

Reconstruction of the Business Judgment Rule Doctrine in Indonesia: Legal Comparison with England, Canada, the United States, and Australia

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Abstract

This research specifically analyzes the comparison of the substance of the business judgment rule doctrine in Indonesia with that in other countries by comparing several countries, namely: England, Canada, the United States and Australia. The aim of this research is to reconstruct the future regulation of the business judgment rule doctrine in Indonesia. This research is normative legal research that prioritizes conceptual, statutory, case, and comparative approaches. The research results show that the principles related to the business judgment rule doctrine in Indonesia include the principle of good faith, the principle of prudence, the principle of expediency, and the principle of legal certainty. The characteristics of the business judgment rule doctrine in Indonesia, as contained in statutory regulations and court decisions, actually emphasize the mechanisms that must be taken by directors before making a decision, namely the obligation to prioritize the willens aspect, namely knowing a decision to be taken and the wettens aspect, namely wanting and understanding the potential consequences. by a decision to be taken. Reconstructing the business judgment rule doctrine in Indonesia by referring to practices in England, Canada, the United States and Australia, the BJR regulations in Indonesia actually require reconstruction or updating in the future by formulating specific regulations regarding the BJR doctrine in Indonesia and providing space for judicial institutions to develop the application of the BJR doctrine according to developing cases.

Keywords: *Business Judgment Rule; Board of Directors; Company.*

1. INTRODUCTION

The Business Judgment Rule (BJR) doctrine is one of the doctrines that has developed amid an increasingly comprehensive business practice to protect directors' actions.¹ Efforts to protect directorial actions are necessary so that directorial actions cannot be easily held legally accountable. Directors, as crucial elements in determining a company's policies, are also given the space to take actions that, from a business logic perspective, have the potential to benefit the company.² Nevertheless, it is not uncommon for board actions aimed at prioritizing profits for the company to have the opposite effect, namely, potentially harming the company. Losses incurred by the company due to board actions in

1 Abdullah Ahmed and Alkayat Alazemi, "Introducing The Business Judgment Rule In Select Countries Of The Arabian Gulf," *Comparative Law Review* 28, no. 1 (2022): 16–20.

2 Shinta Zahara, "Construction Application by Business Judgment Rule Principle as Legal Protection against Directors' Decisions That Harm the Company," *Legal Brief* 11, no. 5 (2022): 2722–4643, <https://doi.org/10.35335/legal.xx.xx>.

this context must be protected because if all board actions are legally accountable, it can stifle the creativity of the board in facing various issues, including efforts oriented towards profit for the company.³

Businesses, as profit-oriented entities, certainly require the creativity and courage of the board of directors to make a new decision or breakthrough aimed at the company's interests.⁴ The board of directors' creativity and innovation for the company's benefit are what receive legal protection oriented towards the Business Judgment Rule (BJR) doctrine. BJR is fundamentally a doctrine where the directors of a company may be exempted from legal accountability as long as the decisions made by the company are based on thoughtful considerations and are aimed at the best interests of the company.⁵ In Indonesia, the application of the Business Judgment Rule (BJR) is essentially facilitated in Article 97 paragraph (5) of Law No. 40 of 2007 Concerning Limited Liability Companies (Company Law). Substantively, the BJR doctrine in Article 97 paragraph (5) of the Company Law emphasizes that directors cannot be held accountable for any decision made as long as they fulfil four aspects: (i) the loss incurred is not due to negligence or error on the part of the directors, (ii) the directors act in good faith, carefully make decisions in line with the company's objectives, (iii) the directors have made efforts to avoid conflicts of interest, both directly and indirectly, in relation to the company's loss, and (iv) the directors have taken measures to prevent losses to the company.

From the four aspects mentioned above, it can be seen that the Business Judgment Rule (BJR) doctrine, as part of the global business practice development, has also found its place in Indonesia, particularly through the provisions in Article 97 paragraph (5) of the Company Law. The implementation of the BJR doctrine as part of the global business evolution has also been applied in other countries based on their respective versions and variations. The more comprehensive the business development in a country, the more progressive the application of the BJR doctrine in that country. This research specifically analyzes the substance of the BJR doctrine in Indonesia compared to other countries, including the United Kingdom, Canada, the United States, and Australia.

Comparison with England, Canada, the United States, and Australia is based on the argument that these four countries have comprehensive business practice developments accompanied by distinctive Business Judgment Rule (BJR) doctrines in each country. The comparison with these four countries is intended as material for evaluating and orienting future developments regarding the BJR doctrine implemented in Indonesia. Research on the BJR doctrine in Indonesia has been conducted by various researchers before. From these previous researchers, three results of previous research discussing the BJR doctrine in Indonesia are presented: first, the research conducted by Raffles, et

³ Gerard V. Mantese and Emily S. Fields, "The Business Judgment Rule," *Michigan Bar Journal* 1, no. 1 (2020): 30-34.

