Good Governance in the Management of Village-Owned Enterprises: A Review of Legal Perspective

**Abstract:** The implementation of Good Governance in every activity of managing a Village-Owned Enterprise (BUMDes) is a legal entity or legal subject that is standalone in judiciary. It has its own responsibility as a legal entity for the actions that it does or a separate legal entity because the Village's finances are sourced from the Republic of Indonesia's State Budget legally, the use of the state’s money must be accounted for and is a loss experienced by the Village. In corporate law the business judgment rule doctrine is known to serve to protect the Directors of business decisions that constitute corporate transactions, as long as this is done within the limits of authority and there is no evidence of corruption based on 2 pieces of evidence that are proven based on a court decision on corruption. In the concept of business judgment rule as abstention doctrine, if the directors in making decisions have fulfilled the business judgment rule criteria, then the directors cannot be convicted (before the court). The making of the BUMDes must be obeyed by the BUMDes board of directors namely the Village Head and his apparatus in order to make an effort to avoid or prevent deviations / abuse of BUMDes.

**Keywords:** Good Governance, BUMDes, Village, Law.

**INTRODUCTION**

Philosophical background regarding the development of the application of moral and ethical issues in village financial management, such as good governance in line with the demands of business ethics. Because village financial management is a special arrangement regarding morals, right and wrong. The focus is on moral standards applied in Dal's management, institutional and behavioral policies (Krause, 1996; B6 et al., 2010). In this context the ethics of village financial management is an activity of moral standards and how they are applied to systems and organizations through modern society that produce and distribute goods and services to those who work in these organizations. There are still limitations in Human Resource management that manages village finances (Eryana, 2018). Besides that, village financial management needs to maintain accountability in every management (Saputra et al., 2018). Village Enterprises should be able to push the wheels of the economy for the community to create community empowerment (Astuti et al., 2020; Junaedi & Handam, 2020).

It can be interpreted that the basic obligation to manage village financial management is not only to maximize the success of achieving the good name of a village head and as Director of the BUMDes, but to ensure the survival of his village by balancing the demands / needs of the people who compete with each other from various stakeholder interests. Therefore, the need for ethical guidelines or code of conduct for the village head / kuwu in the management of the village government in accordance with the principles of good governance has been regulated in article 24 of Law No. 6 of 2014 concerning Villages jo Article 2 paragraph (1) and Article 3 of Law no. 20 of 2001 amendments to Law No. 31 of 1999 concerning Eradication of Criminal Acts of Corruption has adopted several principles of good governance in the management of village financial management. Because these provisions determine the rules that require directors and the supervisory board of the BUMDes in carrying out their duties must implement the principles, legal certainty; orderly administration of government; orderly public interest; openness; proportionality; professionalism; accountability; effectiveness and efficiency; local culture; diversity; and participatory”. This means that BUMDes management is free from Korupi, although not all BUMDes losses are state losses that are qualified as acts of corruption that clearly identify between losses due to business risk and state losses.
The Key to Implementing Good Governance in Legal Aspects

The key is in the implementation of Good Governance in every BUMDes management activity which is a legal entity (legal subject) that is independent (persona standi in judicio). It has its own responsibility as a legal entity for separate legal entities, because village finance is sourced from the RI State Budget, the law then the use of state funds must be accounted for and is a loss experienced by the Village in managing its wealth is not always identical to the state’s loss, but it can be an act of dishonesty carried out by the village head and staff, as regulated in Article 2 paragraph (1) and Article 3 of Law No. 20 of 2001 amendments to Law No. 31 of 1999 concerning Eradication of Corruption Acts “Every person who unlawfully commits acts of enriching oneself or others who are a corporation that can harm the country's finances or the country's economy, is criminally convicted with life imprisonment or imprisonment for at least 4 (four) years and a maximum of 20 (twenty) years and a minimum fine of Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

Any person who aims to benefit himself or another person or a corporation, misuse the authority, opportunity, or means available to him because of his position or position or means available to him because of a position or position that can harm the country's finances or the country's economy, is criminally convicted life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah) Based on Article 3 of Law no. 20 of 2001 amendments to Law No. 31 of 199 concerning Eradication of TIPIKOR.

