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THE IMPACT OF THE TRADE WAR BETWEEN THE UNITED STATES AND CHINA ON ASEAN AND HUAWEI TECHNOLOGIES AS REVIEWED BY TRADE, INVESTMENT, AND COMPETITION LAW

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Abstract

The Trade War between the United States and China is impacting the worldwide economy, especially ASEAN part nations. The aim of this paper is to look at the effect of the US-China exchange battle on ASEAN and Huawei Technologies. It is separated into four sections: the initial segment will clarify the idea of worldwide exchange as it is analyzed by profession, speculation, and rivalry law, the subsequent part will clarify the exchange battle between the US and China as it influences ASEAN and Huawei Technologies, and the third part will clarify the job of RCEP as a guide to ASEAN and Huawei Technologies. The result of the analysis shows that the exchange battle between the US and China can be settled by building up an unbiased association as the Regional Comprehensive Economic Partnership (RCEP), and that substantial advances can be taken to lessen dependence on the US and China by diminishing commodities and imports, just as expanding and working on the quality of domestic items.

Keywords: *Trade War, ASEAN, Huawei Technologies*

1. INTRODUCTION

The economic relationship between the United States and China gives the United States a larger number of advantages than is broadly perceived. As per ongoing information, US commodities to China support over 1.8 million works in regions like administrations, agribusiness, and capital goods[1]. Be that as it may, trade with China has brought about the deficiency of occupations in certain industries in the United States, especially low-wage producing. Regardless of these costs, the organization's successive spotlight on the two-sided shortage is anything but a valuable measurement for assessing the US-China exchange or its effect on positions. The trade imbalance in the United States is an aftereffect of a low homegrown reserve funds rate, which requires the utilization of unfamiliar cash flow to help homegrown venture needs and the development in government obligation in the United States. Besides, the trade deficit doesn't consider the tasks of the U.S. furthermore Chinese members in each market, bringing about an estimation that shows the United States sending out more to China than vice versa[2].

China's financial model has a developing number of implications for the United States and the remainder of the world. In the first place, in creating innovations, the walk toward independence is contrary to an exchanging framework in light of near advantage. Second, the utilization of SOEs, their admittance to sponsorships, and China's limited law and order

[1] Oxford Economics for the U.S.-China Business Council, "Understand the U.S.-China Trade Relationship," last modified 2017, accessed July 2, 2019, http://www.uschina.org/reports/understandingus-china-trade-relationship.
[2] Joshua P. Meltzer and Neena Shenai, "The US-China Economic Relationship: A Comprehensive Approach" (Brookings, 2019), https://www.brookings.edu/research/the-us-china-economic-relationship-a-comprehensive-approach/.

benefit state firms both in China and all over the planet. Third, China's utilization of industrial strategy to choose champs is probably going to bring about overproduction and commodity unloading. This has as of now occurred in industries like steel and solar photovoltaic (PV), with adverse results for us and worldwide businesses, and it is relied upon to occur in further developed enterprises like advanced mechanics, fast rail creation, new energy vehicles, and batteries, as distinguished in China's new modern arrangements.

China has outperformed the United States as the world's top manufacturer of manufactured items beginning around 2011. The assembling area is a critical driver of public financial development and has helped with the improvement of individuals' everyday environments. Due to the huge volume of imports, the United States has concluded that the data and correspondence innovation industry will be affected by an expansion in import obligations. From absolute imports from China at USD $ 526 billion out of 2017, the US imports electronic gadgets and their parts worth USD $ 150 billion, meaning to smother the development of 2025 delivered in China.

President Donald Trump proposed clearing taxes of up to $60 billion on generally Chinese imports into the US in March 2018, because of China's charges against the US over the robbery of innovation and intellectual property.

In July 2018, Trump forced new taxes in the modern and transportation areas, just as a 25% import charge on electronic things and clinical hardware. Then, at that point, China fought back by setting up an arrangement of levy self-assurance for more than 500 US sends out worth an aggregate of US $ 34 billion, with wares like meat, milk, fisheries, and soybeans being focused on. Starting in December 2018, President Donald Trump met with Chinese President Xi Jinping to examine a $ 180 million economic agreement that would raise US soybean offering costs to the most significant level in a 4.5-month time frame in the product prospects market, permitting Chinese SOEs to purchase 500,000 tons of soybeans from the US.

