



The Moral Struggle of the Theory of Reversal of the Burden of Proof in the Accountability of Directors Based on the Principle of the Business Judgment Rule in Achieving Justice

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ABSTRACT

The business judgment rule (BJR) shields corporate policy-making and managerial decisions from scrutiny. Under this doctrine, directors are not legally liable for business decisions that later result in losses, provided the decisions are made in good faith, for proper purposes, on a rational basis, and with due care. BJR is welcomed because it protects directors who must act swiftly in a dynamic business environment. Yet its application often employs a reversal of the burden of proof (*omkering van bewijs*), shifting proof obligations. This research argues that the conventional presumption of innocence has been displaced by a presumption of guilt through the reversal of burdens in corruption cases, so that accused persons are treated as having committed a “presumption of corruption.” Corporate losses in such situations represent ordinary business risk, not wrongdoing; therefore, extraordinary enforcement measures are unnecessary and would only intensify directors’ evidentiary burdens. The reverse-burden rationale is typically grounded in alleged losses to state finances and the difficulty of eradicating corruption. Even so, corporate losses should not be reclassified as a “serious crime” that triggers extraordinary measures. The findings reveal a rigid separation of law and morality in the application of reversed burdens within the BJR framework. Generalization is unwarranted: the mechanism has both benefits and drawbacks. It aids law enforcement in combating corruption, but it is less effective for directors acting in good faith, because losses arising from business risk may be construed as fault. Consequently, criminal penalties can be imposed too readily on directors, owing to the heavy burden of proof placed upon them.

Keyword:

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Presumption Of Innocence,
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INTRODUCTION

Discussing law is inextricably linked to the ideal of law, which is always a discussion of justice. According to Plato, moral force is the essential element of law, because without it, law would lose its supremacy and independence (Maurya, 2021). Justice or injustice under the law is measured by moral values that refer to human dignity and worth (Rosenkranzová, 2024; Simon, 2022). Morality is nothing less than the element that allows law to have a universal nature, because law is understood as connecting law with the ideals of socio-political life, the common good, and social justice (Brownlee & Child, 2018; Malina, 2024). The essence of law rests on the idea of justice and moral force.

The natural law school, or natural law school, as stated by Aristotle, guides the purpose of law. The primary purpose of law is to achieve the ultimate goal in society, namely justice. However, to achieve this justice, order must first be created in society. Without order, a sense of justice is impossible in society. Indeed, the purpose of law is not only to achieve justice but also to achieve legal certainty. This is as intended by the positivist school of law, which developed in the 19th century with its leader, Hans Kelsen. However, the most important and oldest purpose of law, which remains in effect today, is to ensure justice in society. However, this requires the establishment of order in society first. To create order, law is necessary as a tool for regulating society. Law functions to provide precision and order, as posited by the legal positivist school. Regarding the above, Muchtar Koesumaadmadja also stated that law is defined as:

“Law is the totality of principles and rules that regulate human interaction in society, to maintain order and achieve justice, and also includes institutions and processes that make these rules a reality in society.”

The success of law enforcement is influenced by several factors that have both positive and negative impacts, namely: the law itself (legislation), law enforcement officers as the makers and implementers, supporting facilities or means, society as the environment in which the law applies and is created, and culture as the result of human work, creativity, feelings, and intentions in social life. These five factors are closely interrelated, forming the essence of law enforcement and serving as a benchmark for its effectiveness. In line with that, John Graham emphasized that law enforcement in the field is a policy directed at crime prevention (Wolf, 2012). Hamish McRae added that law enforcement will be optimal if carried out by parties who are truly experts in their fields, and its quality will increase if enforcers have practical experience relevant to the cases they handle (Dubinsky et al., 2021; Okhrimenko et al., 2023). Thus, the synergy between norms, implementers, facilities, social environment, and culture, carried out by experienced professionals, is the key to effective law enforcement.

Law enforcement, such as in formal legal aspects, for example, in national economic development, is carried out based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental awareness, independence, and maintaining a balance between progress and national economic unity, aimed at realizing community welfare (Root & May, 2006; Saputra et al., 2023). The increase in national economic development itself requires support from a law regulating limited liability companies that can foster a conducive business climate. Conducive climate changes at that time were followed by the increasing proliferation of legal entities, one of which was the limited liability company. Likewise, the development of the business world and the economy, both at the national and

international levels, has contributed to the growth of law in the business sector. One that is constantly evolving is corporate law, particularly about business activities (Karkalakos, 2024).

