

THE AMBIGUITY OF CRIMINALIZING BUSINESS DECISIONS: AN ANALYSIS OF LEGAL REALISM AND THE BUSINESS JUDGMENT RULE IN SUPREME COURT DECISION NUMBER 121 K/PID.SUS/2020

Afriansyah Tanjung^{a,b}, Muhammad Marizal^{a,c}, Irawan Malebra^{a,d}

^aDoctoral Program in Law, Faculty of Law, Universitas Diponegoro

^bLaw Study Program, Universitas Siber Muhammadiyah, Email: tanjung.afriansyah@sibermu.ac.id

^cLaw Study Program, Tidar University, Email: mmarizal.1303@gmail.com

^dApplied Business Administration Study Program, Politeknik Negeri Semarang, Email: Irawanmalebra@polines.ac.id

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Abstract:

The phenomenon of criminalizing business decisions within State-Owned Enterprises (SOEs) shows that there is a serious tension between the logic of corporate governance and the goal of eradicating corruption. The Supreme Court Decision No. 121 K/Pid.Sus/2020 regarding the acquisition of BMG Australia by PT Pertamina (Persero) is an example of how managerial actions carried out through legitimate corporate procedures can be construed as criminal acts because they lead to state losses. This study aims to analyze the ambiguity of the criminalization of business risk through a doctrinal legal approach combined with the perspective of legal realism. The research method uses a conceptual analysis of the Business Judgment Rule as a standard of accountability of the board of directors in decision-making, as well as a case approach to the Supreme Court's legal considerations with qualitative analysis techniques based on juridical reasoning. The results of the study show that judges emphasize more on the results of decisions in the form of state losses as an indicator of error, so that the line between economic risk and unlawful acts becomes blurred. This condition poses a potential chilling effect that can hinder the courage of the board of directors in carrying out business strategies in risk-intensive SOEs. This research contributes to the need to reformulate the application of Business Judgment Rule in corporate corruption cases to prevent excessive criminalization of business decisions that are not based on malicious intent or conflict of interest.

Keywords: Business Judgment Rule; SOEs; corporate corruption; legal realism; business risks

INTRODUCTION

The phenomenon of criminalization of the business decisions of State-Owned Enterprises (SOEs) in Indonesia is a complex problem that combines the dimensions of criminal law, corporate governance, and public dynamics against state-owned companies, one of which is the case of PT Pertamina in acquiring BMG Australia. Cases involving Pertamina officials

show a pattern in which business decisions taken within the framework of *good corporate governance* and based on rational business principles can lead to investigations or criminal prosecutions. The study that examines the application of the *Business Judgment Rule* doctrine states that in various cases of SOE corruption, including the case that befell the former President Director of Pertamina, accusations against the directors often arise even though the decision was taken based on business practices that can be accounted for in corporate governance.¹ These problems show that there is a tension between criminal compliance assessments and business fairness assessments, which should provide room for management to make business decisions that contain risks but are economically rational.

This tension is strengthened by Pertamina's character as a state-owned enterprise that bears the responsibility of public services and high social expectations,² so that the corporate policy space is not only judged in terms of economic benefits but also in terms of its social and political impacts.³ Consequently, strategic or operational decisions that have a broad impact on the public interest can become a fulcrum for criminalization discourse when there is a perception of public harm or incompatibility with social goals.⁴

PT Pertamina's Organizational Management is an action in restructuring and changing the organizational model carried out by Pertamina (*e.g. holding-subholding*) to improve the efficiency and speed of decision-making as well as placing management in a more complex decision-making environment and has a broad corporate impact, this structural change can increase management's exposure to *legal scrutiny*. If the results of the decision are considered to cause losses to the state or the public, even though the decision is aimed at optimizing the company's performance.⁵

PT Pertamina Persero's corporate governance perspective, the application of *Good Corporate Governance* (GCG) principles such as: *transparency, accountability, responsibility, independency, fairness* is the basis for defending that decisions are taken in accordance with professional standards and corporate interests; research on the implementation of GCG principles in Pertamina's human resources unit found that these principles have been applied even though they have not been maximized, so that proof that business decisions can depend on the quality of the implementation of the internal GCG mechanism.⁶ Thus, claims of criminalization of business decisions are not solely related to individual malicious intent but also to weaknesses in governance processes, documentation, and risk assessment mechanisms that can demonstrate the legitimacy of the decision before external auditors or law enforcement officials.

The phenomenon of criminalization is also influenced by public perception of Pertamina as a national energy service provider. When the results of business decisions contradict public expectations or cause negative impacts,⁷ social reactions can trigger political

¹ Mas Putra Zenno Januarsyah et al., "The Application of the Doctrine of Business Judgment Rule in the Case of Karen Agustawan's Corruption Crime", *Journal of Ius Constituendum* (2022).

