing CG principles, and after becoming the Icon of CG in Asia in 2015 and seizing The Best SoE based on the gratification-control mechanism assessed by the Corruption Eradication Commission in 2015, there have been no court involved to question the directors' business decision. In the two cases involving Bank Mandiri, it was apparent that the directors did not provide transparency and accountability in making its business decision. However, as the judges only considered whether there was good faith, when the prosecutor failed to prove the malicious intent of the suspects, the judges did not criminalize both suspects without considering whether the director had acted in accordance with the best interest of the company.

In different circumstances of *Karen Agustiawan Case (PT. Pertamina Case 2009-2020)*, she was indicted that she had taken personal advantages when PT. Pertamina acquired the BMG Block owned by the ROC Oil Company Ltd in 2009. The judgement to invest in BMG Block had cost Indonesia around 568 billion Rupiah and many argued that it was not a normal business risk. She was sentenced to serve 8 years in prison by the High Court due to corruption charges, but later released by the Supreme Court on the basis of BJR. In its verdict, the Supreme Court stated that Karen Agustiawan's decision can be considered as a business risk as the nature of oil business is unpredictable. However, the Supreme Court never explained the situation of PT Pertamina's CG under her

direction, as well as whether she had taken adequate measures and comprehensive business consideration before taking the business judgement to acquire BMG Block.

PT Pertamina Annual Report in 2009 showed that "*The CG Score Rating increased from 74% in 2007 to 80.03% in 2008. In 2009, the score was 83.56%, higher than the target of 81% and a stretch target of 82%, and earned the predicate "GOOD" from the Ministerial Evaluation*" (PT Pertamina Annual Report 2009: 195). Although in 2009 PT Pertamina's CG programs were still rough as it was their earlier year in implementing CG as an obligation imposed by the government, The Supreme Court could have taken the company's CG outstanding evaluation as a consideration to justify Karen Agustiawan's innocence instead of merely stating that it was a business risk without enough reasoning. These cases illustrate that similar situations may result in various outcomes (with blurry verdict reasonings) that show inconsistencies, even in the level of the Supreme Court. If the court had considered investigating each company's CG, there may be possibility to find malicious intent adhered in the system. Thus, it is reasonable to conclude that in order to accurately determine whether a director is corrupted or not, CG may become an additional objective consideration that should be considered by the judges.

Corruption Eradication Commission Study in 2017 states that the implementation of CG is highly effective to prevent further corruption actions in terms of (1) Transparency and Independence in terms of the Board of Directors' appointment process; (2) Potential of Conflict of Interests; (3) Fairness in the process of selecting supplier companies; (4) Control upon the enforcement of regulations and behavioural guidance; (5) Corruption Prevention; (6) Cooperation with the law enforces (Indonesia CEC, 2017:14). A recent study showed how the implementation of CG in *PT Kereta Api Indonesia* has been effective where it's proven in the last three years there were no corruption crimes

had taken place in the company after a big corruption case happened in 2015 involving Novi Setia (Prastika, 2020: 111). From the study, we can conclude that there is a positive correlation between excellent CG predicate and lower corruption risks. Therefore, using the same premise, we can also argue dissecting a certain corporate's CG could possibly generate clues on whether or not there were corruption acts involved behind a certain corporate's losses.

CONCLUSION

Ideally, the objective of BJR is to establish balance in corporate law between the board authority and judicial accountability (Griffith 2005: 12). However, the fact that BJR is subservient on proving that the suspects (in this case, the directors) do not possess any malicious intent on abandoning their fiduciary duties makes BJR implausible in most cases. Particularly when we acknowledge that corruption is a systemic crime and the malicious intent, it does not always appear to be visible that it was adhered only to the board of directors. Usually, corrupters had designed many scenarios to bury their pernicious intent to disperse the guilt away from themselves by corrupting the internal system (e.g. internal control, monitoring and evaluation of the corporations) to make their further actions undetected. Therefore, it will not be difficult for the suspects to utilize BJR as a shield to escape corruption charges as their malicious intent is hard to prove. CG that uses more objective parameters to assess a certain corporate transparency and financial condition could assist the investigation process that might lead into the discovery of malicious intent, or even certifying someone's innocence based on the corporate track records. Therefore, the addition of CG as a consideration, and not as a determinative factor, to dissect the corrupters' malicious intents which were camouflaged within the system could minimize the harms of BJR misuse and could protect those who possess good faith as well. On some notes, this study