The trade war between the United States and China provoked every government to raise trade tariffs, raising the cost of imported merchandise entering the country. The trade war is a term by the media and rehashed by government officials and financial specialists to depict the United States (US) conduct in raising import taxes on made merchandise from China and different countries, which has brought about the counter from the objective country. The US is making a move against China since it accepts that public authority has hurt the interests of US residents. Since China's commodity volume to the US unfathomably dwarfs its import sum, the US import/export imbalance with China has been consistently extending starting around 2010. To reduce the trade deficit, the US organization has been executing a procedure to raise import tariffs, especially against China, since June 2018. This exchange war went in a different direction when Google, situated in the United States, picked to interface their Android working framework with Huawei, a Chinese cell phone producer, regardless of government limitations. This immensely affects Huawei item clients. Countless Huawei telephones never again approach Google's selective administrations including Gmail, YouTube, Play Store, and Google Maps. Huawei is associated with providing secret activities administrations to the Chinese government on the grounds that the US accepts it is upheld by the military.

The trade war between the United States and China essentially affects ASEAN member countries' stability, especially in economic affairs. This impact is felt most emphatically by nations that depend on the two nations' commodity movement, like Singapore, Vietnam, Malaysia, and Thailand. The nations that sell the most to the United States and China are Vietnam and Malaysia, which are turning out to be progressively uncovered. Besides, in light of the fact that Singapore, Malaysia, and Thailand have significant assembling areas that are associated with worldwide organizations, levies forced on them might make yield be disturbed. In any case, other ASEAN nations, like Malaysia's compound industry and Vietnam's customer items area, may profit from the reception of this tool. Moreover, China's duties on US principle merchandise might help Thai organic product exporters and Myanmar cows farmers in exploiting the market[3]. The problem of this research is to decide how huge the effect of the US-China trade war ASEAN, explicitly on Huawei Technologies, just as the effect on other ASEAN member countries. To resolve these issues, ASEAN is endeavoring to strengthen the participation of six different nations that are individuals from the Regional Comprehensive Economic Forum (RCEP) as expanded exchange and venture, the two of which are relied upon to reinforce the economies of ASEAN's part nations. The Regional Comprehensive Economic Partnership (RCEP) is basic in adjusting the circumstance that has emerged because of the trade war, and it is projected to improve the worth of products and industries, which will affect Indonesia's monetary development.

2. RESEARCH METHODS

By finding reference hypotheses that are relevant to a case, this examination strategy utilizes the writing concentrate on research type. Hypothetical references gathered through research writing examinations fill in as the essential establishment and essential device for research practice in the field. The motivation behind this study is to inspect the effect of the US-China exchange battle on ASEAN and what it has meant for Huawei Technologies. This exploration is a critical thinking study, determined to give an answer. The creator inspects this case utilizing exchange, speculation, and rivalry law as a structure.

As indicated by World Bank data, 33 registered Chinese enterprises declared designs to move or extend their modern base outside of China between June and August 2019. 23 of these organizations were selected to take part. This reality builds up unfamiliar financial investors' impression of a few ASEAN nations' absences of guarantee. In light of the development of American organizations' creation base from China, the open doors introduced by the exchange battle between the US and China seem to have affected ASEAN nations. The following are some of the issues that make it difficult for countries around the world, particularly developing countries, to take advantage of outside investment opportunities: In terms of cost and time, internal procedures are inefficient. After the manufacturing base has been established, investors will consider the industry's life cycle possibilities in order for it to grow and eventually contribute to a rise in gross domestic product. Since domestic result requires raw materials from import activities and will be

[3] Oliver Reynolds, "Which ASEAN Countries Are Most Exposed in the Event of a U.S.-China Trade War?," *Focus Economics*, last modified 2018, accessed July 2, 2019, https://www.focus-economics.com/blog/which-asean-countries-are-most-exposed-in-the-event-of-a-us-china-trade-war.

traded universally through export activities, the significance and simplicity of product and import should be raised. Import tariffs are forced on creation inputs. Creation engineers, process engineers, creation arranging and stock chiefs, and HR directors need more HR. In contrast with other encompassing nations, strategies and asset costs are high. Making decisions that are not in light of training, for example, absolving creation things from import processes in a streamlined commerce zone region, ends up being contradictory with training. There is an idea that import endorsement takes something like five days, but it is requiring 3-6 months. Since specialists are uncertain whether or unsure imports require a suggestion letter, a few businesses have needed to end creation.

Primary legal materials accumulated through perception and secondary legal resources, including information got from journals, documentation books, and the web was utilized by the writer in this review. Documentation is a technique for finding papers or information that are pertinent to the utilization of this exploration through paper or magazine articles, journals, writing, documentation books, and electronic media or the web.