⁴ Saparyanto Saparyanto Abdul Rahman, Annisa Khusnur Rosyida, Nur Afifah Aminudin, "Principle of Proportionality as a Reflection of the Theory of Justice and Its Application by Judges in the Resolution of Business Contract Disputes," *De Lega Lata* 7, no. 1 (2022): 164.

⁵ Hidayatulloh and Éva Erdős, "State-Owned Enterprise's Debt in the State Financial Regime," *Sriwijaya Law Review* 7, no. 1 (2023): 105-20, <https://doi.org/10.28946/slrev.vol7.iss1.1843.pp105-120>.

al. (2023) discussing the BJR doctrine for directors in State-Owned Enterprises.⁶ The novelty from Raffles et al.'s (2023) research asserts that the Business Judgment Rule (BJR) doctrine has two main orientations, namely, protecting the board of directors from actions necessary for business operations and simultaneously safeguarding the company from potential losses caused by the lack of good faith from the directors in deciding corporate policies.

The second study was conducted by Syaflizar (2023), analyzing the limitations of losses that can be justified by the company's board of directors through the Business Judgment Rule (BJR) doctrine.⁷ The novelty from Syaflizar's research (2023) is that the director's obligation to be responsible for company losses should be based on the concept of negligence mistakes. Therefore, outside negligence mistakes, the company directors cannot be held accountable. The third research, conducted by Darmawangsa (2023), discusses some errors in understanding the Business Judgment Rule (BJR) doctrine. The novelty from Darmawangsa's research (2023) is that Article 97 paragraph (5) of the Company Law still broadly understands the BJR doctrine. Thus, besides the need for specific regulations regarding the BJR doctrine, there is also a need for updating the BJR doctrine regulations in Indonesia to address the massive business developments.⁸

From the three aforementioned previous studies, it can be concluded that the author's research, which focuses on the legal analysis of the application of the Business Judgment Rule (BJR) in comparison with the legal systems of England, Canada, the United States, and Australia, serves as an evaluation and orientation for the future development of BJR doctrine in Indonesia. The analysis and in-depth study of the implementation of BJR doctrine in Indonesia have not been conducted in the three previous studies mentioned above. Therefore, this research is considered original.

This research, which focuses on the comparative legal analysis of the application of the Business Judgment Rule (BJR) in Indonesia, with reference to the legal systems of England, Canada, the United States, and Australia, serves as a basis for evaluation and future development of the BJR doctrine in Indonesia. It is a normative legal research that centers on the analysis of authoritative legal materials, including statutory regulations and court decisions. The primary legal sources for this research include the Indonesian Criminal Code (KUHPer), the Company Law (UU PT), Supreme Court Decision No. 417 K/PID.SUS/2014, Supreme Court Decision No. 121 K/Pid.Sus/2020, and regulations related to BJR in England, Canada, the United States, and Australia. Secondary legal sources consist of journal articles, books, and research findings discussing the BJR doctrine, particularly in Indonesia, England, Canada, the United States, and Australia. Non-legal sources include language dictionaries. The research employs a conceptual, legislative, case-based, and comparative approach.

6 Raffles Ersya, Muhammad Haris, Sahuri Lasmadi, "Principles Of Business Judgment Rule For Directors Of State Owned Enterprises," *Das Sollen* 9, no. 1 (2023): 549–61.

7 Larassati Putri Syaflizar, "Business Judgment Rule: Sebuah Prinsip Tanggung Jawab Direksi Atas Kerugian Dalam Pengelolaan Bumn (Persero)," *Jurnal Privat Law* 11, no. 1 (2023): 140, <https://doi.org/10.20961/privat.v11i1.45950>.

8 Williem Darmawangsa, "Interpretasi Yang Salah Mengenai Business Judgment Rule Pada Substansi Dan Struktur Hukum Di Indonesia," *Unes Law Review* 5, no. 3 (2023): 1356–68.

