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APPLICATION OF THE BUSINESS JUDGMENT RULE DOCTRINE IN CORPORATE CRIMINAL LIABILITY IN CORRUPTION CRIMES BY STATE-OWNED ENTERPRISES

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Abstract. The wrong perspective by some of the corporate business actors in understanding the Business Judgment Rule doctrine comprehensively is even used as a tool to merely avoid corporate criminal liability from business actors and bank and insurance executives who have committed criminal acts. This study examines two problem objects as follows: first, how is the perspective of the business judgment rule doctrine in corporate criminal liability in the form of State-Owned Enterprises and second, how is the application of the Business Judgment Rule doctrine in corporate criminal liability for corruption by business entities State Owned. This legal research is doctrinal legal research, using three approaches, namely the conceptual approach, the case approach, and the statute approach. The results of the study can be concluded that first, the provisions of Article 97 paragraph (1) of the Law Number 40 of 2007 concerning Limited Liability Company Law contain the soul and spirit of the Business Judgment Rule doctrine, where the Board of Directors cannot be blamed for their decisions as long as their decisions do not contain elements of personal interest, they are decided based on the information they provide believe, by the right circumstances and rationally and the decision is the best for the company. Second, the application of the business judgment rule doctrine in corporate criminal liability for corruption by State-Owned Enterprises by referring to the systematische specialiteit principle and the logical specialty principle by Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001..

Keywords: the business judgement rule doctrine; corporate criminal liability; corruption criminal act

I. INTRODUCTION

A special type of crime that continues to recur and is increasingly complex in the realization of the development of its modus operandi is the criminal act of corruption. Corruption is an extra ordinary crime that damages and threatens the joints of the nation's life. Romli Atmasasmita **[1]** emphasized that if examined from the negative impacts since the New Order government until now, it is clear that acts of corruption are deprivation of economic and social rights of the Indonesian people, and actions that are considered arbitrary **[2]** are actions carried out without a basis of authority and contrary to court decisions with permanent legal force. Criminal acts of corruption include in the form of state financial losses, bribery, embezzlement in office, extortion, fraudulent acts, conflicts of interest in procurement and gratuities. Corruption moves overtly or covertly infiltrating along with the development process carried out at the center and in the regions. Corruption occurs in state institutions, central and local government agencies, as well as State-Owned Enterprises and Regional-Owned Enterprises that institutionalize and consciously that their actions result in harming state finances. Corruptive behavior has penetrated various sectors, even decentralized to areas involving local officials. Incomplete crackdowns on officials in budget corruption, as well as the settlement of judicial and tax mafia cases involving law enforcement officials and foreign officials, cases involving legislators both at the central and regional levels have emerged. The number of officials in the regions that are being prosecuted on suspicion of various corruption cases, further adds to the long line of enforcement of corruption cases by law enforcement agencies, both in the investigation / investigation stage and in the prosecution stage. Almost no sector or field is immune from the disease of corruption, in fact in reality it has spread to all aspects of human life. Therefore, the World Bank has called the phenomenon of corruption in Indonesia the cancer of corruption, as a chronic disease that can hinder development and destroy the potential effectiveness of all types of governmental programmes **[3]**.

Indonesia's New Order decade has also been contaminated by bribery scandals as reported by Kompas, April 13, 1999 that bribery cases committed by five Japanese contractor companies Taisei Corp, Obayashi Corp., Tekken Corp., Kajima Corp. and Tokai Kagyo Corp. worth Rp. 96.92 billion, involved a number of officials in Indonesia to win tenders and tax evasion. Kajima Corp gave bribes of 80 million yen (around Rp. 5.76 billion), Taisei Corp of 30 million yen (around Rp. 2.16 billion), Tekken Corp of 40 million yen (around Rp. 2.88 billion), Tokai Corp of 10 million yen (around Rp. 720 million) and Obayashi Corp of Rp. 120 million yen (around Rp. 86.4 billion). This data that