The article utilizes general primary and secondary logical techniques for analysis and synthesis to distinguish the reasons and forecast the results of the trade conflict. The creators analyze respective exchange insights just as the time span of the trade war. The analysis centers around key achievements that mirror the two countries' common public interests. It is possible to portray the objectives and concerns of specific significance for both countries by projecting inward rationale. The strategy for gathering information or sources, for example, periodicals, documentation books, the web, and writing, is known as writing study. The information is then assessed utilizing the distinct examination approach, which starts with a portrayal of current realities, trailed by an investigation that depicts as well as gives adequate knowledge and clarification. There has been studying and conversation to demonstrate the effect of the exchange battle on Huawei Technologies, which has broad exchanges in electronic parts with the United States and sells its items there.

3. ANALYSIS AND DISCUSSION

3.1 The Concept of International Trade Reviewed By Trade, Investment and Competition Law

The key stock side policies that can further develop market effectiveness and productivity development incorporate trade, investment, and competition policies. While the interactions among trade and investment, from one perspective, and trade and rivalry, then again, have been considered before, there are not many investigations that gander at the exchange, speculation, and contest changes all simultaneously. It's a good idea to consider these three strategies together on the grounds that they shape the motivations for endeavors and people to be more useful and for business sectors to be more competitive.

Any policy affecting global business, including taxes and non-tax obstructions, is alluded to as trade policy It is the policy framework, laws, guidelines, and international agreements that manage worldwide trade. One element of trade strategy is that it is, by definition, a "worldwide" approach that is "arranged" with different nations or settled upon in global associations, however can likewise be executed singularly. Trade changes, from a bigger perspective, are institutional changes that significantly affect financial conduct, asset

distribution, and associations with the remainder of the world since exchange advancement adjusts creation examples and drives nations' joining into the global economy.

Although both domestic and foreign investment can be tended to by investment policy, the emphasis here is on foreign investment. Investment policy, in this definition, alludes to any guideline or law that invigorates or puts abroad venture down. FDI, extra capital exchanges, and global firm activities are totally remembered for global investment Competition policy is characterized as "a mix of approaches and regulation that guarantees that market contest isn't compelled in a manner that is unsafe to society" or "in a way that diminishes economic efficiency"[4].

The objective of international partnership theory from the beginning has been to comprehend the variables and conditions that prompted the arrangement of the relationship. Organizations might be shaped because of conduct alterations made by entertainers in light of or expecting decisions made by different entertainers. Organization can be set up through an ongoing arranging processor in light of the fact that each side knows about each other and no further dealings are needed[5].

A partnership can be characterized as a bunch of connections that are not in light of savagery or impulse and are legitimately perceived, for example, in the United Nations or the European Union. State entertainers structure helpful connections through worldwide associations and global systems, which are characterized as a bunch of settled upon rules, guidelines, standards, and dynamic methods in which entertainers' assumptions and state interests crash within the context of international relations.

An international partnership can be characterized as a cooperative effort to address the prerequisites of individual nations. Worldwide systems are generally instruments that nations may use to achieve their singular points because of global association. Basically, the association should bring about the nations included receiving the rewards. Global cooperation, similar to clashes, requires the investment of at least two players. In worldwide associations, a mutual perspective of normal interests is utilized as a partnership[6].

Countries collaborate with states that have partnerships with other countries for a variety of reasons[7]:

1. To improve the economy by collaborating with other countries to raise the costs that the state must bear in producing products required by the country.
2. To boost productivity.
3. Because of the existence of issues with shared security.
4. To mitigate the damages incurred as a result of particular countries' reactions to the acts of other countries.

The connection between two countries or the interaction between larger units, frequently known as multilateralism, is examined in principle as a feature of global collaboration. Albeit numerous organizations start between two nations, multilateral

[4] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 1993).
[5] James E. Dougherty and Robert L. Pfaitzgraff, *Contending Theories of International Relations: A Comprehensive Survey* (Michigan: Lippincott, 2001), https://books.google.co.id/books?id=%5C_0nDQgAACAAJ.
[6] Andreas Hasenclever, Peter Mayer, and Volker Rittberger, "Integrating Theories of International Regimes," *Review of International Studies* 26, no. 1 (2000): 30.
[7] Pentti Ermala and Lars R. Holsti, "On the Burning Temperatures of Tobacco," *Cancer Research* 16, no. 6 (1956).