² Raka Abel Bimantara bimantara, "Analysis of Corporate Social Responsibility (CSR) Reports During the Covid-19 Pandemic at Pertamina Laksda Adisucipto Yogyakarta", *Commicast* (2022).

³ Fadinah Fadinah, "Corporate Social Responsibility Programs Analysis PT. Pertamina Indonesia in the Era of Pandemic Covid-19", *Commicast* (2022).

⁴ Faradiba Nurjannah Faatin, Kurnia Ekasari, and Hesti Wahyuni, "Evaluation of the Development of Corporate Social Responsibility (CSR) Programs PT PERTAMINA (PERSERO)", *Journal of Applied Business Taxation and Economics Research* (2024).

⁵ Ririh Aji Pangestu, "Analysis of Dynamics and Restructuring of PT Pertamina (Persero)", *JKMP (Journal of Public Policy and Management)* (2023).

⁶ Windi Dwi Pratiwi and Dini Gandini Purbaningrum, "Implementation of Good Corporate Governance Principles in the Human Resources Division at PT Pertamina Pusat", *Publicity Journal of Public Administration Studies* (2023).

⁷ Shoraya Lolyta Octaviana, "Corporate Social Responsibility Communication Strategy at PT Pertamina (Persero) Region IV Central Java and DIY Region", *The Messenger Journal* (2013).

and legal pressure on the company's management.⁸ The failure to manage business activities carried out by PT Pertamina will certainly have a social impact, it can be an entrance to alleged maladministration or negligence in carrying out business activities that lead to losses, but these losses must be objectively assessed whether they are related to alleged fraud or other business crimes or business failures.

From the perspective of *the Business Judgment Rule* (BJR), the directors of SOEs should receive legal protection for business decisions that have been made in good faith, without conflicts of interest, and based on adequate information.⁹ However, in related cases, the BJR norm seems to be marginalized in the judge's consideration, so that decisions that fail economically are still seen as an unlawful act. The legal construction mentioned above can cause a *chilling effect*, where decision-makers in SOEs become reluctant to take strategic and innovative steps for fear of being punished if the final result is not in accordance with public or political expectations.¹⁰ Therefore, a more critical evaluation of law enforcement practices in the case of state corporations is needed, particularly through a legal realism approach. This approach provides an analytical framework to understand that law not only moves on the basis of text, but is also influenced by the social, political, and psychological factors of judges in responding to public anxiety about corruption. Thus, a reformulation of the criminal liability limit of directors is needed to prevent over-criminalization of business decisions and ensure sustainability and managerial courage in the management of SOEs.¹¹

METHODS

This research is a doctrinal law research that examines Supreme Court Decision No. 121 K/Pid.Sus/2020 through a conceptual approach and realist legal philosophy. Conceptual approaches are used to identify and examine key concepts such as legal realism, *business judgment rule*, state losses, and corporate criminal liability.¹² Meanwhile, the legal philosophy approach of realism (Holmes, Llewellyn, Frank) is applied to assess judges' reasoning based on *law in action*, focusing on empirical facts, the institutional context of SOEs, and the possible influence of non-juridical factors.¹³ The analysis was carried out through a *case approach* by dissecting the judge's consideration structure using the IRAC (*Issue–Rule–Application–Conclusion*) method,¹⁴ to see how the judge constructed unlawful acts, errors, and losses in the context of business decisions. Primary legal material consists of court decisions and related laws and regulations, while secondary legal materials include academic literature, realist legal

⁸ Sitti Faoziyah, "Corporate Social Responsibility to Reduce Community Rejection of a Company Existence: Analysis of Business Ethics Perspective", *Journal of Sciencetech Research and Development* (2022).

⁹ Raffles Raffles, "Responsibility and Legal Protection of the Board of Directors in the Management of Limited Liability Companies", *Invite: Legal Journal* 3, no. 1 (July 7, 2020): 107–137.

¹⁰ Viktoris Dahoklory, "The Dynamics of SOE Financial Management Regarding the 'Dilemma' between State Losses or Business Losses", *Right Finding Journal: National Legal Development Media* 9, no. 3 (December 8, 2020): 349.

¹¹ Hari Sutra Disemadi, Mochammad Abizar Yusro, and Ali Ismail Shaleh, "Legal Protection of Business Decisions of SOE Directors Through Business Judgement Rule Doctrine", *Journal of Jurisprudence* (2020).

¹² Afriansyah Tanjung, "Strengthening Business Sustainability: One-Tier Boards System For Micro-Small Business Enterprises Resilience After The Enactment Of Law Number 06 Of 2023 About Job Creation", *Adijaya Multidisciplinary Journal* 1, no. 04 (August 11, 2023): 722–734–722–734, accessed December 23, 2024, <https://e-journal.naurendigition.com/index.php/jam/article/view/749>.