Experience has shown that economic downturns in various countries, including Indonesia, are partly caused by companies in those countries not consistently implementing the principles of good corporate governance (Ahmad et al., 2021, 2023). Corporate governance is the process and structure used to direct and manage a company's business and affairs, aiming to increase business prosperity and corporate accountability. The primary goal is to realize long-term shareholder value while considering the interests of other stakeholders (Dittmar & Mahrt-Smith, 2007).

According to Detlev F. Vagts, "legally, the company's management mandate must be managed by the board of directors." In addition, the board of directors, as a PT organ, represents the interests of the PT as an independent legal subject because the existence of the PT is the reason for the existence of the board of directors (*raison d'être*) (Chang, 2016). Therefore, if there is no PT, then the board of directors will never exist. This is the reason that the board of directors must always serve the interests of the PT. In other words, the board of directors is obliged to serve the interests of all shareholders, not to serve the interests of one or several shareholders (Quinn, 2019). This means that the board of directors is not a representative of the shareholders, but is a representative of the PT, as *persona standi in iudicio* (Noor & Aziz, 2019).

The board of directors is the company's management that represents the company, both inside and outside the court. The legal norm implied in this provision is that all responsibility for the company, both in management and administration, rests with the board of

directors. According to Article 97 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as the UUPT), it states that, "the management of the company must be carried out by members of the board of directors in good faith and with full responsibility." According to Bismar Nasution, the measure of good faith and responsibility of the board of directors is the principle of fiduciary duty.

Legally, most jurisdictions describe directors as having two duties: a duty of care and a duty of loyalty (Shaner, 2010). The duty of loyalty requires a director to demonstrate unwavering and undivided loyalty to the company's shareholders. Thus, if a director sits on two corporate boards with conflicting interests (the second is trying to buy a third business, for example), they will be forced to resign from one board because it is clear that they cannot simultaneously show loyalty to the shareholders of both companies (Villiers, 2022). Second, the duty of care requires a director to exercise due diligence when making decisions. They must obtain as much information as possible about the question at issue and be able to demonstrate that in reaching a decision, they have considered all reasonable alternatives (Nilsson, 2007).

Because a limited liability company is not a person, to be a complete legal entity, it requires a board of directors. This includes the board of directors, whose duties encompass managing the company for the benefit of its stakeholders by its aims and objectives, and representing the company both within and outside the courts, as stipulated in its articles of association.

The normative law enforcement process in Law No. 40 of 2007 concerning Limited Liability Companies provides legal protection to directors, as it accommodates the business judgment rule (BJR) principle in their duties. This principle is concretely

stated in Article 97 paragraph (5) of the UUPT which states that members of the board of directors cannot be held responsible for company losses if they can prove that the losses are not due to their mistakes or negligence, that they have managed the company in good faith and with great care by the company's objectives, have no direct or indirect conflicts of interest, and have taken steps to prevent the occurrence or continuation of losses. The primary task of the board of directors is to organize, manage, and represent the company, with management being a shared responsibility among all members of the board of directors in a collegial manner. Recently, the performance of the board of directors has often been in the public spotlight because it is considered less professional, efficient, and transparent. Especially in the face of a global crisis that has the potential to plunge the company into bankruptcy, the board of directors is required to implement strategic policies to save the company. Theoretically, every business decision taken in managing a company is protected by the BJR doctrine, so directors cannot be held legally accountable even if their decisions cause losses, as long as the decisions are made with a rational basis, the correct method, the right objectives, and in good faith. The presence of this doctrine is considered very positive because it protects directors who often have to act quickly to respond to the dynamics of the uncertain business world.

Article 97 paragraph (5) of Law No. 40 of 2007 concerning Limited Liability Companies, which accommodates the principle of the business judgment rule (BJR), functions as a counterbalance to the principle of fiduciary duty, which emphasizes the obligations and prohibitions of directors. Suppose the fiduciary duty binds directors to act responsibly. In that case, the BJR protects by emphasizing that directors cannot be