2. ANALYSIS AND DISCUSSION

2.1. Principles and Characteristics of the Business Judgment Rule Doctrine in Indonesian Legislation and Court Decisions

The development of business requires every director to be creative and even progressive in making decisions or corporate policies that can accommodate the existing business developments.⁹ The demand for the board of directors to be creative and progressive not only requires courage in exercising discretion but also necessitates a safety action to ensure that every creative and even progressive decision by the board of directors is not always considered legally responsible.¹⁰ Every board decision associated with legal accountability makes the board afraid to make a decision or corporate policy that can accommodate the existing business developments. The board may even opt for a safe approach by being passive and choosing to remain silent rather than taking the risk of a decision that has been made.¹¹ To provide a sense of security for the board of directors in making a decision aimed at accommodating business development, the Business Judgment Rule (BJR) doctrine finds its relevance in every directorial decision intended for the benefit of the company.

The BJR doctrine, in the context of legal science, is a doctrine or scientific construction created by experts related to a specific legal act or event.¹² In legal science, doctrine can serve as a legal source that strengthens the substance of legislation and can even be considered as a consideration for judges in deciding a particular legal case.¹³ The doctrine in legal science itself essentially has two classifications, namely, first, the doctrine that has not been accommodated in positive law or in statutory regulations, and second, the doctrine that has been accommodated in positive law.¹⁴ Regarding the BJR doctrine, the BJR doctrine is essentially qualified as the second type of doctrine, which has been accommodated in positive law, as clarified in Article 97 paragraph (5) of the Company Law in Indonesia.

Article 97 paragraph (5) of the Company Law explicitly states that the board of directors cannot be held accountable for any decisions made as long as they fulfil four aspects: (i) losses resulting from decisions made are not due to negligence or errors on the part of the directors, (ii) the directors act in good faith and with due care, making decisions in line with the company's objectives, (iii) the directors have made efforts to avoid any conflicts of interest, both directly and indirectly related to the company's

9 Ariawan Gunadi Berry Gunawan, "Doctrin Business Judgment Rule Analysis As An Effort To Protect The Law Of Directors Of Limited Liability Companies In Indonesia And The United States," *Edunity* 2, no. 10 (2023): 1198–1209.

10 Hari Sutra Disemadi, Mochammad Abizar Yusro, and Ali Ismail Shaleh, "Perlindungan Hukum Keputusan Bisnis Direksi BUMN Melalui Business Judgement Rule Doctrine," *Jurnal Jurisprudence* 10, no. 1 (2020): 127–45, <https://doi.org/10.23917/jurisprudence.v10i1.11006>.

11 Genta Arief Gunadi et al., "Peran Stake Holder Dalam Pemenuhan Prinsip Business Judgement Rule (BJR) Direksi BUMN," *Jurnal Pendidikan Tambusai* 8, no. 1 (2024): 405–14.

12 Eduardus Bayo Sili, Kurniawan Kurniawan, and Gatot Dwi Hendro Wibowo, "Implementation of the Doctrine of Business Judgment Rule in Management of Limited Liability Companies," *International Journal of Multicultural and Multireligious Understanding* 8, no. 2 (2022): 627–45.

13 Nick Sage, "Relational Wrongs and Agency in Tort Theory," *Oxford Journal of Legal Studies* 41, no. 4 (2021): 1012–39, <https://doi.org/10.1093/ojls/gqab009>.

14 Marika Turava, "The Scope of the Business Judgment Rule and Its Relation to the Fiduciary Duties of Company Directors," *Journal of Law* 1, no. 1 (2023): 224–51, <https://doi.org/10.60131/jlaw.1.2023.7073>.

losses, and (iv) the directors have taken measures or actions to prevent losses to the company. Although Article 97 paragraph (5) of the Company Law does not explicitly state that it is a manifestation of the Business Judgment Rule (BJR) doctrine, based on its substance, it can be seen as a manifestation of the BJR doctrine.

Article 97, paragraph (5) of the Company Law, which regulates the substance of the Business Judgment Rule (BJR), essentially still has two problematic aspects. Firstly, one of the reasons why a director cannot be held accountable for every decision made is when the loss incurred from the decision is not due to negligence or errors on the part of the director. The aspect of negligence or errors by the director requires further clarification, as it remains somewhat ambiguous in its concept. Negligence or errors also relate to the concepts of negligence mistakes and honest mistakes.¹⁵ The unclear aspect in Article 97 paragraph (5) of the Company Law is whether the negligence or mistakes in the Business Judgment Rule (BJR) doctrine adopted by the Company Law actually refer to the concept of negligence mistakes or honest mistakes. This is what is still overlooked in the regulation of Article 97 paragraph (5) of the Company Law.