¹³ Afriansyah Tanjung, "The Role and Discretion of Religious Court Judges in Handling Marriage Dispensation Applications: A Socio-Legal Study on Local Legal and Cultural Practices", *Islamic Family Law Proceedings*, no. 5 (2025): 191–207, <https://prosiding.stdiis.ac.id/index.php/hki/article/view/85>.

¹⁴ "Your Excellency, *Legal Research Methods*, ed. Zulfa and Nita, I. (Sukabumi: CV Haura Utama, 2022), accessed December 23, 2024, [https://repository.uinbanten.ac.id/9155/1/P Research Methods Hukum.pdf](https://repository.uinbanten.ac.id/9155/1/P%20Research%20Methods%20Hukum.pdf).

philosophy theory, and the doctrine of *Business Judgment Rule*.¹⁵ The data analysis technique is carried out qualitatively through legal reasoning and judicial hermeneutics methods, by comparing *law in books* and *law in action* to identify whether the verdict is formalistic or shows realist tendencies through *fact skepticism*, *result-oriented reasoning*, or *judicial policy consideration*. With this methodological design, the research aims to uncover the ambiguity of criminal decisions on business decisions and make a theoretical contribution to the development of a legal realism approach in corporate corruption cases. The following is the research methodology used in this study, namely:

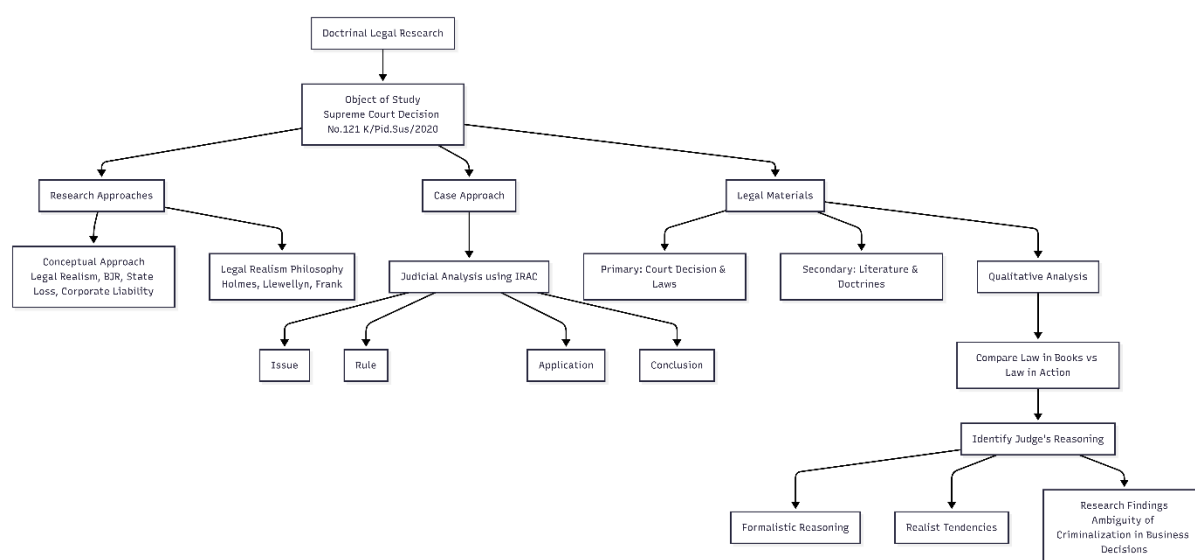


Figure 1 - Research Flow and Methodology used in Research
Source: Processed from multiple sources by the author

ANALYSIS AND DISCUSSION

The Chronology of the Acquisition of BMG Australia and the Judge's Consideration in the Supreme Court Decision No. 121 K/Pid.Sus/2020

This case began with the corporate decision taken by the Board of Directors of PT Pertamina (Persero) in 2009 to acquire a 10% *participating interest* in the Basker Manta Gummy (BMG) oil and gas block in Australia. The investment decision was proposed and approved through the company's internal mechanism, involving technical presentations, feasibility studies, *legal reviews*, and approval by the Board of Commissioners and shareholders through PT Pertamina Hulu Energi (PHE) as the subsidiary that carried out the transaction. In its development, BMG's field production did not take place as projected, so the project was closed and divestment was carried out. This incident was then used as the basis for accusations that the acquisition decision caused state losses and was carried out without the principle of prudence.¹⁶ However, the entire decision-making process is based on technical reports and the approval of legal corporate organs according to company law. This then becomes the source of the debate between business risk and criminal error.¹⁷

Furthermore, the Public Prosecutor argued that the defendant as the President Director of Pertamina had abused his authority by making investment decisions without adequate

¹⁵ Afriansyah Tanjung, "Introduction to Legal Research Method", in *Introductory Module of Legal Research Methods of the S1 PJJ Law Study Program, Muhammadiyah Cyber University*, I. (Yogyakarta City: Muhammadiyah Cyber University, 2025).