burdened with responsibility for the consequences of business decisions they take, even if the decision is wrong, as long as it remains within the limits of authority, is carried out in good faith, with caution, and without conflict of interest. The BJR, which originated from the standard law legal system, essentially provides legal immunity for directors about business decisions made in running the company. This doctrine not only protects directors and commissioners, but also serves as a reference for law enforcement officials in determining whether a decision is made by legal principles or deviates from them. In common law practice, the responsibility of directors is reflected in several important cases, such as *Gries Sport Enterprises, Inc. v. Cleveland Brown Football Co., Inc.* (1986) and *Smith v. Van Gorkom*, which presents a dispute between shareholders and directors regarding violations of the principle of fairness in corporate transactions. However, the implementation of BJR in Indonesia through the Company Law has legal consequences in the form of a reversal burden of proof system (*omkering van bewijslast*), where directors must prove their innocence for the company's losses. This system is generally only appropriate for corruption crimes, particularly bribery-related gratuities, leading to debates about the fairness and morality of applying this concept to directors' responsibilities. The question that arises is whether it is appropriate to hold directors criminally liable for losses that are essentially business risks, not criminal acts of corruption.

RESEARCH METHODS

Departing from the character of the manuscript, which examines the moral-juridical tension in the application of the Business Judgment Rule (BJR) to director accountability and the implications of reversing the burden of proof, this study employs a normative/doctrinal legal

research approach with philosophical and prescriptive content. The nature of the research is descriptive-analytical, mapping existing judicial norms, doctrines, and practices, and evaluative-prescriptive, assessing the suitability of these practices about the principles of BJR, the principles of justice, and protection for directors in good faith. This assessment will then inform the formulation of recommendations for improving norms and practices.

The approach used is integrated, including: a statutory approach to the Limited Liability Company Law (UUPT), the Corruption Law (UU Tipikor), and relevant procedural law provisions; a conceptual approach to BJR, fiduciary duties (duty of care and duty of loyalty), the principle of proof, reversal of burden of proof, and the principle of fair trial; a case approach through analysis of court decisions that touch on the responsibilities of directors and the distinction between pure business risks and unlawful acts; a comparative approach to BJR practices in common law jurisdictions as a comparison that is carefully translated into the Indonesian context; and a legal philosophy approach to weigh the balance between substantive justice and procedural certainty.

The legal materials used include primary (statutory regulations and court decisions from first instance to the Supreme Court in relevant corporate/commercial civil and criminal/corruption cases), secondary (books, journal articles, theses/dissertations, and monographs on BJR, fiduciary duties, corporate governance, and the law of evidence), and tertiary (legal dictionaries and encyclopedias). All materials were collected through literature studies and decision searches using structured keywords (e.g., "Article 97 paragraph (5) of the UUPT", "BJR", "corporate losses", "good faith", "conflict of interest", "reverse burden of

proof", "Corruption in procurement", "BUMN/BUMD"), with inclusion criteria in the form of references that explicitly discuss the elements of BJR and the burden of proof for directors, as well as exclusion criteria for materials that do not contain these issues or are outside the scope of the directors' responsibilities.

To maintain consistency of analysis, key concepts are operationalized through an assessment matrix that maps each case/reference against the four elements of BJR (absence of error/negligence, good faith and due care for the benefit of the company, lack of conflict of interest, and existence of loss prevention measures), indicators of reversal of burden of proof (who bears the burden, the standard of proof applied, and the object and qualification of loss), and the proportionality test (alignment with fair trial and the limits of the use of reverse burden of proof as an extraordinary measure). The collected data are analyzed normatively-qualitatively through grammatical, systematic, historical, and teleological interpretation methods (placing BJR as a safe harbor for reasonable business decisions), supported by deductive syllogism (general norm fact conclusion), analysis of decisions on ratio decidendi and obiter dicta, and comparative analysis of foreign practices to produce lessons compatible with the Indonesian legal system. The reflective-philosophical stage (reflective equilibrium) is used to align moral principles (justice, dignity, legal objectives) with the positivity of norms in formulating policy recommendations.

The validity of the findings is maintained through source triangulation (regulations, rules, doctrines), comparative cross-jurisdictional cross-examination, and negative case analysis of seemingly deviant decisions to test the robustness of the arguments. The research procedure is step-by-step: formulation of the problem

and theoretical framework; inventory and codification of materials into a matrix; analysis of norms and decisions using the above techniques; synthesis to derive the *ius constitutum* (applicable positive law) rules while formulating *ius constituendum* (proposed reforms); and formulation of practical recommendations for law enforcement and corporations (e.g., the two-step BJR screening before the criminal regime, indicators of good faith and due care, and standards for documentation of business decisions). The research is limited to the responsibilities of directors within the framework of Article 97 of the Company Law and their relationship to the Tipikor regime; foreign decisions are used for comparison purposes only, not as a source of positive law.