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was successfully known, not to mention that was not successfully monitored. A series of bribery scandals committed by these corporations, shows that the area of corporate crime is not only limited to local, national, but also international, namely foreign corporations that bribe officials with the intention of obtaining economic benefits from the bribery **[4]**. Corruption cases in corporations in the form of State-Owned Enterprises (SOEs) where the Prosecutor's Office has refiled the charges of 13 (thirteen) corporations corruption cases of PT. Asuransi Jiwasraya, to the Central Jakarta Corruption Criminal Court (PN Tipikor). Head of the Central Jakarta State Prosecutor's Office (Kajari Jakpus), Bima Suprayoga, said the reindictment of Investment Managers (MI) related to the Rp 16.8 trillion state loss case would be carried out by separating the charges into 13 files according to the interlocutory decision of the panel of judges. The Central Jakarta District Attorney's Office has reassigned it on August 20, 2020 to the Corruption District Court in Central Jakarta. The transfer of 13 defendants each became 13 indictment files. **[5]**. In this 13 MI case, the investment fund management corporation was accused of being involved in corruption, and financial irregularities in Jiwasraya. These MI companies include; PT. Danawhibawa Investment Management, or PT. PAN Arcadia Capital (DMI or PAC), PT. Oso Investment Management (OMI), PT. Pinaccle Persada Investama (PPI), PT. Millenium Dana Tama, or PT. Millennium Capital Management (MD or MCM), PT. Prospera Asset Management (PAM), PT. MNC Asset Management (MNAM), PT. Maybank Asset Management (MyAM), PT. GAP Capital (GAP), PT. Capital Asset Management Services (JCAM), PT. Pool Advista Management (PAAM), PT. Corfina Capital (CC), PT. Treasure Fund Investama (TFI), PT. Sinar Mas Asset Management (SAM) **[5].** The corporate defendants are said to have taken part in managing IDR 12.15 trillion of Jiwasraya's stock investment funds, mutual funds, and medium-term notes (MTN). The management of these investments benefited other parties which made the state lose Rp 16.8 trillion. Other beneficiaries related to this case have previously been convicted. They include Benny Tjokrosaputro, Heru Hidayat, Joko Hartono Tirto, Hendrisman Rahim, Hary Prasetyo, and Syahmirwan. The names were sentenced to life imprisonment. The others, Fakhri Hilmi and Piter Rasiman, were sentenced to 6 years in prison and 20 years in prison respectively **[5].**

The Central Jakarta District Attorney's Office (Kejari) on August 25, 2021 has executed 6 convicts related to Corruption Criminal Cases (Tipikor), Money Laundering Crimes (TPPU), Financial Management and Investment Funds at PT. Asuransi Jiwasraya (PT. AJ) Persero. This was done after Kejari Central Jakarta received 6 (six) Citations of Verdict from the Supreme Court against the 6 (six) people with the convicts executed by the Central Jakarta District Attorney's Office with:[6]

a. The Decision of the Supreme Court of the Republic of Indonesia Number: 2931 K / Pid.Sus / 2021 dated August 24 on behalf of, among others: Defendant Heru Hidayat, rejected the cassation application from the Cassation Applicant, both the Defendant and the Public Prosecutor.
b. The Decision of the Supreme Court of the Republic of Indonesia Number: 2933 K / Pid.Sus / 2021 dated August 24 on behalf of the Defendant Hary Prasetyo, sentenced him to imprisonment for 20 (twenty) years and a fine of IDR 1,000,000,000 (one billion rupiah) provided that if the fine is not paid, the Defendant is subject to a criminal substitute in the form of imprisonment for 6 (six) months.
c. The Decision of the Supreme Court of the Republic of Indonesia Number 2935 K / Pid.Sus / 2021 dated August 24 on behalf of the Defendant Hendrisman Rahim, imposes a prison sentence of 20 (twenty) years and a fine of IDR 1,000,000,000 (one billion rupiah) provided that if the fine is not paid, the Defendant is subject to a criminal substitute in the form of imprisonment for 6 (six) months.
d. The Decision of the Supreme Court of the Republic of Indonesia Number: 2937 K / Pid.Sus / 2021 dated August 24 on behalf of the Defendant Benny Tjokrosaputro, rejected the cassation application from the Cassation Applicant, both the Defendant and the Public Prosecutor.
e. The Decision of the Supreme Court of the Republic of Indonesia Number: 2939 K / Pid.Sus / 2021 dated August 24 on behalf of the Defendant SyahmirwaN, imposes a prison sentence of 18 (eighteen) years and a fine of IDR 1,000,000,000 (one billion rupiah) provided that if the fine is not paid, the Defendant is subject to a criminal substitute in the form of imprisonment for 6 (six) months.
f. The Decision of the Supreme Court of the Republic of Indonesia Number: 2971 K / Pid.Sus / 2021 dated August 24 on behalf of the Defendant JOKO HARTONO TIRTO, sentenced him to imprisonment for 20 (twenty) years and a fine of IDR 1,000,000,000 (one billion rupiah) provided that if the fine is not paid, the Defendant is subject to a criminal substitute in the form of imprisonment for 6 (six) months.