The second issue in Article 97 paragraph (5) of the Company Law is the ambiguity regarding the director's attempt to avoid conflicts of interest, both directly and indirectly, in relation to company losses. The limit of "indirect" conflicts of interest is something unclear, and if there is no limitation or explanation regarding "indirect" conflicts of interest, the regulation in Article 97 paragraph (5) of the Company Law could potentially increase the pressure on directors. This is because directors may be held accountable for conflicts of interest, even indirectly, in their decisions, instead of aiming to protect directors for decisions made in the best interest of the company.¹⁶ From the two problems regarding the regulation of the BJR doctrine in Article 97 paragraph (5) of the Company Law, it can be seen that although the BJR doctrine in Article 97 paragraph (5) of the Company Law has a good purpose of protecting directors, if the two aforementioned problems are not addressed, it may potentially harm the directors instead of providing protection.

The regulation regarding the BJR doctrine, especially in Article 97 paragraph (5) of the Indonesian Company Law, is part of the global development of business law. The development of business law in the global era is characterized by an understanding of the importance of a particular legal principle or concept that must be applied by various countries around the world.¹⁷ Although the principles or concepts of a particular legal system as part of business law development must be applied by various countries around the world, their implementation can vary depending on the conditions and legal systems adopted by each country.¹⁸ The BJR doctrine, as part of the global development

15 Jeffrey MacIntosh, "The Business Judgment Rule, the Public Interest Powers, and the 'Fair and Reasonable' Test: Fellow Travellers or Ships in the Night?," *Osgoode Hall Law Journal* 60, no. 1 (2023): 73–125, <https://doi.org/10.60082/2817-5069.3876>.

16 Selamat Lumban Gaol, "Aturan Kebijakan Bisnis (Business Judgment Rule) Sebagai Alasan Penghapus Pertanggungjawaban Pidana Pribadi Direksi Perseroan Terbatas Atas Kerugian Perseroan Terbatas Berdasarkan Yurisprudensi Mahkamah Agung Republik Indonesia Di Luar Kitab Undang-Undang," *Jurnal Ilmiah Hukum Dirgantara* 12, no. 1 (2021): 52.

17 Ahmed and Alazemi, "Introducing The Business Judgment Rule In Select Countries Of The Arabian Gulf."

18 Yafet Yosafet Wilben Rissy, "Business Judgment Rule: Ketentuan Dan Pelaksanaannya Oleh Pengadilan Di Inggris, Kanada Dan Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 32, no. 2 (2020): 275,

of business law, is essentially intended to protect directors as those responsible for every decision made by the company.¹⁹ The importance of the position of the board of directors in business law practices in the modern era necessitates that directors be exempted from personal responsibility for aspects in which they have been careful or have a mature understanding of a decision made for the benefit of the company.

The individual exemption from accountability for directors regarding decisions that impact the company should be viewed from two aspects: first, in the modern business era that emphasizes the aspect of good corporate governance, directorial decisions are not always related solely to formal legal mechanisms but may also accommodate the increasingly massive business developments.²⁰ The development of business, whether regional or global in nature, is dynamic, making progressive decisions from the board crucial to accommodate the ongoing business developments. This emphasizes that individual accountability exceptions for directors regarding decisions that impact the company are relevant when applied to decisions related to efforts to accommodate business development. Secondly, individual accountability for directors regarding decisions that impact the company should also be viewed in terms of the intent of the directors making the decision.

The intensity or intention of the board of directors in making a decision also needs to be considered, namely whether the board of directors has been careful and prioritized careful considerations for the benefit of the company when making a decision.²¹ If in making a decision, the board of directors has been careful and prioritized thoughtful considerations for the benefit of the company, then the board of directors should be legally protected in accordance with the Business Judgment Rule (BJR) doctrine. Conversely, if in making a decision, the board of directors is not careful and does not prioritize thoughtful considerations for the benefit of the company, then the directors may be personally liable if the decision taken is detrimental to the company.²²

Referring to the provisions of Article 97 paragraph (5) of the Company Law that accommodates the application of the Business Judgment Rule (BJR) doctrine, at least in Article 97 paragraph (5) of the Company Law, it is emphasized regarding four main principles in regulating the BJR doctrine, namely: the principle of good faith, the principle of prudence, the principle of utility, and the principle of legal certainty. The principle of good faith itself in Indonesian law is expressly stated in Article 1338 paragraph (3) of the Civil Code, which substantively asserts that good faith is a fundamental principle

<https://doi.org/10.22146/jmh.56117>.

19 Imastian Chairandy Siregar et al., "Tanggung Jawab Dan Tata Kelola Perseroan Perorangan Sebagai Badan Hukum Baru Di Indonesia," *Locus Journal of Academic Literature Review* 1, no. 1 (2022): 26–35, <https://doi.org/10.56128/ljoalr.v1i1.49>.