still has several limitations. First, this study is unable to capture and explain the inconsistency of some court results due to the constant changes and the blurriness of the existing regulations. Second, this study only provides qualitative analysis upon the relevance of CG towards the BJR principle. Therefore, we recommend future studies to measure empirically about the correlation between CG and BJR principle which is used in court. Third, due to the limited availability of data, this study only provides two parameters of CG implementation in Indonesia: CGPI and ASEAN Corporate Governance Scorecard. However, we acknowledge that the assessment system through both indices is not compulsory. Therefore, future research might be contingent on the enforcement of CG framework towards the SOEs by the regulators.

REFERENCES

- Akbar, M. (2016). Business Judgement Rule Sebagai Perlindungan Hukum Bagi Direksi Perseroan Dalam Melakukan Transaksi Bisnis. *Justisi Ilmu Hukum Journal* 1(1):1-15.
- Aronson v. Lewis, 473 A.2d 805, 1984 Del. LEXIS 305 (Del. Mar. 1, 1984).
- Berle, A. Means, C. (1932). *The Modern Corporation and Private Property*. New York: Macmillan.
- Balotti, R. Franklin and Hanks, J. James. Rejudging the Business Judgment Rule. *The Business Lawyer* 48(4): 1337-1353.
- Bhandari, Arabinda. (2018). *Strategic Management: A Conceptual Framework*. New York: McGraw Hill Education.
- Cahyaningtyas, A.R. and Hadiprajitno, B. (2015). Pengaruh Corporate Governance Perception Index dan Profitabilitas Perusahaan Terhadap Nilai Perusahaan. *Diponegoro Journal Accounting*, 4(3): 556-567.

- Chakham, Jonathan. (1994). *Keeping Good Company: A Study of Corporate Governance in Five Countries*. Oxford: Claredan Press.
- Coudert, Frederic R. (1905). Certainty and Justice. *The Yale Law Journal* 14 (7): 361-373.
- Fahlevi, M. and Juhandi, N. (2019). 'The Impact of CGPI Award towards Financial Performance of LQ45 Firms'. In *The 2nd International Conference on Inclusive Business in The Changing World*.
- Fuady, Munir. (2003). *Perseroan Terbatas Paradigma Baru*. Bandung: PT Citra Aditya Bakti.
- Furlow, Clark W. (2009). Good Faith, Fiduciary Duties, and the Business Judgement Rule in Delaware. *Utah Law Review* : 1063-1095.
- Griffith, Sean J. (2005). Good Faith Business Judgement: A Theory of Rhetoric in Corporate Law Jurisprudence. *Duke Law Journal* 55 (1):1-73.
- Hamzah, Andi. (2005). *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional*. Jakarta: Raja Grafindo Persada.
- Indonesia's Anti-Corruption Court Ruling No. 1513 K/Pid.Sus/2012.
- Indonesia Corruption Eradication Commision. (2017). *Study on the Implementation of Good Corporate Governance in Private Entities, State-Owned Enterprises and Regional-Owned Enterprises*. Jakarta: Indonesia CEC.
- Jhandir, S.U., (2012). Relationship between Corporate Governance score and stock prices: Evidence from KSE-30 index companies. *International Journal of Business and Social Science*, 3(4):239-249.
- Jungmann, C. (2006). The effectiveness of corporate governance in one-tier and two-tier board systems–Evidence from the UK and Germany–. *European Company and Financial Law Review* 3(4): 426-474.
- K. Gopal. (1998). Emerging Trends in Corporate Governance. *Indian Management Journal* (5): 12.
- Kasim, Helmi. (2017). Memikirkan Kembali Pengawasan Badan Usaha Milik Negara Berdasarkan Business Judgement Rules. *Jurnal Konstitusi* 14 (2): 440-462.
- Lamintang P.A.F and Lamintang. T. Fransiscus. (2016). *Dasar-dasar Hukum Pidana di Indonesia*. Jakarta: Sinar Grafika.
- Mohamed, W.S. and Elewa, M.M., (2016). The Impact of Corporate Governance on Stock Price and Trade Volume. *International Journal of Accounting and Financial Reporting*, 6(2): 27-44.
- Neri-Castratane, Giulia. (2015). Corporate Governance from a Comparative Perspective: Does the Business Judgement Rule Promote Corporate Social Responsibility?. *Frontiers of Law in China* 10 (1): 9-21.
- Novelino, Andry. (2020). 'Eks Dirut Pertamina Karen Agustawan Divonis Lepas MA', CNN Indonesia, 09 March. Available at: <https://www.cnnindonesia.com/nasioal/20200309202923-12-481918/eks-dirut-pertamina-karen-agustiawan-divonis-lepas-ma> (Accessed: 25th July 2020).
- Nowicki, Elizabeth A. (2007). Not In Good Faith. *SMU Law Review* 60(2):1-53.

- OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264236882-en>.
- Pertiwi, Hana and C. Sitompul. (2013). 'Prinsip Business Judgment Rules Terhadap Unsur Melawan Hukum Pada Tindak Pidana Korupsi (Studi Kasus: Putusan 36/Pid.B/TPK/2013/PN.JKT.PST Dengan Terdakwa Hotasi Nababan Mantan Direktur PT Merpati Nusantara Airlines)'. Undergraduate Thesis. Depok: Universitas Indonesia.
- Ponsford, P. Matthew. (2016). Corporate Governance and the Business Judgment Rule: Fiduciary Duties of Directors in Canada and the People's Republic of China. *Journal of Civil & Legal Sciences* 5 (1):1-4.
- Prasinta, D. (2012). Pengaruh CG Terhadap Kinerja Keuangan. *Accounting Analysis Journal* 1(2).
- Prastika, Yurice Prastika. (2020). Efektivitas Penerapan Good Corporate Governance (CG) dalam Upaya Pencegahan Tindak Pidana Korupsi di PT Kereta Api Indonesia. *Jurnal Idea Hukum* 6 (1): 96-112.
- Prasetyo, Adi. (2015). Pertanggungjawaban Pidana Direksi terkait Business Judgment Rule (Analisis Putusan Tindak Pidana Korupsi No. 1513 K/Pid.Sus/2012 atas nama terpidana Umar Zen). *MaPPI FHUI*: 117-142.
- Roberts, J., (2005). Agency theory, ethics and corporate governance. *Advances in Public Interest Accounting*, 11: 249-269.
- South Jakarta District Court Ruling 36/Pid.B/TPK/2013/PN.JKT.PST
- Stanwick, A. Peter and Stanwick, D. Sarah. (2002). The Relationship between Corporate Governance and Financial Performance: An Empirical Study. *The Journal of Corporate Citizenship* (8):35-48.
- Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Del. Nov. 6, 2006).
- Supreme Court of Indonesia Ruling No. 130/PK/Pid.Sus/2013 (*Extraordinary Appeal*).
- Supreme Court of Indonesia Ruling No. 861 K/Pid.Sus/2015.
- Taher, Andrian. (2020). 'MA Vonis Bebas eks Dirut Pertamina Karen Agustawan', *Tirto.id*, 10 March [Online]. Available at: <https://tirto.id/ma-vonis-bebas-eks-dirut-pertamina-karen-agustawan-eD27> (Accessed: 25th July 2020).
- Unsecured Creditors of Integrated Health Services, Inc. v. Elkins, C.A. No. 20228-NC, 2004 Del. Ch. LEXIS 122 (Del. Ch. Aug. 24, 2004).
- Varzaly, Jennifer. (2012). Protecting the Authority of Directors: An Empirical Analysis of the Statutory Business Judgment Rule. *Journal of Corporate Law Studies* 12 (2) : 429-463.
- Walt Disney Co. Derivative Litigation, 825 A.2d 275 (Del. Ch. 2003).