The Executing Prosecutor has carried out corporal criminal executions against the six Convicts each; Convict Heru Hidayat has been executed at the Cipinang State Detention Center. Convict Hary Prasetyo has been executed at Salemba State Detention Center; Convict Hendrisman Rahim has been executed at the Salemba State Detention Center by first being transferred from the KPK detention center. Convict Benny Tjokro Saputro has been executed at Cipinang Penitentiary. Convict Syahmirwan has been executed at Cipinang State Detention Center; Convict Joko Hartono Tirto has been executed at the Cipinang State Detention Center. The Prosecutor Executor will immediately complete the execution of criminal fines, evidence, costs of each convict according to the decision of the case a quo **[6]**

Furthermore, in 2022, the Attorney General's Office of the Republic of Indonesia is considering imposing the death penalty according to Article 2 paragraph (2) of the Corruption Law for suspects in cases of alleged corruption by providing CPO (Crude Palm Oil) export facilities which causes domestic cooking oil to be scarce. Article 2 paragraph (2) of the Corruption Act (Tipikor) discusses that in the event that corruption as referred to in paragraph (1) is committed under

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certain circumstances and the death penalty can be imposed **[7].** Shidarta Such legal events are part of the modern history of power that is closely connected with the development, interests and capabilities of the state. The power that the state gains comes from its ability to control its citizens, mobilize collective action, regulate corporations and economic activity. **[8]** Even the conviction handed down to the management of the Jiwasraya corporation is considered to have not fulfilled the sense of justice for the state and society because it is necessary to optimize the return of state financial losses, through the conviction and criminal responsibility of corporations charged with corruption.

II. RESEARCH METHODS

This legal research is doctrinal legal research. According to Soetandyo Wignjosoebroto **[9]** explained that what is meant by doctrinal legal research is research on law that is conceptualized and developed on the basis of doctrines adopted by the conceptor / or the developer. The doctrinal method is commonly referred to as the normative legal research method. This research uses 3 (three) approaches, namely conceptual approach, case approach, and statute approach. According to Peter Mahmud Marzuki **[10]** that conceptual approach departs from views and doctrines that develop in legal science. Approach the case by reviewing cases related to the issue at hand which has become a court decision that has permanent legal force **[10].** While the legal approach is carried out by reviewing all laws and regulations related to the legal issue being handled. **[10]**

This type of research is normative legal research commonly called normative juridical research **[11]**, using secondary data, namely data obtained from judges' decisions, official documents, related books, and related laws and regulations. Secondary data consists of 3 (three) legal materials, namely primary legal materials, secondary legal materials, and non-legal materials. Primary legal material is legal material that is authorative, meaning it has authority. Primary legal materials consist of legislation, official records or minutes in making legislation and judges' decisions. Secondary legal materials constitute all publications on law including textbooks, legal dictionaries, legal journals, and commentaries on court decisions **[10]**. While non-legal materials include the ability possessed by intelligent legal practitioners to identify and analyze facts accurately and find legal issues on these facts **[10]**.

This research is equipped with a research library on theories that support the analysis of the proposed problems, as well as positive laws in the form of laws and regulations related to the optimization of effective punishment with integrative criminal law enforcement in the eradication of corruption in corporations in the form of State-Owned Enterprises (SOEs). According to Nico Ngani **[12]** that normative legal research is engaged in idela norms, exploration on the das sollen or normwissenschaft side of law. This research uses qualitative methodology with content analysis method. Furthermore, the data is processed using descriptive analytical data analysis methods **[10].**

III. RESULTS AND DISCUSSION

Perspective of Business Judgement Rule Doctrine in Corporate Criminal Liability in the Form of State-Owned Enterprises

Different perspectives in viewing state finances not only have an impact on formulative policies carried out by legislators but also have an impact on law enforcement practices. This reality can be seen in the practice of handling cases of criminal acts of corruption, especially those related to activities carried out by State-Owned Enterprises (BUMN) or Regional-Owned Enterprises (BUMD). There are at least 2 (two) principle issues related to polemics between Law Enforcement Officers and business practitioners in viewing losses that occur within SOEs/BUMDs. The two differences include 1) perceptions of state finances and state finances being separated and 2) perceptions of state receivables and the status of the Board of Directors and Board of Commissioners of SOEs **[13].** The difference in views is due to various interpretations of the provisions of laws and regulations contained in various positive laws. In accordance with the provisions of Article 2 letter g of Law Number 17 of 2003 concerning State Finance, including state wealth separated into SOEs is still recognized as state finance. While the provisions of Article 4 paragraph (1) and its explanation from Law Number 19 of 2003 concerning State-Owned Enterprises states that state wealth that is separated is only limited to capital in SOEs so that the wealth of SOEs is not state wealth. Likewise, the provisions of Article 8 and Article 12 of Law / Prp Number 49 of 1960 concerning PUPN which apply SOE receivables are the same as state receivables, SOEs are the same as government agencies, so the settlement of SOE receivables follows the procedures for settling state receivables. While the provisions of Article 1 number 6 of Law Number 1 of 2004 concerning the State Treasury states that state receivables are the amount of money that must be paid to the central government so that according to Law Number 1 of 2004, SOE receivables are the same as state receivables **[13]**.