20 Gülşen Pazarbaşı and Ece İlci Gönenç Gürkaynak, Esq., "Business Judgment Rule: A Legal Theory or a Real Protection for the Board Members in Turkey?," 2020, <https://doi.org/10.1016/j.qref.2017.01.001> <http://dx.doi.org/10.1016/j.cirp.2016.06.001> <http://dx.doi.org/10.1016/j.powtec.2016.12.055> <https://doi.org/10.1016/j.ijfatigue.2019.02.006> <https://doi.org/10.1016/j.matlet.2019.04.024> <https://doi.org/1>.

21 Friedrich Hamadziripi and Patrick C. Osode, "A Critical Analysis of Zimbabwe's Codified Business Judgment Rule and Its Place in the Corporate Governance Landscape," *Law, Democracy and Development* 25, no. 2021 (2021): 1–29, <https://doi.org/10.17159/2077-4907/2021/ldd.v25.20>.

22 Lucie Josková, "The Business Judgment Rule in the Czech Republic," *Acta Universitatis Carolinae Iuridica* 68, no. 3 (2022): 37–47, <https://doi.org/10.14712/23366478.2022.34>.

in contract law.²³ Nevertheless, extensively, the principle of good faith is essentially a general legal principle that can be applied in various legal fields. Specifically related to the Business Judgment Rule (BJR) doctrine, the principle of good faith can be used as a means to assess whether the actions of a director have accommodated the principle of good faith in a corporate decision. The principle of prudence in the BJR doctrine is related to the decision-making of a company by the board of directors, which must prioritize careful consideration.²⁴ This is to emphasize that the board of directors, in making decisions for a company, should not be done arbitrarily and must be based on careful consideration, especially regarding the risks involved.

The principles of utility related to the BJR doctrine are relevant to the board of directors in making decisions for a company, whether prioritizing benefits in the form of a focus on maximizing corporate profits or avoiding the company from specific losses or risks.²⁵ The principles of utility associated with this BJR doctrine emphasize the aspect of rationality, where the management in making decisions for a company must have an orientation towards whether a decision made is oriented towards optimizing the company's profits or avoiding the company from certain losses or risks. The principle of legal certainty related to the BJR doctrine lies in the limitation or specific determination of standards regarding the exemption of directorial accountability based on the BJR doctrine, and the limits and standards must be precisely defined.²⁶ Referring to Article 97 paragraph (5) of the Company Law, the limits and standards of the Business Judgment Rule (BJR) manifestation in Indonesia have actually been precisely defined as regulated in Article 97 paragraph (5) of the Company Law.

Based on the four principles mentioned above, namely the principle of good faith, the principle of prudence, the principle of utility, and the principle of legal certainty as stated in Article 97 paragraph (5) of the Company Law, it can be concluded that the application of the BJR doctrine is essentially related to the procedures or mechanisms that must be followed by the board of directors before formulating a corporate decision. This is essentially unrelated to the substance of the corporate decision issued by the board of directors. Regarding the four principles mentioned above, namely the principles of good faith, prudence, utility, and legal certainty, the application of the BJR doctrine emphasizes that every director, in making decisions related to the company, must prioritize the aspect of *willens*, which is knowing a decision to be made, and the aspect of *wettens*, which is desiring and understanding the potential consequences of a decision to be made.²⁷

23 Jan Halberda, "The Principle of Good Faith and Fair Dealing in English Contract Law," *Pravovedenie* 64, no. 3 (2020): 313.

24 Melissa Seenacherry, "Liability of Company Directors: The Business Judgment Rule As Developed in the US and Adopted By Germany Compared To the Netherlands' Approach," *Amsterdam Law Forum* 12, no. 1 (2020): 75, <https://doi.org/10.37974/alf.345>.

25 Desty Sari Wardani, "Perlindungan Direksi Terhadap Keputusan Bisnis Melalui Penerapan Prinsip Business Judgment Rules Di Amerika Serikat, Jepang, Dan Indonesia," *Dharmasiswa* 2, no. 3 (2023): 1141, <https://doi.org/10.1080/14735970.2017.1412688>.

26 OECD-Latin America Roundtable on Corporate Governance, "The Business Judgment Rule: A Comparative Analysis," 2023.

27 Ghani Satria Hartanto, Dewi Kania Sugiharti, and Anita Afriana, "Aktualisasi Mitigasi Risiko Bisnis Berdasarkan Prinsip Fiduciary Duty Dan Business Judgment Rule," *Jurnal Sains Sosio Humaniora* 5, no. 2 (2021): 1191–1202, <https://doi.org/10.22437/jssh.v5i2.16535>.