RESULTS AND DISCUSSION

The Shift from the Presumption of Innocence to the Presumption of Guilt: Business Risks Do Not Lead to Criminal Prosecution

Evidence is a central point in the examination of a case in a court hearing, as it determines the fate of the defendant or accused. If the evidence presented by the defendant or accused proves their innocence, then the defendant is acquitted. Conversely, if the evidence establishes the defendant's or accused's guilt, they are declared guilty. In the judicial process in Indonesia, the parties to the case (in civil proceedings) and the accused (in criminal proceedings) are always guaranteed their rights to prove their innocence, and the presumption of innocence. The presumption of innocence in conventional evidentiary law has shifted or been abandoned, becoming a reversal of the burden of proof, which is based on the assumption that every person accused of committing a criminal act of corruption is considered guilty until proven innocent. This presumption of guilt is rooted in the assumption that every person accused of

committing a corrupt act is presumed to be guilty. The company's losses in this case are business risks, so they do not require extraordinary measures, as this would complicate the board of directors' burden of proof. This is due to the reversal of the burden of proof, which is based on the impact of losses to state finances and the difficulty of eradicating corruption. Furthermore, the company's losses cannot be considered a "serious crime" using extraordinary enforcement or measures.

One of the legal aspects in Law No. 20 of 2001 is the adoption of a system of reversing the burden of proof, which, according to the general explanation, expressly states that:

"Considering that corruption in Indonesia occurs systematically and widely, thus harming state finances but also violating the social and economic rights of the wider community, the eradication of corruption needs to be carried out in extraordinary ways, thus the eradication of criminal acts of corruption must be carried out specifically, including by implementing a reverse burden of proof system, namely the burden of proof is placed on the defendant."

Therefore, by establishing the reversal of the burden of proof, the burden of proof shifts from the public prosecutor to the defendant.

Application of Negative Non Sunt Probanda, Deviation of Actori Incumbit Onus Probandi

Actori incumbit onus probandi is a legal maxim in Latin. It means 'the burden of proof is on the plaintiff.' Every plaintiff at law or complainant at equity must show a good title or claim before they can prevail in their suit, conformably to the maxim, Actori incumbit onus probandi. This means that the burden of proof is on the plaintiff. Every plaintiff in law or complainant in equity must show a good

claim before he can win in his lawsuit. The law of evidence teaches that the distribution of the burden of proof is carried out based on the following principle: Every person who claims that he has a right, or to confirm his right, or deny the rights of others, points to an event, is required to prove the existence of that right or event. Essentially, in terms of establishing the business judgment rule, it is the directors who must demonstrate the truth of their decision, namely by reversing the burden of proof. Thus, the burden of proof in the use of the business judgment rule principle deviates from the division of the burden of proof in civil law as regulated in Hir/Rbg as stated in Article 163 HIR "whoever claims to have a right, or submits an event (feit) to confirm his right or to deny the existence of another person's right must prove the existence of the right for that event.

In this case, G.W. Patton wrote that: "Should not be forced on a person without very strong reasons." Something negative is beyond the limits of ability to be proven; therefore, according to the adage: *ultra posse nemo obligatur* (no one is obliged to do more than his ability), then the person who states/states something must be burdened with proof. The judge who examines a civil case has the authority to divide the burden of proof between the disputing parties. The division of the burden of proof is carried out by considering the principle of fair trial in the trial, so that it must be done fairly and not biased, because a division of the burden of proof that is one-sided means plunging the party who receives a hefty burden into the abyss of defeat. In civil law, the reversal of the burden of proof is known as the principle of negative non probanda, which means that something negative is difficult to prove. Something negative is usually marked by the word "No". This means that, when applying the business judgment rule, directors must be able to demonstrate their

innocence. To confirm that directors are innocent, they are required to establish the truthfulness of business decisions made by existing clauses. In Article 97, paragraph 5 of the UUPT.

The Limited Liability Company Law stipulates that members of the board of directors cannot be held personally liable if they can prove their innocence and meet the requirements as stated in Article 97 paragraph (5) of the Limited Liability Company Law. However, this provision is still a principle and therefore needs to be interpreted more concretely so that it can be applied correctly and fairly. The adoption of the business judgment rule doctrine from the standard law legal system requires Indonesia to maintain and develop universally applicable legal principles and concepts, so that it can adapt to global legal developments. In judicial practice, three main steps must be taken, namely: first, finding the law by establishing applicable rules or formulating new rules if they are not available; second, interpreting these rules by determining their meaning according to the purpose of their formation and the scope of their application; and third, applying the rules found or interpreted to the case at hand. With the existence of a negative proof system, directors must bear a significant risk if they are unable to prove their innocence. This burden is heavier than positive proof, because the party burdened with proving something negative faces greater difficulties than the party that is sufficient to prove positive things, which should be borne by the party with greater ability to do so.