State finance in its interpretation is based on analogy by comparing the provisions of Article 2 number 7 and the Explanation of Law Number 28 of 1999 concerning Clean and Free State Administration from Corruption, Collusion, and Nepotism; which includes Directors, Commissioners and other structural officers in SOEs as well as other state administrators. In fact, according to the provisions of Article 1 number 2, number 5 and number 6 of Law Number 40 of 2007 concerning Limited Liability Companies and Article 87 of the SOE Law states that the Board of Directors and the Board of Commissioners are organs of Limited Liability Companies where the Board of Directors has full authority and responsibility for the management of the company for the benefit of the company. The Board of Commissioners conducts general and/or special supervision and advises the

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Board of Directors. Therefore, BUMN employees are BUMN workers subject to Law Number 13 of 2003 concerning Manpower **[13]**.

Another point of view is that the SOEs/BUMDs consider the various activities they carry out to be pure business activities if there is a loss of SOEs/BUMDs as a result of errors in the management of SOEs/BUMDs as a business risk only. This perspective is increasingly narrowed in line with the doctrine of the Business Judgment Rule adopted from business practices in Anglo Saxon countries. The doctrine of the Business Judgment Rule teaches that the decision of the Board of Directors regarding the company's activities must not be contested by anyone even if the decision is detrimental to the company. The rationale for this view is because not every decision of the Board of Directors can provide benefits for the company so that when the company experiences a loss, it is a business risk **[13]**.

The term Business Judgement Rule in Black's Law Dictionary is interpreted as: '..... rule immunizes management from liability in corporate transaction undertaken within power of corporation and authority of management where there is reasonable basis to indicate that transaction was made due care and good faith.' While Robert Charles Clark **[13]** defines the Business Judgement Rule as '.....a presumption that in making a business decision, the director of corporation acted on an informed basis in good faith and the honest belief that the action was taken in the best interest of the company.' Both terms indicate that the doctrine of the Business Judgment Rule wants to protect directors for every business decision that is a business transaction of the company, as long as it is carried out within the limits of authority with due care and good faith. Therefore, the decision of the Board of Directors is taken on the basis of correct and accountable information and is carried out solely in the best interest of the company **[13]**.

At the positive legal level in Indonesia, the doctrine of Business Jugement Rule has been implicitly accommodated in Article 92 and Article 97 of Law Number 40 of 2007 concerning Limited Liability Companies (Limited Liability Company Law) which specifies **[13]**:

The provisions of Article 92 read:

1) The Board of Directors carries out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company;
2) The Board of Directors is authorized to carry out the management as referred to in paragraph (1) in accordance with policies deemed appropriate. Within the limits specified in this law dna/or the Articles of Association.

The provisions of Article 97 read:

1) The Board of Directors is responsible for the management of the company as referred to in Article 92 paragraph (1);
2) Management as referred to in paragraph (1), must be carried out by every Member of the Board of Directors in good faith and full of responsibility;
3) Each member of the Board of Directors is fully responsible personally for the company's losses if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2).

The principle of good faith stated in Article 97 paragraph (1) of the Limited Liability Company Law contains the soul and spirit of the doctrine of Business Judgment Rule, where directors cannot be blamed for their decisions as long as the decision has no element of personal interest, decided based on reliable information, by appropriate and rational circumstances and the decision is the best for the company. In legal theory, the conditions that must be met in order not to blame the board of directors for its decisions are: **[13]**

1) There are no elements of fraud;
2) No conflict of interest;
3) No illegality;
4) There is no concept of gross negligence.

These conditions as parameters that indicate that the Board of Directors committed actions outside and/or not in accordance with the limits of his authority that have been given to him by the articles of association, he will personally be legally responsible both in civil and criminal law **[13]**.

The principle of good faith stated in Article 97 paragraph (1) of the Limited Liability Company Law contains the soul and spirit of the doctrine of the Business Judgment Rule, where the Board of Directors cannot be blamed for their decisions as long as the decision has no element of personal interest, decided based on information they believe, by appropriate and rational circumstances and the decision is the best for the company. The opinion of Detlev F. Vagts **[14]** states the benchmark for deciding whether a loss is not caused by improper business judgment, so as to avoid violations of the duty of care principles based on at least 3 (three) things. First, have information regarding the issue to be decided and trust that the information is true and accountable. Second, have no interest in the decision and decide in good faith. Third, have a rational basis to believe that the decisions he makes are the best for the company.

In line with Hans G. Nilson's opinion **[15]** provides conditions that must be met to not blame the board of directors for their decisions, namely: "1) there are no elements of fraud; 2) no conflict of interest; 3) there is no illegality, nor 4) there is no concept of gross negligence". These four conditions as parameters indicate that the directors take actions outside and / or not in accordance with the limits of their authority that have been given to them by the articles of association will personally be legally responsible, both civil and criminal law. Criminal liability by directors is only possible, in case of violation of "duty of care and duty of loyalty". Joel Seligman **[16]** stated that in fiduciary duty theory, the position of directors and commissioners is the company's fiduciary as a vital organ in a company. The fiduciary duty relationship is based on trust and confidence consisting of scruulous, good faith and candor. One of the most important parts in the implementation of fiduciary duty has required the directors not to act rashly in carrying out their duties (duty of care), as well as to the directors in carrying out their duties by taking advantage of their personal interests over the company (duty of loyalty).