The practice of applying the BJR doctrine in Indonesia is exemplified in Supreme Court Decision No. 417 K/PID.SUS/2014, which concerns the legal relationship of the lease of a Boeing 737 aircraft between PT A and PT B.²⁸ In the verdict, the board of directors cannot be held legally accountable because the leasing transaction of the Boeing 737 aircraft between PT A and PT B was conducted for the benefit of the company, specifically to replace old aircraft with new ones. Another relevant decision related to the application of the Business Judgment Rule (BJR) in Indonesia is the Supreme Court Decision No. 121 K/Pid.Sus/2020. Substantively, Supreme Court Decision No. 121 K/Pid.Sus/2020 asserts that directors cannot be held legally accountable when making corporate decisions, emphasizing the absence of fraud, intentional wrongdoing, errors, or unlawful acts, as well as the absence of conflicts of interest.²⁹

From the analysis above, it can be concluded that the principles related to the Business Judgment Rule (BJR) doctrine in Indonesia include the principles of good faith, prudence, utility, and legal certainty. The characteristics of BJR in Indonesia, as stipulated in laws and court decisions, emphasize the mechanisms that directors must follow before making decisions. This involves prioritizing the willens aspect, which means being aware of the decision to be made, and the wettens aspect, which involves desiring and understanding the potential consequences of the decision. Additionally, the characteristics of BJR in Indonesia also emphasize that the BJR doctrine applies when corporate decisions by the directors do not involve elements of fraud or intentional misconduct, there are no errors or intentional unlawful acts, and there is no conflict of interest.

2.2. Comparison and Reconstruction of the Business Judgment Rule Doctrine in Indonesia

The practice of implementing the BJR doctrine in Indonesia, referring to Article 97 paragraph (5) of the Company Law, actually needs to be evaluated in relation to efforts to improve the BJR doctrine. This is because the regulation of the BJR doctrine in Indonesia inherently has two problems: first, one of the reasons why a director cannot be held accountable for every decision made is when the loss incurred from a decision is not due to negligence or error on the part of the director. The aspect of negligence or error by the director actually requires further explanation because the concept of negligence or error by the director is still ambiguous; in its concept, negligence or error is also related to the concepts of negligence mistakes and honest mistakes.³⁰ The unclear aspect in Article 97 paragraph (5) of the Company Law is whether the negligence or errors in the Business Judgment Rule (BJR) doctrine adopted by the Company Law actually refer to the concept of negligence mistakes or honest mistakes. This is still overlooked in the regulation of Article 97 paragraph (5) of the Company Law.

28 Andika Wijaya, "Implementation of the Doctrine of the Business Judgment Rule on Bankruptcy Law in Indonesia," *Yuridika* 35, no. 1 (2019): 1, <https://doi.org/10.20473/ydk.v35i1.12436>.

29 Gloria Angelita and Eko Saksono, "The Role of Communication Corporate To Save the Reputation of PT. Garuda Indonesia, Tbk (BUMN Companies Restructure & BJR Implimentation)," *American Journal of Humanities and Social Sciences Research* 7, no. 3 (2023): 64–69.

30 MacIntosh, "The Business Judgment Rule, the Public Interest Powers, and the 'Fair and Reasonable' Test: Fellow Travellers or Ships in the Night?"

The second issue in Article 97 paragraph (5) of the Company Law is the ambiguity regarding the aspect where directors have attempted to avoid conflicts of interest, both directly and indirectly, in relation to company losses. The boundary of “indirect” conflicts of interest is something unclear, and if there is no limitation or explanation regarding “indirect” conflicts of interest, the regulation in Article 97 paragraph (5) of the Company Law may potentially add pressure on directors. Instead of aiming to protect directors for decisions made in the best interest of the company, the regulation could potentially make directors more burdened, as they might be held accountable for “indirect” conflicts of interest in their decisions.³¹ From the two issues regarding the regulation of the Business Judgment Rule (BJR) in Article 97 paragraph (5) of the Company Law, it can be observed that although the BJR doctrine in Article 97 paragraph (5) of the Company Law has a good intention to protect directors, if the two issues mentioned above are not addressed, it may potentially result in directors being harmed by that provision instead.