coordinated effort is the primary accentuation of global participation. John Ruggie characterizes multilateralism as an institutional structure that oversees the connection between at least three nations in light of commonly acknowledged social standards communicated in different types of foundations, like global associations, worldwide systems, and peculiarities that presently can't seem to show themselves, like global request. Several elements influence the formation of an international partnership:

1. Technological advancements lead to an easier manner for the state to interact with its citizens, hence increasing their reliance on one another.
2. Economic advancement and development have an impact on the nation's and state's well-being. The well-being of a country can have an impact on the well-being of other countries.
3. Shifts in the nature of war, such as a common desire to protect and defend one another through international collaboration.
4. There is an understanding and desire to negotiate, which is one of the strategies of international collaboration that is founded on the idea that negotiating will make it easier to solve difficulties.

The World Trade Organization (WTO) is a set of universally agreed-upon trade regulations that serve as a foundation for determining where China deviates from previous commitments. The US might next identify areas where Chinese activities are troubling but are not covered by WTO regulations, justifying the need for bilateral or unilateral action.
In terms of what the US could pursue at the WTO, the following are some possibilities:

1. The US ought to help out China to get an understanding at the WTO to lead a top to bottom audit of China's consistency with its WTO responsibilities.
2. Through the WTO, the US should ensure that China represents all of its SOE exercises and appropriations, as expected of any WTO part and as specified in its Protocol of Accession.
3. The US ought to draw in with partners and China to reestablish the China-explicit defense and foster a concurrence with China regarding its proceeded with utilization of the NME system until China can show that it is a market economy. An arranged settlement of China's WTO question against the EU and the US over their proceeded with utilization of the NME approach in exchange cure procedures could prompt advancement on this issue.
4. The United States should try to adjust the World Trade Organization's (WTO) debate settlement framework to empower quicker question goals, including possible injunctive solutions for uncalled-for exchange rehearses. This would be an institutional shift that could be useful in managing China.
5. The United States and China should use a bilateral agreement or BIT to re-energize WTO negotiations on new regulations in areas including technology transfer, SOEs, and digital commerce.

Regional cooperation is one of the most influential types of international cooperation. Each country in the area has fostered its own regional alliance. ASEAN is a kind of local coordinated effort or association that has created collaboration in an assortment of fields over the long term. At the beginning of ASEAN's development, the association's objective was to end the spread of socialism in Southeast Asia. Be that as it may, by building up a

common responsibility in the areas of economy and security[8], this territorial association is producing ties.

In addition, there are several other principles of tariff provisions in the WTO that must be considered, namely[9]:

1. The principle of protection through tariffs, The principle of protection through tariffs requires that protection of domestic industries is only allowed through tariffs, protection with tariffs needed to build certain industries infant industry protection and protection with quantitative restrictions in order to improve the balance of payments.
2. The waiver principle and emergency restrictions on imports, an act that allows a country to impose a quota on an imported product that experiences a substantial surge that harms the domestic industry.

3.1.1 The Impact of the Trade War on ASEAN from the perspective of Trade Law

China is the chief objective of the US exchange war activities because of its high development rates in the course of the most recent twenty years and the biggest exchange lopsidedness with the US. Levies are the first shot in a progression of reciprocal disagreements that are multilateralizing and endangering worldwide monetary solidarity, as well as an escalating mechanical rivalry. The arising worldwide situations of exchange and innovation clashes between the United States and China are the aftereffect of developing anxiety toward leaving multilateral participation for supremacy speculations. In the direst outcome imaginable, these strains may prompt a "decoupling" of the two economies, bringing about a drawn-out worldwide downturn and new international conflict. With the phenomenal utilization of leader power by post-US systems, this somber possibility has turned into a chance. The Trade War ASEAN nations that take on an open financial framework will be defenseless against outer macroeconomic elements, for example, the effect of an exchange battle between the US and China. Whenever an exchange war breaks out, every nation raises its exchange obligations, raising the cost of imported products.

The rising cost of imported merchandise will diminish how much business, making the sending out country lessen its assembling movement, bringing about a drop in trades. Item sending out nations to the United States and China will quit trading when the degree of products falls since interest for the ware falls attributable to stopped modern activities. ASEAN, as the aware exporter to China and the United States, should take on monetary methodologies that include macroeconomic factors to moderate the effect of the trade war.

3.1.2 The impact of the Trade War on ASEAN from the perspective of Investment Law

The law fills in as an expansive assertion of the plan for the worldwide business area. Unfamiliar organizations ought not to be constrained to hand over their

[8] David Galbreath, "International Regimes and Organizations," in *Issues in International Relations*, ed. T. C. Salmon and M. F. Imber (New York: Routledge, 2008).