¹⁶ Pangestu, "Analysis of Dynamics and Restructuring of PT Pertamina (Persero)".

¹⁷ The Supreme Court of the Republic of Indonesia, *Decision of the Supreme Court of the Republic of Indonesia No. 121 K/Pid.Sus/2020* (2020).

analysis and without valid legal approval, so that the state suffered losses. The prosecutor relied on Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law to place the act as a criminal act of corruption. The Central Jakarta District Court in a first-instance ruling stated that the elements of Article 2 were not proven, but Article 3 was proven because the act was considered detrimental to the state's finances and was carried out unlawfully even though there was no personal benefit. The High Court then upheld the first-instance ruling. At the cassation level, the Supreme Court strengthened the conviction with the argument that the defendant did not apply the principle of prudence, so that even though the action was a business decision, it was still considered a form of abuse of authority that met the elements of unlawful acts according to the Corruption Law. The main difference between the parties lies in the assessment of whether the business decision that later leads to losses can be used as a basis for criminal prosecution.¹⁸

The Supreme Court in its ruling still imposed a sentence of eight years in prison and a fine on the defendant, as well as stipulating the payment of compensation with the amount of state losses as calculated by the auditor and then used as a basis for proof. The legal reasons constructed by the judge depart from the view that the elements of state loss and abuse of authority have been fulfilled even though there is no element of self-enrichment.¹⁹ The judge interpreted state losses broadly as a result of decisions that were considered not in accordance with governance principles and irrational in business. In legal considerations, the Supreme Court emphasizes the impact and outcome aspects of the decision rather than the process. This shows that the interpretation of losses is not only based on actions but also the end result of corporate policies. In this context, it can be seen that the line between reasonable business risk and criminal acts of corruption has become blurred.

The following is a comparative analysis table of the decisions of the District Court (PN), High Court (PT), and Supreme Court (MA) in the case of the Acquisition of BMG Australia (Supreme Court Decision No. 121 K/Pid.Sus/2020). This table tries to illustrate in particular how the construction of facts and norms changes at each level of justice, thus showing the process of transformation from a business fact to a criminal legal fact,²⁰

Table 1 - Comparative Analysis Table of District Court (PN), High Court (PT), and Supreme Court (MA) Decisions in the Acquisition of BMG Australia (Supreme Court Decision No. 121 K/Pid.Sus/2020)

Aspects	District Court (First Level)	High Court (Appeal Level)	Supreme Court (Cassation Level)
General View	Assess that there are administrative errors and omissions in investment decisions.	Strengthening the PN decision, emphasizing the element of state loss.	Legalize the criminalization and affirm that business risk = state loss.
Facts Highlighted	Internal processes are considered to be immetable. There is no personal gain.	State losses due to investment decisions. Corporate procedures are considered invalid.	The result of investment (loss) is more decisive than the process and intention.

¹⁸ Ibid.

¹⁹ KPK RI Public Relations Bureau, "State Losses of IDR 2.1 Trillion, KPK Designates Suspects for LNG Procurement Corruption at Pertamina", *Press Release of the Corruption Eradication Commission of the Republic of Indonesia*, last modified September 21, 2023, accessed December 23, 2024, <https://www.kpk.go.id/id/ruang-informasi/berita/kerugian-negara-rp21-triliun-kpk-tetapkan-tersangka-korupsi-pengadaan-lng-di-pertamina>.

²⁰ Supreme Court, *Decision of the Supreme Court of the Republic of Indonesia No. 121 K/Pid.Sus/2020*.

Aspects	District Court (First Level)	High Court (Appeal Level)	Supreme Court (Cassation Level)
Action Construction	Wrong actions in investment management.	Abuse of authority and violation of the principle of prudence.	Unlawful acts that meet Article 3 of the Corruption Law.
Construction Risk vs Loss	Business risk is considered proof of negligence.	Business risks are shifted to state losses.	Business risk = state loss = corrupt crime.
Fault Assessment	Professional error (maladministration).	Legal error (against the law formally).	Criminal offenses (corruption even without the element of self-enrichment).
Reasoning Standards	<i>Business judgment</i> → <i>negligence</i>	<i>Negligence</i> → <i>corruption</i>	<i>Outcome-based</i> → <i>corruption liability</i>
Neglected Theories	The BJR has not been considered but is de facto recognized.	The BJR is increasingly neglected, the procedure is qualified as flawed.	BJR was completely rejected, business decisions were criminalized.
Juridical Effects	Criminalization with a loose interpretation of Article 3 of the Criminal Code.	Strengthening the criminalization and position of the country's losses as an absolute element.	Affirmation of punishment is consequence-based, not process

Source: Decision of the Supreme Court of the Republic of Indonesia Number. 121 K/Pid.Sus/2020

The Ratio Legis of Legal Realism in Supreme Court Decision No. 121 K/Pid.Sus/2020