If we refer to the two issues regarding the regulation of the BJR doctrine above, efforts are needed to compare the application of the BJR doctrine with various countries worldwide. The effort to compare the implementation of the BJR doctrine in Indonesia with other countries is because the BJR doctrine is part of the global development of business law. This means that the BJR doctrine is also applied in other countries with varying applications. In this study, a comparison of the application of the BJR doctrine is conducted with several countries, namely England, Canada, the United States, and Australia. At a glance, these four countries compared are common law legal system countries. This is reasonable considering that the BJR doctrine was originally commonly applied in countries with a common law legal system.³²

The BJR doctrine is essentially a development of the fiduciary duty doctrine with its main principle being the duty of skill and care principle, which emphasizes that the leaders of a company can be exempt from accountability if a company decision has been made with reference to the fiduciary duty doctrine such as prudence or careful consideration before making a decision.³³ Because initially known in countries with a common law legal system, it is reasonable to compare the application of the Business Judgment Rule (BJR) in this study with countries having a common law legal system. Referring to the perspective of Peter D. Cruz, legal comparison is an effort to compare the legal validity in one country with another based on parameters that are both micro and macro in nature.³⁴ The parameters that are of a micro nature specifically relate to the application of specific laws that are substantively the same, including comparisons of court decisions as the implementation of legal provisions in a particular field.

31 Gaol, “Aturan Kebijakan Bisnis (Business Judgment Rule) Sebagai Alasan Penghapus Pertanggungjawaban Pidana Pribadi Direksi Perseroan Terbatas Atas Kerugian Perseroan Terbatas Berdasarkan Yurisprudensi Mahkamah Agung Republik Indonesia Di Luar Kitab Undang-Undang.”

32 Mikkel Skriver Villsen, “The Business Judgment Rule – Reglens Ophav Og Dens Indmarch i Dansk Retspraksis The Business Judgment Rule - The Origin of the Rule and Its Entrance into Danish Jurisprudence,” 2021, 1–43.

33 Mas Putra Zenno Januarsyah et al., “Penerapan Doktrin Business Judgment Rule Dalam Perkara Tindak Pidana Korupsi Karen Agustian,” *Jurnal Ius Constituendum* 7, no. 1 (2022): 143, <https://doi.org/10.26623/jic.v7i1.4922>.

34 Peter De Cruz, *Comparative Law in a Changing World* (London: Taylor & Francis Group, 2015).

Parameters that are of a macro nature involve comparing legal aspects applicable in one country with another on a general level and drawing general principles regarding the implementation of a particular legal substance.³⁵ This research refers to the perspectives of Peter D. Cruz, which is a macro-level comparative legal study that focuses on the substance of applying the Business Judgment Rule (BJR) doctrine in the legal systems of England, Canada, the United States, and Australia.

In England itself, the development of the Business Judgment Rule (BJR) doctrine has long been underway and is even a part of *stare decisis*, which is the binding law, and English judges are obligated to adhere to the provisions regarding the BJR doctrine. Nevertheless, in England, the evolving concept is not truly the BJR doctrine but rather the Business Judgment Doctrine, which develops contextually through various practices in the courts.³⁶ This affirms that, unlike in Indonesia where it is regulated in Article 97 paragraph (5) of the Company Law, the business judgment rule (BJR) in England is not specifically governed by statutory regulations. Nevertheless, in practice, in some court decisions in England, the business judgment doctrine becomes a primary consideration for judges, as seen in the case of *Re City Equitable Fire Insurance Co Ltd* in 1925. In this case, Judge Romer emphasized that directors or company leaders cannot be held accountable if, in making decisions, they prioritize the duty of skill and care principle.³⁷ Another case in 1999 was the *Re Barings Plc & Others* case, in which the judge emphasized that the duty of skill and care principle, in practice, is dependent on the case, meaning it must be adapted to the context of the issues at hand and is flexible. In further developments, the duty of skill and care principle evolved in various cases in the UK, and in its progression, it is considered more precise with the use of the term “commercial judgment.”³⁸ In England, the development also saw the formulation of The UK Companies Act 2006. Although it does not specifically mention the Business Judgment Rule (BJR) doctrine, it imposes limitations on the duties of directors in companies, including the obligation to act with care before deciding on corporate policies.

In Canada, the BJR (Business Judgment Rule) doctrine also evolves through the duty of skill and care principle, similar to its application in England. In Canada, specifically, the duty of skill and care principle is formulated in Article 122(1)(b) of the CBCA 2019 (Canada Business Corporations Act), which emphasizes that good faith is the primary principle allowing directors to be exempted from liability for corporate decisions.³⁹ In practice, the Business Judgment Rule (BJR) doctrine in Canada has been evolving, as exemplified in the 1998 case of *Maple Leaf Foods v Schneider*. In this case, the judge affirmed that good faith is a fundamental principle for a board of directors, and directors

35 Herlambang Perdana Wiratraman, “The Challenges of Teaching Comparative Law and Socio-Legal Studies at Indonesia’s Law Schools,” *Asian Journal of Comparative Law* 14, no. 1 (2019): 236.