[9] M. Rizky Syahputra et al., "Prinsip-Prinsip Dasar World Trade Organization (WTO) Dalam Hukum Perdagangan Internasional" (Medan: Fakultas Hukum Universitas Medan Area, 2013), https://enzifebrianti.blogspot.com/2013/03/makalah-hukum-perdagangan-internasional.html.

innovation to Chinese organizations; licensed innovation insurance ought to be reinforced; acquirement of merchandise ought not to victimize unfamiliar organizations, and unfamiliar venture should be urged however dependent upon security audits. Global business associations have lauded the consideration of a condition without a second to spare expressing that offices would protect classified data given by unfamiliar undertakings and that violators would be arraigned. Everything being equal, changing China's current strategies and cycles at both the public and neighborhood levels to conform to the new regulation will require years, on the off chance that not many years. Large numbers of these claims are hard to demonstrate lawfully, however, the message was clear: China's trade and speculation arrangements are "unreasonable."

The new regulation plans to reaffirm that China's exchange rehearses are or will be brought into consistency with universally acknowledged norms. The new regulation is about goals, however, activities make a difference to global undertakings. The issue is that the different sides are managing an assortment of underlying hardships that can't be dealt with in a solitary bill or even in the plausible next US-China economic alliance. The two players should attempt to assemble a more organized, rules-based methodology. However, the sustainability of its recent growth experience, which was powered by excessive credit expansion, is a concern. The quality of China's growth, rather than the rate, is the source of concern. China should place a greater emphasis on enhancing labor productivity and improving the efficiency of its investment spending.

3.1.3 The impact of the Trade War on ASEAN from the Competitive perspective

The two nations are excited about the respective item and administration trades as well as the improvement of worldwide inventory chains. Since the two nations will lose beyond what they can acquire because of the conflict, an arranged settlement understanding and the finish of the conflict is conceivable. Notwithstanding their elevated rivalry, we might expect China and the United States to stay vital accomplices. Business-to-business ties will fortify, and shared social arrangements will create. This exploration study has three objectives: first, it investigates the effect of domestic governmental issues in the United States and China on the exchange war and mechanical seriousness, as well as the means taken by the two nations to accomplish an innovative benefit.

It likewise assesses China's capability to impact worldwide innovation administration and standard-setting. At last, it considers the drawn-out impacts of the US-China exchange war and the US-China tech race overall on Asia-Pacific exchange and speculation streams. The review takes a gander at the risks of expanded vital contention - and the unsteadiness it brings to countries that need to keep up with associations with both the US and China - as well as the more extensive ramifications and likely solutions for limiting the impacts of the US-China monetary confirmation. Even if the United States and China reach an agreement to halt their on-again, off-again trade war, the economic and commercial relationship between the two countries will remain tense for years.

This is because the current disagreement is more about wider structural issues than it is about trade. In the long run, the United States and China are locked in a struggle for

economic and technological domination. Both sides will have to find a mutually acceptable middle ground in order to resolve this new rivalry.

3.2 Trade War between the US and CHINA and Its Impacts on ASEAN and the HUAWEI Technologies Company

In Donald Trump's leadership, the US has the slogan "America First"[10]. This slogan has an implicit intention regarding the US's desire to be the best and become number one in the world. But considering that China is growing rapidly in almost all trade sectors, both of them want to achieve this desire. ASEAN is a very strategic scope to develop the economy so that it can be a good field to invest in economic investment. Nations are not permitted to discriminate among their tariffs partners under WTO rules. Assuming that you give somebody an extraordinary blessing such a lower customs obligation rate for one of their things, you should respond to any remaining WTO individuals. The World Trade Organization (WTO) fills in as a scene for arranging arrangements pointed toward eliminating hindrances to global exchange and giving a fair battleground to all, so advancing financial development and advancement. The World Trade Organization (WTO) additionally gives a lawful and authoritative system for carrying out and observing these arrangements, just as settling arguments about their understanding and execution. The pursuit of open borders, the insurance of the most inclined toward country guidelines and non-oppressive treatment by and among individuals, and a commitment to straightforwardness in the lead of its exercises stay the WTO's essential and core values. With OK special cases or fitting adaptability, opening public business sectors to worldwide exchange will urge and add to reasonable turn of events, improve individuals' government assistance, dispose of destitution, and back harmony and steadiness. Simultaneously, such market progression should be supported by solid homegrown and international strategies that advance monetary development and improvement as per the necessities and desires of every part.