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If the parameters presented by Hans G. Nilson **[15]** and the legal theory are not proven, there can potentially be 2 (two) possibilities. First, as negligence due to lack of knowledge, inexperience or unprofessionalism (malpractice) or wanprestatie (failure to perform on obligation) or unlawful acts (onrechmatigedaad) as referred to in Article 1365 of the Civil Code. The actions of directors or company organs in the form of negligence as a result of lack of knowledge or skills can only lead to criminal charges, if the negligence is formulated as an element of action or dolus eventualis. If it is not listed as an element of criminal acts or dolus eventualis, then it falls within the domain of administrative, ethical or civil sanctions. Second, if the above parameters are met, then the actions of the directors or organs of the company have fulfilled the elements of criminal law, because all of the negative parameters above have nuances of malicious intention (dolus malus) and arise/strengthen the elements of formal and material unlawful nature (wederrechtelijkheid) in criminal law. To qualify an act as a criminal act of corruption as stipulated in Article 2 and Article 3 of Law No. 31 of 1999 as amended and supplemented by Law No. 20 of 20021 concerning the Eradication of Criminal Acts of Corruption, there are at least 2 (two) main elements that must be met, namely elements against the law and elements of state financial losses.

Application of the Business Judgement Rule Doctrine in Corporate Criminal Liability for Corruption by State-Owned Enterprises

The tendency to use the doctrine of the Business Judgment Rule as a justification for business people and bank executives when accused and prosecuted of corruption. This is because there is a mistake in some people in understanding the doctrine of the Business Judgment Rule comprehensively and even used as a tool to solely avoid criminal liability from business people and bank executives who have committed crimes. If this 'misguided thinking' penetrates law enforcement practices, including in handling corruption crimes, then no one from business people or bank executives can be blamed for committing criminal acts which in turn can tear apart the sense of justice of the community **[16]**. In line with the purpose of providing criminal sanctions that are influenced by the reasons used as the basis for threats and criminal convictions. Briefly, the reasons for punishment develop from reasons for punishment for retaliation, punishment for expediency in order to cause a deterrent effect for both perpetrators and others, and a combination of retaliation and expediency **[17]**. In its development, the purpose of criminalizing corporations and their management, although there are still polemics around state financial losses, does not only occur between law enforcement officials and business people, even differences of opinion occur among fellow Law Enforcement Officers. The different perspectives between fellow Law Enforcement Officers regarding state financial losses are clearly seen in the case of the former President Director of PT. Pupuk Kaltim (PKT) Omay Komar Wiraatmadja in the case of alleged corruption in the procurement of rotor generators PT. Kaltim Daya Mandiri (KDM) is around U$ 4 million US dollars. The Haki Council argued that the purchase of rotors for KDM was not proven to be legally detrimental to state finances. Because based on Government Regulation Number 29 of 2007 concerning the Transfer of Government Capital from PT. PKT to PT. Sriwijaya Fertilizer; status of PT. PKT is no longer a state-owned enterprise that manages state finances, so Omay Komar Wiraatmadja, President Director of PT. PKT, Rukasah Darajat Technical Director of PT. PKT and Alfian Aman Head of Procurement/Auction Bureau of PT. CCPs related to similar cases have received acquittals. While the Public Prosecutor argued differently that the losses incurred as a result of the difference in expensive prices of about U$ 1,400,000 were state financial losses **[17]**.

In line with the opinion of D. Andhi Nirwanto [36] that different perspectives developed into polemics related to state finances also occurred in judicial practice as in Supreme Court Decision Number 474K / Pid.Sus / 2007 dated October 22, 2008 in the case of corruption with the defendant Drs. Omay Komar Wiraatmadja, in South Jakarta District Court Decision No. 2123 / Pid.B / 2006 / PN. Jak.Tue dated February 23, 2007 The Panel of Judges has given the definition of state finance according to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, does not apply to Limited Liability Company entities whose shareholders are PT Persero or BUMN. At the discretion of the South Jakarta District Court Judges, it has been annulled by the Panel of Cassation Judges that "..... The panel of judges had erred in applying the Supreme Court Fatwa Number WKMA/Yud/20/VIII/2006 dated August 16, 2006 because according to the Supreme Court Judge it was included in the civil corridor so the irregularities that occurred were the result of the actions of the defendant Drs. Omay Komar Wiraatmadja which caused state financial losses to PT. Pupuk Kaltim, Tbk. continues to enforce Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.