The legal realism movement emerged in the early 20th century as a critical reaction to the dominance of legal formalism that was considered too abstract and detached from social reality. Rather than understanding law as a set of logical norms that can be applied mechanically, realists emphasize that law should be understood through its real-life practice. The essence of this approach is that law is not only a text or rule, but also human behavior especially judges, lawyers, and other legal institutions that play a role in interpreting and applying it. Thus, legal realism places empirical experience and social context at the center of legal analysis.²¹

The roots of legal realism can be traced back to various intellectual traditions. In Russia, Leon Petrażycki became one of the earliest figures to develop similar ideas through what is called legal psychology. He argues that law appears not only in written rules, but also in individual psychological experiences, especially feelings of obligation and entitlement. This approach came to be known as one of the early variants of legal realism in Eastern Europe. Meanwhile, in the United States, legal realism developed more systematically in the 1920s–1930s, along with the influence of the philosophy of pragmatism.²² Figures such as Karl Llewellyn asserted that law should be understood as something that is "done," not simply

²¹ Andrey Polyakov, "The St. Petersburg School of Legal Philosophy and Russian Legal Thought", *Law and Philosophy Library* 125 (2018): 1–35, https://www.scopus.com/inward/record.uri?eid=2-s2.0-85113678097&doi=10.1007%2F978-3-319-98821-4_1&partnerID=40&md5=4822576b1caad233a348235d4edeb1cb.

²² Realino Marra, "A new reflection on legal realism. The American realists; [NUOVA MEDITAZIONE SUL REALISMO GIURIDICO REALISTI D'America]", *Materiali per una Storia della Cultura Giuridica* 55, no. 1 (2025): 5–33, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-105012413584&doi=10.1436%2F117573&partnerID=40&md5=02f6e85dd7bf701e43d39c1202367e2e>.

"written." They highlight that court decisions are often unpredictable from written rules alone, but are influenced by the social, economic, and even personal factors of the judges.²³

Another equally important development emerged from Scandinavia, especially through the influential Uppsala School in Sweden. This group rejects metaphysics in law and emphasizes emphasizing empirical analysis of legal language and practice, an approach that helps strengthen the philosophical foothold for legal realism. With a focus on the observational aspects and the social function of law, Scandinavian realism became one of the branches that was considered methodologically consistent among the world realist movement.²⁴

The BMG Australia acquisition case involving PT Pertamina Persero paid special attention to how business decisions can be drawn into criminal liability, before further reconstruction of facts plays a central role in forming the normative framework used by judges to assess the defendant's actions. In material terms, the acquisition decision was made through a legitimate corporate mechanism, involving a technical feasibility study, financial analysis, legal due diligence, approval of a subsidiary (PT Pertamina Hulu Energi), and approval of the supervisory body through the Board of Commissioners.²⁵ This fact shows that the defendant's actions were within the domain of business discretion prevalent in corporate practice. However, when those facts are processed judicially, the court establishes a different legal fact: the decision is considered to have been made without prudence, exceeded authority, and caused state losses. This shift shows that the legal construction of facts does not simply reflect the events that occurred, but reconstructs reality based on the normative framework of corruption criminal law.²⁶

The District Court in its consideration acknowledged that the defendant was not proven to have enriched himself, but considered that the element of abuse of authority was fulfilled due to the failure to adequately consider the risks. At this stage, there is a factual transformation from a business act to an unlawful act. Similarly, the High Court strengthened the ruling with an emphasis on the aspect of state losses as a direct result of decisions that were deemed immeasurable.²⁷ At the cassation level, the Supreme Court took a firmer position by placing the final result of the transaction (state loss) as a determining normative element, regardless of the procedures and corporate approvals that have been carried out. Instead of assessing whether the decision was within the limits of business reasonableness (*business judgment*), the Supreme Court considered that the absence of real business profits could be interpreted as an indication of legal error. The following table below will illustrate the comparative analysis between Material Facts and Legal Facts in Supreme Court Decision No. 121 K/Pid.Sus/2020, which shows how concrete facts are transformed into juridical constructions that underlie criminality:²⁸

²³ John Henry Schlegel, *Legal Realism, International Encyclopedia of the Social & Behavioral Sciences: Second Edition*, 2015, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85043428018&doi=10.1016%2FB978-0-08-097086-8.86076-6&partnerID=40&md5=22095c9f2c52df75a61cb6f3d1ac62b2>.

²⁴ Uta Bindreiter, *Sweden: Legal philosophy in the 20th century, A Treatise of Legal Philosophy and General Jurisprudence: Volume 12 Legal Philosophy in the Twentieth Century: The Civil Law World, Tome 1: Language Areas, Tome 2: Main Orientations and Topics*, 2016, https://www.scopus.com/inward/record.uri?eid=2-s2.0-85008958178&doi=10.1007%2F978-94-007-1479-3_21&partnerID=40&md5=280615fb58bbf0256775d7bfeb09bb33.