Then what is the connection between the Prevention of Misuse of Village Owned Enterprise Funds (BUMDes) Towards Good Governance of BUMDes with the Government Judgment Rule Principle for Village Heads as BUMDes President Director?

This understanding is in line with the business judgment rule terminology according to the Black's Law Dictionary, which is defined as rule immunizes management from liability in corporate transactions undertaken within the power of corporation and authority of management where there is a reasonable basis to indicate that the transaction was made with due care and good faith (Black et al., 1990).

From this understanding, the business judgment rule doctrine actually wants to protect the directors of every business decision as a corporate action, as long as it is carried out within the limits of authority with prudent and good will. The implementation of the business judgment rule doctrine in the civil law system does not emphasize certain standards. However, it is more fundamental to the authorization agreements between the parties. In accordance with the principle of fiduciary duty, a director as the recipient of a power of attorney from a company may not act beyond his authority, as specified in the company's articles of association. If a director takes action outside and or does not comply with the limits of authority that have been given to him, he personally will be legally responsible, not the company as the authorizer.

Even though in the level of positive law, like Law No. 6 of 2014 concerning Villages was not found explicitly and clearly related to the business judgment rule doctrine. However, if examined closely, the business judgment rule doctrine has actually been accommodated in the substance of Law No. 6 of 2014 Article 71 paragraph (1) and paragraph (2) of Village Finance are all village rights and obligations that can be valued in money and everything in the form of money and goods related to the implementation of village rights and obligations.

Article 72 paragraph (1) of Law no. 6 of 2014 sub a, b and sub c stated expressly that: “Bhawa Desa Revenues as referred to in Article 71 paragraph (2) are sourced from: a). State Budget Revenue and Expenditure allocations; b). a share of the revenue from the regional tax and retribution for the regency / city area; c). Village fund allocation which is part of the balance fund received by the Regency / City.

Legal Linkages To BUMdes

Regarding the relationship between BUMdes and the business judgment rule doctrine related to the misuse of state money in BUMDes regulated in Article 1 paragraph (6), it states that: by the Village (derived from the allocation of the State Budget and Expenditures; b). a share of the revenue from the regional tax and retribution for the regency / city area; c). Village fund allocation which is part of the balance funds received by the Regency / City) through direct participation from village assets which are separated to manage assets, services, and other businesses for the maximum welfare of the village community.

Although the principle of ‘good faith’ to advance and prosper the village community through the development of BUMDes is regulated Article 87 paragraph (1) and paragraph (2) Village can establish a Village Owned Enterprise called BUM Desa. BUM Desa is managed with the spirit of kinship and mutual cooperation, in Article 88 paragraph (1), it is stated that the Establishment of BUMDes is agreed through the Village Conference. Which means that the establishment of the BUMDes in addition to the good faith of the village head (BUMDesa’s Managing Director) is also approved by the village community as shareholders containing the ‘soul’ and ‘spirit’ of the business judgment
rule doctrine. Which directors cannot be blamed for their decision as long as the decision does not contain an element of personal interest, is decided based on information they believe, by the right circumstances and rationally, and is the best decision for the company.

There are at least three parameters, which make whether a business decision is protected from violating the duty of care principles. First, have information about the problem to be decided and believe that the information is true and can be justified. Second, decide in good faith and have no interest in the decision. Third, it has a rational basis for believing that the decision it makes is the best for the company (Vagts, 1989).

The concept of mens rea departs from the business judgment rule doctrine, so in essence a director cannot be blamed for his business decision, as long as that decision (1) there are no elements of fraud (fraud), (2) there is no conflict of interest (conflict of interest), (3) there is no illegality, or (4) there is no concept of deliberate error (gross negligence). These parameters indicate that directors who take actions outside and or not in accordance with the limits of authority that have been given to him by the articles of association, will be personally responsible legally, both in the realm of civil law and within the scope of criminal law.

Criminal liability by Board of Directors BUMDES can be made possible, if there is a violation of duty of care and duty of loyalty. In the theory of fiduciary duty, the position of directors and commissioners is the fiduciary holder of the company and as a vital organ of a company. The fiduciary duty relationship is based on trust and confidentiality, which includes accuracy, goodwill, and candor. One important point in implementing fiduciary duties is the obligation for directors not to act recklessly in duty of care while not taking advantage for themselves over the company (duty of loyalty).