The trade war that erupted in early 2018 is a big stumbling block at an era when manufacturing has become a global activity and international commerce has powered Asia's progress and wealth. The two primary protagonists, the United States (US) and the People's Republic of China (PRC), are the world's largest economies and traders, accounting for roughly a quarter of global trade and two-fifths of global GDP. Furthermore, the trade dispute is not just bilateral, but worldwide, with many nations retaliating against the first round of tariffs on steel, aluminum, washing machines, and solar panels, even as a fresh wave of levies on auto and auto parts is threatened. As a result, it's critical to comprehend and evaluate the dangers that the existing policies, as well as those that may be imposed in the future, offer to Asian economies. The premise that free trade will allow Asia's growth plan to profit from ever-longer global value chains, where each production unit is engineered

[10] "Donald Trump: 'America First, America First,'" *BBC News*, January 20, 2017, accessed July 2, 2019, https://www.bbc.com/news/av/world-us-canada-38698654.

to minimize costs, maximize efficiency, and stimulate innovation through international alliances, underpinned Asia's growth strategy.

As per a review from the 2018 GDP Annual Growth Rate, China's economy is more steady, as demonstrated by the normal GDP of 6.75 percent, which is quickly ascending in contrast with the US GDP of 4.2 percent as of July 2018. This phenomenon elevates US readiness against China, requiring cautious assessment of each US financial methodology so America First can be cultivated. China has involved uncalled for modern and trade approaches in the past, for example, dumping, non-tariff barriers, forced technology transfers, overcapacity, and industrial subsidies, to make it harder for American businesses to compete. The "Made in China 2025" development is harming American organizations from one side of the planet to the other. China's average tariff is over three times higher than the average tariff in the United States.

The United States has found that China has taken its intellectual property, bringing about huge harm. Theft of Chinese intellectual property costs US financial investors billions of dollars every year, and China is answerable for 87% of all fake things entering the US. For a long time, the United States has had a merchandise import/export imbalance with China, remembering a deficiency of USD $ 375 billion for 2017. The sum represented north of 66% of the complete US import/export imbalance, which was USD $566 billion, or around 66% of the revealed overall excess. In principle, forcing high import levies will make US-made merchandise more affordable than imported things, empowering clients to purchase more US-made products. The impact of expanding utilization of homegrown items will at last build nearby businesses and back the public economy. Under the Trump organization, the strategy is relied upon to make US GDP higher and more steady than China.

Since July 2018, the United States has gotten multiple times how much cash from China as expanded items costs, adding up to USD $ 250 million. Luggage, handbags, bathroom tissue, and fleece are among the imported products subject to this toll. Food items, like frozen meat, different sorts of fish, soybeans, organic products, and rice, are likewise liable to import duties under this strategy. The forceful US activity drew a retaliatory reaction from China. As of now, the bamboo drape country has forced levies adding up to the US $ 110 billion[11] on imported products from the United States. A trade war between the two countries erupted as a result of this rate of reciprocity action.

The United States is the one that began a trade war by slapping heavy taxes on Chinese products. Nonetheless, Chinese tariffs on US imports have brought about fewer things and lower numbers than the US. China's government has expressed that it won't hurry to match the worth of tariff rates forced by the United States. In the present circumstance, China doesn't need a trade war to break out, accordingly, the Chinese methodology is to keep up with economic stability. Be that as it may, on the off chance that China doesn't correct revenge, China will experience critical misfortunes because of permitting the US to utilize the entirety of China's financial potential. Eventually, this exchange war was battled in light of a legitimate concern for every country to ensure its public advantages.

[11] "China Kenakan Tarif Balasan Untuk Produk Amerika," *CNN Indonesia2*, August 4, 2018, accessed July 2, 2019, https://www.cnnindonesia.com/ekonomi/20180804133135-532-319473/china-kenakan-tarif-balasan-untuk-produk-amerika.

To secure his country's interests, President Donald Trump sanctioned various arrangements, remembering a 25% duty for $50 billion in goods imported from China that contain significant industrial technologies, just as the "Made in China 2025" program, the last rundown of which will be reported on June 15, 2018. The US Trade Representative will then, at that point, complete the authorizations forced by the World Trade Organization (WTO) against China, which were first forced in March to address China's oppressive innovation permitting necessities, and the US will force explicit speculation limitations and more tight product controls for Chinese people and elements engaged with the securing of mechanically critical innovation. By June 30, 2018, a rundown of cutoff points and controls will be delivered.