²⁵ Supreme Court, *Decision of the Supreme Court of the Republic of Indonesia No. 121 K/Pid.Sus/2020*.

²⁶ Public Relations Bureau, "State Losses of IDR 2.1 Trillion, KPK Designates Suspects for LNG Procurement Corruption at Pertamina".

²⁷ Supreme Court, *Decision of the Supreme Court of the Republic of Indonesia No. 121 K/Pid.Sus/2020*.

²⁸ *Ibid*.

Table 2 - Comparative analysis table between Material Facts and Legal Facts
in Supreme Court Decision No. 121 K/Pid.Sus/2020

Aspects	Material Facts (Empirical / Managerial)	Legal Facts (Normative / Judicial)
Nature of the Decision	Corporate investment decisions are made through Pertamina and PHE's internal mechanisms.	The decision was qualified as an abuse of authority according to the Corruption Law.
Procedure	Through technical studies, business evaluations, legal reviews, and approval of corporate organs (directors, commissioners, shareholders).	The procedure is "considered invalid or beyond authority" because it is considered not to meet the principle of prudence.
Action Motivation	To obtain potential long-term business profits from foreign oil and gas assets.	It is interpreted as a wrong decision so that it is considered against the law even without personal benefit.
Risks & Losses	Losses due to business factors, production fluctuations, and uncertainty in oil and gas exploration.	State losses are expressed as a direct result of the defendant's decision despite the inherent risks in the industry.
Accountability	It is collective and attached to the company's organs (<i>corporate decision</i>).	Personalized into individual liability.
Background	Managerial and corporate domains (business judgment).	It is reduced to the domain of criminal law corruption.
Assessment Standards	Business standards and good <i>corporate governance</i> .	Strict <i>liability in practice</i> .

Source: Decision of the Supreme Court of the Republic of Indonesia Number. 121 K/Pid.Sus/2020

It is in this space that the approach of legal realism becomes very relevant because legal realism invites us to honestly and objectively see the law not as it should be, but as it is in practice. Legal realism rejects the myth that judges are merely the lips of the law. Decisions are never born out of a vacuum, but are always influenced by public fear, social values, political pressure, and in this case, the national trauma to corruption in SOEs must be seen in a casuistic and contextual manner.

Substantively, legal realism presents several major contributions to the philosophy of law. First, the movement strongly criticizes legal formalism that assumes that law can be understood deductively through internal logic.²⁹ On the contrary, realists assert that legal uncertainty is inherent, as the legal text is often insufficient to determine the outcome of a verdict.³⁰ Second, they encourage serious studies of judges' behavior, as judicial decisions are considered to reflect more practical considerations than just the application of rules.³¹ Third,

²⁹ Justin Zaremby, *Legal realism And American law, Legal Realism and American Law*, 2013, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-84904196429&partnerID=40&md5=0a4b8763a1e4ca013e514a79788eabe4>.

³⁰ Schlegel, *Legal Realism*.

³¹ Marra, "A new reflection on legal realism. The American realists; [NUOVA MEDITAZIONE SUL REALISMO GIURIDICO REALISTI D'America]".

legal realism opens the door to the integration of social sciences in the study of law. By adopting the methods of sociology, psychology, and anthropology, they sought to describe how law works in social reality, not just how it should work according to doctrine.³²

Ultimately, legal realism marks an important shift in the philosophy of law: from law as a closed system to law as a complex and value-laden social practice. His legacy is still felt today through socio-legal approaches, critical law, and various empirical methods used to understand the role of law in modern society. This movement not only challenged traditional ways of thinking, but also expanded the definition of law itself from a mere normative text to a living and ever-evolving social phenomenon.³³

In the perspective of legal realism, court decisions are not understood as the result of a purely logical deduction from legislative norms, but as a product of the interaction between social facts, the psychology of judges, the political context, and the practical needs of the legal system. Legal realism, as developed by Oliver Wendell Holmes Jr., Karl Llewellyn, and Jerome Frank, departs from a critique of the positivist view that considers law as a set of rules that are neutral and autonomous. For the realists, "*the life of the law has not been logic; it has been experience*", meaning that the law must be read through what the judge decides in reality, not just what is written in the text of the law. In the Indonesian context, this approach is also affirmed by thinkers such as Shidarta, that the judge's decision is a reflection of a combination of empirical, sociological, and ideological dimensions that influence the legal reasoning behind the courtroom.³⁴

The facts of the case in the above ruling show that Pertamina's investment decisions were made through a series of juridical and financial analyses, consultations with professional institutions such as Baker McKenzie and Deloitte, and the approval of the company's official organs. No malicious intent, conflict of interest, or personal gain was found for the defendant. All of these are empirical legal facts that are very important in a realist approach because the law must read reality, not just the number of losses.