In this regard, Subekti stated that, in essence, the judge should not order the seller to prove negative things by analogy, namely not to burden the seller with the burden of proving that he has not received payment, because it will be easier for the buyer to prove that he has paid. Proving in the legal sense means nothing other than

providing sufficient grounds to the judge examining the case in question to provide certainty about the truth of the events submitted. Legal proof is historical (see H. Drion's opinion, that it is said that legal proof is historical proof because what is to be proven in civil or criminal cases is something "that has happened, something that is in the past. Therefore, this legal proof aims to determine what happened in concrete terms. Thus, proof is a judge's decision based on that evidence, so here it is demonstrated how significant the role of evidentiary law is in determining the outcome of the case for the parties.

To what extent can the reversal of the burden of proof system in the business judgment rule principle be applied correctly and fairly, and can protect directors, because in its application, it uses a reversal of the burden of proof; does the application of this principle also apply to private companies and state-owned enterprises? What is the real reason for the norm or principle of the business judgment rule created by the legislators, because on the one hand, this principle is an immunity doctrine. Still, on the other hand it makes it difficult for directors to provide evidence and defend themselves in court because of the application of this reversal of the burden of proof. From the above, in the application of this reversal of the burden of proof system, it is hoped that judges can distinguish between losses experienced by the company that are the result of pure business decisions and those that are the result of unlawful business decisions by directors, thereby not merely burdening directors in terms of proof. Likewise, regarding the regulation of the reversal of the burden of proof under the business judgment rule principle, it remains vague and unclear, thereby failing to guarantee fair legal certainty.

If justice is realized in the sense that all parties are treated fairly after undergoing a fair legal process, then

substantive justice will be achieved. Conversely, if law enforcement is carried out solely to achieve legal certainty, then procedural justice will be achieved. This procedural justice is a legal process carried out solely to fulfill the provisions of positive law; however, such actions can sometimes set aside substantive justice, as the law is implemented, but justice is ignored. The main problem with the application of this reversal of the burden of proof is the inconsistency of the use of the reversal of the burden of proof itself, if it is known at a glance that the regulation regarding the reversal of the burden of proof has the same goal, namely, to facilitate the process of evidence. However, problems arise when the formulation of regulations related to the reversal of the burden of proof in the business judgment rule principle ignores the legal principles which are the basis of values for the legal regulation itself, especially regarding the exclusion of the principle of presumption of innocence and the unclear legal construction of whether the nature of this reversal of the burden of proof is pure or limited and balanced, the UUPT does not explain it clearly so that it has an impact on legal injustice and legal uncertainty.

This system of reversing the burden of proof aims to simplify evidence in specific cases or instances of a special nature. Thus, this burden of proof is very limited to a few instances that are difficult to prove, so that a system is adopted that contradicts universal principles and evidence-based standards. Discussing the law is inseparable from its relationship to the ideal of law, which is always a discussion of justice as well. According to Plato, moral strength is an essential element of law because without morality, the law will lose its supremacy and independence. Justice or injustice, according to law, will be measured by moral values that refer to human dignity and honor. Morality is nothing other than

an element that enables law to have a universal nature. Because law is understood as connecting with the ideals of socio-political life, the common good, and social justice, morality plays a crucial role. The essence of law rests on the idea of justice and moral strength.

CONCLUSION

According to Plato, moral strength is the essential element of law because without morality, the law will lose its supremacy and independence. Justice or injustice, according to law, will be measured by moral values that refer to human dignity and worth. The formulation of regulations related to the reversal of the burden of proof in the business judgment rule principle ignores the legal principles that are the basis of values for the regulation of law itself, especially regarding the exclusion of the presumption of innocence and the unclear legal construction of whether the nature of this reversal of the burden of proof is pure or limited balanced, the Company Law does not explain explicitly so that it has an impact on legal injustice and legal uncertainty for directors. The above legal facts can be a consideration for lawmakers when applying the reversal of the burden of proof in the business judgment rule principle in the future, aiming to achieve legal certainty and justice.

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