Since the United States and China colossally affect the financial strength of different nations, any instability in one of them will inconveniently affect the worldwide economy. ASEAN is one of the areas that has been impacted by this. This happens because of ASEAN part nations' product and import relations with the United States and China. An overview of 1,008 respondents from government, the scholarly community, business, common society pioneers, and the media in ASEAN observed that most of the respondents didn't trust the reality of US association in Southeast Asian nations and that the greater part of the respondents didn't confide in the two nations to make the best choice in adding to harmony, security, flourishing, and worldwide administration in the ASEAN district. Truth be told, Japan, which well affects ASEAN[12] financial development, has a more elevated level of certainty.

One of the effects of the US-China trade war was also felt by Huawei Technologies. Trump issued an executive order that prohibits the use of Huawei in the US and raises a list of entities that mention every company affiliated with Huawei not to sell its products in the US. The impact of Trump's policy, made Huawei's income predicted to decline by around USD $ 30 billion in the next two years. As a result of this trade war, Google broke off the Android license partnership relationship with Huawei. This is a follow up to the signing of Trump's decision regarding the ban on US companies from buying foreign telecommunications equipment if it is indicated to endanger national security and Huawei is included in the list of foreign companies that endanger national security. But responding to this, Huawei has prepared a counter-attack through Patents. Until now, Huawei holds 56,492 patents embodied in high-tech telecommunications, network and technology in other fields of communication. Huawei is also one of the most 5G-themed patent holders in the world. This is used by Huawei to take patent rights with the aim of forcing Trump to cancel his policy. The US-China trade war heats up at the end of May 2019, because the US considers the Android-based smartphone market as an enemy. For the Trump regime, the Chinese government has the possibility of forcing companies such as Huawei to install a backdoor or loophole on products marketed in the US to be used as spy devices.

[12] Ign. L. Adhi Bhaskara, "Saat Cina Dan Amerika Berebut Pengaruh Di Asia Tenggara," *Tirto.Id*, January 10, 2019, accessed July 5, 2019, https://tirto.id/saat-cina-dan-amerika-berebut-pengaruh-di-asia-tenggara-ddxg.

In the G20 Summit in Osaka, Japan on Saturday, June 29th of 2019, President Donald Trump stated he would allow Huawei to buy products from the US again. US companies can resell their devices to Huawei, but the equipment sold is that does not disturb national security issues. Trump cannot force his will to continue to compete with China, because it fights Huawei or China, it can bring risks to the US. Especially from Huawei's $ 30 billion in revenue, of which US $ 11 billion is income from US companies, so Trump is increasingly aware of this[13].

ASEAN is probably going to experience collateral damage. This is on the grounds that each 10% decrease in Chinese products to the United States lessens essentially 1.1 percent of ASEAN nations' financial turn of events, The trade war between the United States and China will influence ASEAN as an association since it can possibly obstruct the execution of the ASEAN Economic Community Blueprint for 2025. China is ASEAN's top exchanging accomplice, while the United States is in the fourth position. These two nations' products represented 20% of ASEAN nations' complete commodities. Assuming the exchange battle between the two countries proceeds, send out merchandise creation would slow, which will, thus, impede the ASEAN part nations' unfilled inventory and solid interest for items. Trade wars, then again, diversely affect every ASEAN country, contingent upon how intently their commodities and imports are subject to one another. Thailand, Singapore, and Malaysia, for instance, are the nations generally impacted by the US and Chinese protectionism. With regards to cash deterioration, obviously, it affects Indonesia and the Philippines.

A Senior Executive of China's telecoms company Huawei said that, "America needs Huawei more than Huawei needs America". Beside that, 30% of components of Huawei's global products come from the US and that last year, Huawei spent US$11 Billion buying technologies and components from some 130 US Companies. Without purcase by Huawei, those US Companies are going to lose, which might affect 40.000 US jobs. Also, some 40 rural telecoms carriers in the United States and tens of thousands of rural residents would not be happy if they could no longer use Huawei equipment, which has been proved to be safe and have competitive "America needs Huawei an overabundance America," a senior chief of Huawei, a Chinese telecoms giant, expressed. Besides that, 30% of Huawei's worldwide merchandise are made in the United States, and Huawei burned through US$11 billion keep going year on advances and parts from 130 US organizations. Without Huawei's buy, those US organizations will be compelled to close, maybe bringing about the deficiency of 40.000 positions in the United States. Also, around 40 rustic telecoms transporters in the United States, just as a huge number of country residents, would be disappointed on the off chance that they couldn't keep on using Huawei hardware, which has been shown to be protected and practical. Huawei has had gigantic accomplishments regardless of not having a significant presence in the United States. They said that "obstructing Huawei won't make America secure"[14].