The Supreme Court also placed the principle of *Business Judgment Rule* (BJR) as a rational standard for assessing the actions of directors. This principle, which is explicitly recognized in Article 97 of the Limited Liability Company Law, provides protection to the directors as long as the decision is taken in good faith, prudence, and without personal interest. By acknowledging that Pertamina's investment decision meets these parameters, the Supreme Court emphasized that business risks should not be turned into criminal risks. This is where we see the Supreme Court's courage not to follow mere doctrinal logic, but to side with the logic of substantive justice, a hallmark of legal realism reasoning that assesses law as a rational instrument in social and economic contexts.³⁵

The doctrine of the *Business Judgment Rule* (BJR) is one of the most important pillars in modern corporate law, especially in the framework of corporate governance. This concept was born out of the legal tradition of the United States, specifically through the court rulings in Delaware, which is known as the most influential jurisdiction in corporate law. Basically, BJR provides room for the board of directors to make business decisions without fear of lawsuits, as long as the decision is made in good faith, based on adequate information, and in

³² Pierluigi Chiassoni, "Some Realism about legislation", *Theory and Practice of Legislation* 1, no. 1 (2013): 173–186, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-84883861041&doi=10.5235%2F2050-8840.1.1.173&partnerID=40&md5=719538a2496508c954a2327a328ed739>.

³³ Zaremby, *Legal realism And American law*.

³⁴ Shidarta, *Law of Reasoning and Legal Reasoning: Philosophical Roots*, I. (Bantul: Genta Publishing, 2013), https://www.researchgate.net/profile/Shidarta-Shidarta/publication/354053170_Hukum_Penalaran_dan_Penalaran_Hukum_Buku_1_Akar_Filosofis/links/612130b5232f955865a0e3d9/Hukum-Penalaran-dan-Penalaran-Hukum-Buku-1-Akar-Filosofis.pdf.

³⁵ Ibid.

the best interest of the company. Thus, this doctrine serves as a form of protection for directors in dealing with business risks inherent in the corporate world.³⁶

Historically, the BJR principle dates back to the 19th century, when common *law courts* sought to establish limits on the extent to which judges could interfere with business decisions that management had made.³⁷ Over time, Delaware became the center of the development of this rule, by affirming the *presumption* or presumption that the board of directors had acted correctly and responsibly. This presumption has since become a model for many other countries, both in Europe and in developing jurisdictions, that have adopted or adapted the principles of the BJR into their respective legal systems.³⁸

The substance of the BJR lies in the protection of the directors from personal liability for failed business decisions, as long as such decisions do not reflect serious negligence, conflicts of interest, abuse of authority, or breach of *fiduciary duties*. The two main obligations attached to the board of directors are *duty of care* and *duty of loyalty*. As long as these standards are met, the court will refrain from assessing the substance of the business policy made, even if the decision ultimately has an adverse impact on the company. In practice, there are two views on the BJR:³⁹ first, as a standard of legal liability that allows courts to assess whether the board of directors has breached their fiduciary duties; second, as a principle of non-intervention that affirms that courts should not review the essence of business decisions unless there are indications of serious irregularities.⁴⁰

The Supreme Court essentially sends an important message: criminal law is not a tool to punish every state loss, and the state must not replace the corporate liability mechanism with criminalization. This ruling is a marker that the criminalization of business decisions without considering procedures, intentions, and governance structures will threaten the courage of the directors and weaken the competitiveness of SOEs. The realistic approach used by the Supreme Court is a correction to the hyper-penalistic tendency in the eradication of corruption, a reminder that the function of law is not only to punish, but also to protect rationality and courage in decision-making. The following table describes the approach to Legal Realism in the study of ontology, epistemology, and axiology of Supreme Court Decision No. 121 K/Pid.Sus/2020, namely:⁴¹

³⁶ Giulia Neri-Castracane, "Does the business judgment rule help promote corporate social responsibility?", *Frontiers of Law in China* 10, no. 1 (2015): 8–23, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85031500907&doi=10.3868%2Fs050-004-015-0003-8&partnerID=40&md5=e1aae653f19131621d6db7b330511234>.

³⁷ Bruno Ferreira and Manuel Sequeira, *Business Judgement Rule as a Safeguard for ESG Minded Directors and a Warning for Others*, *The Palgrave Handbook of ESG and Corporate Governance*, 2022, https://www.scopus.com/inward/record.uri?eid=2-s2.0-85161940104&doi=10.1007%2F978-3-030-99468-6_14&partnerID=40&md5=b80f06f472bdf284e0958562310739d2.