In more detail, Hans G Nilson in his writings Future Corruption in Europe states an act is classified against criminal law if there are elements of deceit, misrepresentation, concealment of facts. And, manipulation, breach of trust, and subterfuge or circumvention of regulations (illegal circumvention).

Based on the parameters as stated by Hans G Nilson and the legal theory above, two possibilities can occur. First, these actions constitute negligence or negligence due to lack of knowledge, inexperience or unprofessional (malpractice) or default (failure to perform an obligation), or acts against the law (onrechmatigedaa) as referred to in Article 1365 of the Civil Code.

This condition in turn can lead to criminal prosecution, if the negligence is formulated as an element of conduct so that it can be classified as conditional intentionality (dolus eventualis). However, if the action is not listed as an element of offense or ‘dolus eventualis’, it is included in the domain of administrative, ethical, or civil sanctions.

Second, if the above parameters are met, the actions of the directors or company organs have met the elements of criminal law. Therefore, all the negative parameters above are nuanced intentionally evil (dolus malus) and give rise to / strengthen the elements of the nature of the law (wederrechtelijkheid) formal and material in criminal law.

To qualify an act as corruption offense as regulated in Article 2 and Article 3 of the Law on the Eradication of Corruption, there are at least two main elements that must be fulfilled, namely, the unlawful element and the element of state financial loss. In the level of criminal law, the concept of acts against the law is the equivalent of the word wederrechtelijk, which is slightly different from acts against the law in the realm of civilization (onrechmatigedaa, default), and in administrative law (detournement de pouvoir).

The concept of criminal law teaches that to be categorized as wederrechtelijk requires a real intention from the perpetrators to commit a crime (mens rea). This understanding is in line with the Latin adagium "actus non facit reum, nisi mens sit rea", which means an act does not make a person guilty of committing a crime, unless his inner intentions are to blame according to law (an act does not make a person guilty, unless the mind is legally blameworthy).

Based on this principle, there are at least two conditions that must be met for a person to be convicted, namely the existence of a prohibited outward act (actus reus) as determined in the legislation and the existence of an evil inner attitude / reprehensible (mens rea).

It is at this point that the true business judgment rule doctrine with the concept of an element against the law in a criminal act of corruption, intersects with one another. When a director makes a business decision made solely for the purpose and interests of the company, for him will be protected by law when a loss that is a business risk.

Legal Consequences BUMDes board of directors policy

BUMDes Board of Directors Policy will be in touch and become the realm of law, when the process of a business decision is due to a conflict of interest, there is fraud, deliberate error, or is based on information that cannot be justified.

In addition, law enforcement officials can conduct an investigation / investigation, when business decisions violate the procedures set out in the legislation.
CONCLUSION

One of the objectives of the BUMdes is Village Development, village community empowerment, and assistance for the poor through grants, social assistance, but the making of BUMDes must be obeyed by BUMDes board of directors (Village Heads and their apparatus) in order to make efforts to avoid or prevent deviations / arbitrariness occur against BUMdes. If a BUMDes board of directors (the Village Head and his apparatus) may be subject to corruption. This is a consequence of the status of the legal entity owned by the BUMDes board of directors (Village Heads and their apparatus), because the funds for the establishment of the BUMdes come from the allocation of the State Budget; b) a share of the revenue from the regional tax and retribution for the regency / city area; c). Village fund allocation which is part of the balance funds received by the Regency / City and its responsibility for the loss of the business, therefore, although a Director (Village Head and his device as BUMDes board of directors) has a good intention in advancing BUMDes, BUMDES BOARD OF DIRECTORS must be responsible for the management actions and the consequences thereof. Therefore, in corporate law the business judgment rule is known to protect the Directors of business decisions that constitute corporate transactions, as long as they are carried out within the limits of authority and there is no evidence of corruption based on 2 pieces of evidence that are proven based on the decisions of the Corruption Court. In the concept of business judgment rule as abstention doctrine, if the directors in making decisions have fulfilled the business judgment rule criteria, then the directors cannot be convicted. The main mission of implementing the business judgment rule doctrine is to achieve justice, especially for directors of a limited company in making business decisions.

DAFTAR PUSTAKA