36 Rissy, “Business Judgement Rule: Ketentuan Dan Pelaksanaannya Oleh Pengadilan Di Inggris, Kanada Dan Indonesia.”

37 Rissy.

38 Nabila Ghina Dzakhirah Wilda Shafira, Ananda Elena Nur Azizah, Primanadya Dian Pamella, “Business Judgment Rule Dalam Perspektif Hukum Progresif: Esensi Dan Implikasinya Di Indonesia,” *Rechtsidee* 11, no. 1 (2022).

39 Rissy, “Business Judgement Rule: Ketentuan Dan Pelaksanaannya Oleh Pengadilan Di Inggris, Kanada Dan Indonesia.”

can be exempted from liability for corporate decisions if they act in good faith. Good faith, in this context, involves the directors acting honestly and considering various existing risks.⁴⁰

In the United States, the BJR doctrine is essentially formulated in The MBCA 2016 (Model Business Corporate Act), one of its key components being the duty of care and loyalty. Directors of a company are required not only to be cautious but also to consider the benefits or interests of the company in decision-making.⁴¹ However, the business judgment rule (BJR) doctrine in the United States has specific exceptions, particularly regarding potential conflicts of interest. If directors are proven to have a conflict of interest, they cannot shield themselves with the BJR doctrine. Furthermore, the Supreme Court of the United States, in various rulings, has formulated eight main principles of the BJR doctrine, including: a decision oriented towards business or commercial interests, a decision made after considering reliable sources of information, executed in good faith, carried out with care, absence of fraud or illegality, absence of unfair dealing, and a decision made within the discretion of the directors as stipulated in the company's regulations.⁴²

The practice of applying the BJR (Business Judgment Rule) doctrine in Australia is regulated through the Corporations Act of 2001 (The Australia Corporations Act 2011). The Australia Corporations Act 2011 governs four essential conditions of the BJR doctrine in Australia, which include: acting in good faith, absence of conflicts of interest, having reasonable and reliable information before making a decision, and being directed for the benefit of the company.⁴³ The interesting thing about The Australia Corporations Act 2011 is that the business judgment rule (BJR) in Australia is also related to force majeure circumstances, where the presence of certain conditions and situations makes business losses unavoidable.

Referring to the practice of the Business Judgment Rule (BJR) in England, Canada, the United States, and Australia, it can be observed that, in addition to being regulated by legislation, provisions regarding the BJR doctrine generally evolve through court decisions. Referring to the parameters of the BJR doctrine in the United States, which have specifically imposed restrictions on the BJR, the regulation of the BJR in Indonesia essentially requires reconstruction or future updates by formulating specific regulations on the BJR doctrine in Indonesia and allowing the judiciary to develop the application of the BJR doctrine according to evolving cases.

3. CONCLUSION

The principles related to the Business Judgment Rule (BJR) doctrine in Indonesia include the principles of good faith, prudence, utility, and legal certainty. The

40 Joan Loughrey, "Business Judgments And Directors' Accountability," *School of Law, Queen's University Belfast*, 2018.

41 Wardani, "Perlindungan Direksi Terhadap Keputusan Bisnis Melalui Penerapan Prinsip Business Judgment Rules Di Amerika Serikat, Jepang, Dan Indonesia."

42 Anisatur Rohmah and Ahmad Musadad, "Konsep Business Judgment Rule Dalam Perspektif Masalah Mursalah," *Nukhbatul 'Ulum* 9, no. 2 (2023): 178-92, <https://doi.org/10.17977/um019v6i1p72-81.1>.

43 Hamadziripi and Osode, "A Critical Analysis of Zimbabwe's Codified Business Judgment Rule and Its Place in the Corporate Governance Landscape."

characteristics of BJR in Indonesia, as outlined in legislation and court decisions, emphasize the mechanisms that directors must follow before making decisions. This involves prioritizing the willens aspect, which entails understanding the decision to be made, and the wettens aspect, which involves desiring and understanding the potential consequences of the decision. Additionally, the characteristics of BJR in Indonesia emphasize that the BJR doctrine is applicable when corporate decisions by directors do not involve fraud, intentional wrongdoing, legal violations, or conflicts of interest.

The reconstruction of the business judgment rule doctrine in Indonesia, with reference to practices in the United Kingdom, Canada, the United States, and Australia, suggests that the regulation of BJR in Indonesia inherently requires reconstruction or future updates. This involves formulating specific regulations on the BJR doctrine in Indonesia and allowing the judiciary to develop the application of the BJR doctrine in accordance with evolving cases.

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