Efforts to qualify an act as a criminal act of corruption as stipulated in Article 2 and Article 3 of Law Number 31 of 1999 as amended and supplemented by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Criminal Acts (Law on the Eradication of Corruption Criminal Acts) which contains 2 (two) main elements which are the main requirements for the fulfillment of unlawful elements and elements of loss state finance. Both elements are described as follows **[17]**:

1. Unlawful Elements (Wederrechtelijke)

At the level of knowledge of criminal law, the concept of unlawful acts is the equivalent of the word wederrechtelijke which is slightly different from unlawful acts in the civil realm commonly called onrechtmatigedaad. The concept of criminal law teaches that to be categorized as a wederrechtejke requires a real intention on the part of the perpetrator to commit a crime. This understanding is in line with a Latin adagium actus non facit reum, nisi mens sit rea which means that an act does not make a person guilty of a

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criminal act unless the mind is legally blameworthy. Based on this principle, there are 2 (two) conditions that are met for a person to be punished, namely there is an outward act that is forbidden (actus reus) and there is an evil / despicable mental attitude (mens rea). Criminal law expert Moeljatno stated that for guilt requires 2 (two) main things, namely: first, the existence of a certain psychic (mental) state; Second, there is a certain relationship between the mental state and the actions done, to cause reproach **[17]**. In accordance with the Constitutional Court Decision No. 003/PUU-IV/2006 dated July 25, 2006, the element of unlawful acts is a formal unlawful act (formeel wederrechtejike) in the sense of written laws and regulations that are violated.

2. Elements of State Financial Losses

The understanding of state finance as the fulfillment of elements of corruption becomes something debatable and causes multiple interpretations. This is partly due to the different notions of state finance in various laws, as a positive legal product that has implications for law enforcement practices, especially corruption. To answer this problem, it is interesting to observe the understanding of the principle of lex specialist derogate legi generalis where the provisions in special laws override provisions in laws of a general nature. The principle of lex specialist derogate legi generalis is reflected in the provisions of Article 103 of the Criminal Code: 'The provisions of Chapter I to Chapter VIII of this book also apply to acts which by other statutory provisions are punishable with a crime unless otherwise provided by law **[17]**. In the theory of criminal law where the principle of lex specialist has developed in such a way, that it is not only limited to overriding generally accepted laws (lex generalis) but also relates to special laws and the provisions of articles in special laws. To the provisions of the article to be enforced in a special law, the principle of logische specialiteit (logical specificity) applies in the sense that criminal provisions are said to have a special nature if the criminal provisions in addition to containing all elements of general criminal provisions also contain special elements. Meanwhile, to determine which special laws will be enforced, the principle of systematische specialiteit (systematic specificity) applies in the sense that criminal provisions in specific laws are determined by the makers of specific laws from existing laws **[17]**.

Referring to the principle of systemtische specialiteit (systematic specificity) and the principle of logische specialiteit (logical specificity), Prosecutors and Law Enforcement Officers will use the definition of state finance as stated in the General Explanation of Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption. Therefore, any act that deviates from the use and management of state finances so that it can be qualified as an act detrimental to state finances or can harm the state economy by fulfilling the elements of the criminal act of corruption, namely 1) the existence of unlawful acts or abuse of authority, opportunity or means available to it; 2) the enriched parties, whether themselves, others or corporations. This is an implementation of the principle of systematische specialiteit and the principle of logische specialiteit, as well as to prevent and limit the existence of all embracing acts and multipurpose acts and harm state finances and can immediately be subject to criminal acts of corruption **[17]**.

Furthermore, the handling of corruption crimes in SOEs by the Attorney General's Office has tried to optimize punishment by filing cassation legal remedies against the decision of the DKI Jakarta High Court in the case of alleged corruption crimes of PT. Asuransi Jiwasraya (Persero). Head of the Legal Information Center (Kapuspenkum) Kecorn, Leonard Eben Ezer Simanjuntak said that the legal effort was carried out against the six defendants on Monday, March 8, 2021. The six defendants include Hendrisman Rahim; Hary Prasetyo; and Head of Investment and Finance Division Jiwasraya Syahmirwan, President Director of PT. Hanson International Tbk, Benny Tjokrosaputro; Heru Hidayat; and Director of PT. Maxima Integra, Joko Hartono Tirto. It is known that the panel of judges of the Jakarta District Court previously sentenced all defendants in the Jiwasraya case to life imprisonment **[18]**. However, some of the defendants in this corruption case received leniency through appeals submitted to the DKI Jakarta High Court. One of them is the former President Director of Jiwasraya, Hendrisman Rahim. Initially, he was sentenced to life imprisonment through a judge's decision in the court of first instance, but the verdict was shortened to 20 years and a fine of Rp. 1 billion subsidiary 4 months. In addition, the DKI Jakarta High Court also reduced the sentence of the defendant Joko Hartono Tirto who is the Director of PT. Maxima Integra Joko Hartono Tirto. Initially, a panel of judges at the Corruption Court sentenced Joko to life, but now it has only 18 years in prison and a fine of Rp. 1 billion subsidair 4 months **[18]**. The Prosecutor's Office as a law enforcement agency that holds the role of dominus litis by carrying out prosecution duties, must work optimally by optimizing punishment. Therefore, if the cassation decision in the Supreme Court does not meet the sense of justice, it is necessary to make legal efforts to review so that the return of state financial losses can be achieved. Although initially the charges and charges were high against the management of the Jiwasraya corporation, but the panel of judges who determined the severity of the punishment contained in the verdict, the legal effort as a strategic effort that can be taken by the Prosecutor's Office in order to achieve a conviction that imprisons the management of the Jiwasraya corporation.