³⁸ Jakub Brejdek, "Should be the CEO of the Company also a Philosopher? About the Principle of Business Judgment Rule which has been Codified in Poland; [Czy prezes spółki powinien być filozofem? O zasadzie business judgment rule, która doczekała się swojej kodyfikacji w Po]", *Prawo i Wiedza* 2021, no. 4 (2021): 256–271, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85127306567&doi=10.36128%2Fpriw.vi38.172&partnerID=40&md5=d69e24d13cdc504ad52ae65bf3f7594>.

³⁹ *Ibid.*

⁴⁰ Ambareen Beebeejaun in Pramod Bissessur, "The Business Judgment Rule as a Protective Armor for Directors' Responsibilities: A Comparative Study Among Mauritius, United Kingdom, and United States", *Statute Law Review* 45, no. 2 (2024), <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85194926708&doi=10.1093%2Fslr%2Fhmae028&partnerID=40&md5=78adf051d00acfb34129759b9d58029f>.

⁴¹ Shidarta, *Law of Reasoning and Legal Reasoning: Philosophical Roots*.

Table 3 - Conceptual Table of Legal Realism in the Perspective of Ontology–Epistemology–Axiology of the Supreme Court Decision No. 121 K/Pid.Sus/2020

Aspects of Philosophy	Basic Questions	The Character of Legal Realism	Implications in Supreme Court Decision No. 121 K/Pid.Sus/2020
Ontology (The Essence of Law / What is Law?)	What is the essence of the existence of law? What is the true law?	The law is not just a text, but a judge's decision in practice. Law is <i>law in action</i> , not <i>law in books</i> . Factual reality is more important than abstract normative constructions.	The Supreme Court did not stop at Articles 2-3 of the Corruption Act but saw the acquisition of BMG as a business reality that was subject to corporate risks and processes. The judge views the action as <i>a business decision</i> , not a corrupt act.
Epistemology (How to acquire legal knowledge / How do judges know the law?)	How is legal truth discovered? What are the sources and methods of legal knowledge?	The legal method is inductive, empirical, and contextual. Judges use experience, impact, empirical facts, and legal intuition as the basis for reasoning. It does not rely solely on deductive logic.	The Supreme Court assessed the empirical facts: due diligence, approval of the company's organs, no malicious intent, and no personal gain. Legal knowledge is built from business process documentation, not just from normative construction.
Axiology (Value / What is the law used for?)	For what purpose is the law applied? What is the value that the law must embody?	Law has an instrumental and pragmatic function: to improve social realities, protect the greater interests, not simply enforce the legal text. The value of substantive justice is paramount.	The Supreme Court's decision protects the managerial courage and business rationality of SOEs. The law is not used to punish business risks, but to protect the company's sound management process. Prevent overcriminalization of economic decisions.

Source: Shidarta, Law of Reasoning and Legal Reasoning: Philosophical Roots, 2013

Thus, through the lens of legal realism, this ruling is not just an acquittal, but an affirmation of the basic principle that the law must understand the realities of business and distinguish between strategic mistakes and crimes. This is where the philosophical value of the Supreme Court's ruling lies: the law must not stop at the text, but rather must move into a living space where business logic, the principle of prudence, and corporate rationality are valued as a legitimate part of the state-owned corporate management process. This ruling is a tangible manifestation of how legal realism works as a "sharpening knife" to bring substantive justice to life amid the complexities of modern law enforcement.

CONCLUSION

This study shows that the criminalization of business decisions in the Supreme Court Decision No. 121 K/Pid.Sus/2020 case cannot be adequately understood only through the lens of formal criminal law doctrine. When corporate strategic choices made through legitimate governance procedures are constructed as criminal acts, the line between economic risk and unlawful acts becomes blurred. This phenomenon confirms the tension between the criminal responsibility

regime for corruption and the principles of *the Business Judgment Rule* which should protect directors when decisions are made in good faith, rationally, and without conflicts of interest.

The approach of legal realism opens up space to understand that court decisions are not born in empty space; it was shaped by public anxiety about state-owned corruption, political pressure, and moral preferences that influenced judges' reasoning. The ruling shows the tendency of the law to focus more on results (state losses) rather than processes and intentions, thus shifting business risk as a natural part of management into the basis for punishment. This has the potential to cause a chilling effect on strategic decision-making in SOEs and weaken the economic function of state corporations.

This study confirms the importance of repositioning *the Business Judgment Rule* in corporate corruption cases, not to weaken accountability, but to prevent criminalization of business actions that do not involve fraud, conflicts of interest, or malicious intent. Criminal law must be applied proportionately while still considering the character of risk in the business world. Through the approach of legal realism, it can be seen that the protection of business rationality is an integral part of the enforcement of substantive justice and sound governance of SOEs. Thus, strengthening business discretion through the integration of BJR principles and the application of stricter evidentiary standards against the elements of error is key to preventing excessive criminalization, while maintaining the effectiveness of corruption eradication. This conclusion also opens up opportunities for theoretical development and policy reform so that criminal law does not become an instrument that hinders innovation and managerial courage in state-owned enterprises.

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