Although criminal law as the ultimate remedium is primarily designed to deal with individual human behavior. Although there have been efforts to allow corporate criminal liability, Indonesian criminal justice practice shows that corporate criminal liability is only imposed on human perpetrators (directors, commissioners and corporate employees). The threat of criminal fines needs to be increased or the application of maximum criminal fines with the aim that the management of the corporation and its corporation feel losses due to their actions, which have an impact on corporate profits (dividends to be distributed) are reduced. In the case of layered corporations in project financing such as PT. Jiwasraya who causes financial losses to the state and its customers, then should also be prosecuted with punishment in

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the form of a criminal fine at most determined under category VI in the amount of Rp. 15,000,000,000,- (fifteen billion rupiah).

Therefore, in order to prevent and eradicate criminal acts or corporate crimes (which cannot be separated from one field to another) and in order to avoid overlapping and duplication of norms, legal principles are needed that are the basis for carrying out the criminalization, in this context an integrated criminal law policy is needed **[19]**. In line with the opinion of Nibraska Aslam **[20]** who stated that to prevent the occurrence of BUMN corruption whose upstream is maladministration, BUMN employees or Directors as the highest leaders in the company must be strengthened ethical and moral values of Pancasilanya so that they can clearly distinguish good or bad actions or moral or immoral. Do not mix private interests and public interests. When it can be done, the SOE employee is showing fair and wise behavior. If this behavior is maintained, it will be difficult for SOE corruption to occur. Because compliance with regulations is not due to orders from superiors or fear of getting sanctions from the state but is indeed driven by personal awareness that manipulative and corrupt actions are contrary to moral values. First, corrupt practices that have occurred in SOEs as one of the actors providing public services become fertile ground for corrupt practices. This is due to the suboptimal implementation of Good Corporate Governance Principles and an unhealthy bureaucratic system. Second, these problems require the formulation of appropriate corruption prevention policies, especially for the SOE sector in the context of providing public services. These formulations include: (1) The Board of Directors pays attention to the routine habits of SOE employees, (2) Functions the internal supervisory unit of SOEs (3) Functions the community as external supervisors through electronic public service mechanisms. In addition, it can be done by socializing Pancasila Ethics to BUMN employees **[20]**.

In particular, based on the provisions of Article 74 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies (UUPT) confirms that companies that carry out corporate social responsibility (CSR) are companies that carry out their business activities in the field of and / or related to natural resources, other than companies engaged in natural resources, they are not required to carry out CSR in the provisions of the Law. Likewise, other regulations state that CSR is closely related to natural resources and the environment. But many companies that make huge profits have no direct relation to natural resources, while their contribution to the environment and society is urgently needed **[21]**. CSR strategies are expected to reduce the occurrence of corruption in State-Owned Enterprises (SOEs).

IV. CONCLUSION

Based on the presentation of answers to both problem formulations in the discussion, it can be concluded as follows: The provisions of Article 97 paragraph (1) of the Limited Liability Company Law contain the soul and spirit of the doctrine of the Business Judgment Rule, where the Board of Directors cannot be blamed for their decisions as long as the decision has no element of personal interest, decided based on information they believe, by appropriate circumstances and rationally and the decision is the best for the company. The application of the doctrine of business judgment rule in corporate criminal liability for corruption crimes by State-Owned Enterprises based on the principle of systematische specialiteit (systematic specificity) and the principle of logische specialiteit (logical specificity), prosecutors and law enforcement officials will use the definition of state finance as stated in the General Explanation of Law No. 31 of 1999 as amended and supplemented by Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption.

REFERENCES

[1] Indrayana, Denny. *Negeri Para Mafioso: Hukum di Sarang Penyamun*. Jakarta: Kompas, 2008.

[2] Redi, Ahmad dan Susanto Dharma, "Penerapan Prinsip First Come First Served dalam Penyelesaian Tumpang Tindih Wilayah Izin Usaha Pertambangan", *Era Hukum: Jurnal Ilmiah Ilmu Hukum*, Volume 17, Nomor 2, Oktober 2019, hlm. 190,

[3] Nirwanto, D. Andhi. *Dikotomi Terminologi Keuangan Negara dalam Perspektif Tindak Pidana Korups.* Semarang: Aneka Ilmu, 2013.

[4] Amrullah, M. Arief. *Perkembangan Kejahatan Korporasi Dampak dan Permasalahan Penegakan Hukum*. Jakarta: Prenadamedia Group, 2018.

[5] Anonim, "Kejaksaan Ajukan Ulang Dakwaan 13 Korporasi Kasus Jiwasraya", https://republika.co.id/berita/nasional/hukum/qy574k354/kejaksaan-ajukan-ulang-dakwaan-13-korporasi-kasus-jiwasraya, diakses 11 Desember 2021, jam 15.00 WIB.

[6] SUR, "Kejaksaan Negeri Jakarta Pusat Mengeksekusi 6 Terpidana Dalam Kasus PT Asuransi Jiwasraya", http://www.berita-one.com/2021/08/kejaksan-negeri-jakarta-pusat.html, diakses Sabtu, 23 April 2022 jam 05.50 WIB.

[7] Junia Indriasti, Xandra. *"Kejagung RI Ungkap Tersangka Kasus Minyak Goreng Bisa Dijerat Hukuman Mati",* https://www.suara.com/news/2022/04/23/115953/kejagung-ri-ungkap-tersangka-kasus-minyak-goreng-bisa-dijerat-hukuman-mati, diunduh hari Sabtu, 30 April 2022, pukul 11.03 WIB.

[8] Shidarta, *Reduksi Kedaulatan Negara dan Dampaknya Bagi Ilmu Hukum***,** dalam Ani Purwanti, *Konstruksi Hukum dalam Perspektif Spiritual Pluralistik Kumpulan Pemikiran dalam Rangka Purnabakti Prof. Dr. Esmi Warassih Pujirahayu, S.H., M.S.*, Yogyakarta: Thafa Media**,** 2021.

[9] Wignjosoebroto, Soetandyo. *Ragam-Ragam Penelitian Hukum*, dalam Sulistyowati Irianto dan Shidarta, *Metode Penelitian Hukum Konstelasi dan*

Volume 07, Number 02, July 2023, Page 529-536
e-ISSN: 2598-120X; p-ISSN: 2598-117X

Refleksi. Jakarta: Yayasan Pustaka Obor Indonesia, 2017.
[10] Mahmud Marzuki, Peter. *Penelitian Hukum*. Jakarta: Kencana-Prenada Media Group, 2021.
[11] Ali, H. Zainuddin Ali. *Metode Penelitian Huku.* Jakarta: Sinar Grafika, 2016.
[12] Ngani, Nico. *Metodologi Penelitian dan Penulisan Hukum*. Yogyakarta: Pustaka Yustisia, 2012.
[13] Nirwanto, D. Andhi. *Otonomi Daerah Versus Desentralisasi Korupsi*. Semarang: Aneka Ilmu, 2013.
[14] F. Vgats, Detlev. *Basic Corporation Law: Materials, Cases, Text.* Westbury New York: Foundation Press, Third Edition, 1989.
[15] G. Nilson, Hans. *Future Corruption Control in Europe.* Amsterdam: Fifth International Anti Corruption Conference, 1998.
[16] Joel Seligman, Joel. *Corporation Cases and Materials*, New York, Little Brown & Company, 1995, 145.
[17] Bahagiati, Kurniasih, "Filsafat Pemidanaan Terhadap Penyalahguna Narkotika Bagi Diri Sendiri dalam Perspektif Hukum Positif dan Hukum Pidana Islam", *Era Hukum: Jurnal Ilmiah Ilmu Hukum*, Volume 17, Nomor 2, Oktober 2019, hlm. 119, DOI: http://dx.doi.org/10.24912/erahukum.v18i1.9810
[18] CNN Indonesia, "Kejagung Tempuh Kasasi Vonis 6 Terdakwa Kasus Jiwasraya", https://www.cnnindonesia.com/nasional/20210316073402-12-617878/kejagung-tempuh-kasasi-vonis-6-terdakwa-kasus-jiwasraya, diakses 11 Desember 2021 jam 15.05 WIB.
[19] Kristian. *Kejahatan Korporasi di Era Modern & Sistem Pertanggungjawaban Pidana Korporas-Buku Satu*. Bandung: Refika Aditama, 2016.
[20] Aslam, Nibraska, "Pencegahan Korupsi di Sektor BUMN dalam Perspektif Pelayanan Publik di Indonesia," INTEGRITAS: Jurnal Antikorupsi, Volume 7 Nomor 2 Desember 2021, https://doi.org/10.32697/integritas.v7i2.818
[21] *Pujiyono, Jamal Wiwoho, Triyanto,* "Model Pertanggungjawaban Hukum Pelaksanaan Corporate Sosial Responsibility (CSR) untuk Meningkatkan Kesejahteraan Masyarakat", Yustisia Jurnal Hukum Universitas Sebelas Maret, Volume 5 Nomor 1 Januari-April 2016, DOI: https://doi.org/10.20961/yustisia.v5i1.8716