[13] Ahmad Zaenudin, "Di Balik Melunaknya Donald Trump Kepada Huawei," *Tirto.Id*, July 2, 2019, accessed July 5, 2019, https://tirto.id/di-balik-melunaknya-donald-trump-kepada-huawei-edlN.
[14] Xinhua, "Executive: US Needs Huawei More Than Huawei Needs US," *China Daily* (Hong Kong, September 11, 2019), accessed September 18, 2019, https://www.chinadailyhk.com/articles/233/42/23/1568172177998.html.

Besides, the trade war between the United States and China fundamentally affects ASEAN part nations' stability, especially in financial issues. This influences principally nations that depend on the two nations' product action, like Singapore, Vietnam, Malaysia, and Thailand. Vietnam and Malaysia send out the most to the United States and China, putting the two nations in danger. Besides, in light of the fact that Singapore, Malaysia, and Thailand have a sizable assembling area that is connected to an overall organization, duties forced on them might make yield be upset.

The impact of the trade war in competition for ASEAN members, including Indonesia's economic growth itself is one of those affected by the global slowdown due to the trade war. Economic growth in the second quarter of 2019 only reached 5.05%, slower than the same period last year of 5.27%. Meanwhile, during the first half of this year, the economy accumulated 5.17%, still far from the government's target of 5.3% this year. The reasons include falling investment and export performance. In the second quarter of 2019, investment still grew 13.7%, but slowed down compared to last year. Meanwhile, exports in January-July 2019 fell by 8.02% compared to the same period last year[15].

The impact of the trade war also hit Thailand, which today announced that economic growth in the second quarter of 2019 only reached 2.3%, the lowest in the last five years. Quoted from BangkokPost, the slowdown was partly due to the weakening of tourist growth, which is one of the main contributors to the country's economic growth. Meanwhile, the Philippines also recorded a slowdown in economic growth from 5.8% in the first quarter of 2019 to 5.5% in the second quarter of 2019. This growth was even the lowest in 17 quarters and still far below the government's target of 6-7%. In addition to the trade war, the political conditions in the country are also a factor holding back the country's economic pace. Singapore is the ASEAN country that has experienced the most impact from the US-China trade war. Investors are even worried that the Asian Investment and Financial Relations Country will experience a recession.

In the second quarter of 2019, Singapore's economy fell 0.6% compared to the previous quarter, the lowest since the 2009 global financial crisis. Quoted from CNN, the Singapore government also cut its economic growth target this year from the range of 1.5% to 2.5% to 0% to 1%. On the other hand, the economies of Vietnam and Malaysia are recorded to be still advancing amid the threat of a US recession and a trade war between the two largest economies. Quoted from Reuters, Vietnam's economy in the second quarter of 2019 still grew 6.71%, slowing compared to the first quarter of 2019 of 6.82%. Although slower than the first quarter, the growth was above analysts' predictions. In the first half of this year, the manufacturing of this Socialist State still grew 9.14%. Investment grew 8%, exports also grew 7.3%. Malaysia's economic growth in the second quarter of 2019 even reached 4.9%, higher than the first quarter of 2019 of 4.5%. Economic growth is also higher than analysts forecast[16].

[15] Agustiyanti, "Negara ASEAN Yang Menang Dan Kalah Di Tengah Perang Dagang AS-Tiongkok," *KataData* (Jakarta, September 19, 2019), https://katadata.co.id/agustiyanti/finansial/5e9a503885039/negara-asean-yang-menang-dan-kalah-di-tengah-perang-dagang.

[16] *Ibid*.

3.3 The Role of RCEP To Assist ASEAN in Maintaining Economic Stability AMID The Trade War

The Regional Comprehensive Economic Partnership, called RCEP, is a regional trade agreement between ASEAN countries and also plays a role in the giant Asian economic sectors, namely China, India, Japan, and South Korea. The RCEP initiative began in 2013, but until now it has not yet received an agreement due to resistance from several ASEAN countries and Japan. The development of RCEP is a system for its individuals to achieve innovation, high quality, and common monetary advantages. ASEAN, as recently said, adversely affects the event of exchange clashes. Despite trouble or question, the state will advance joint effort in view of neoliberal thoughts, especially in the monetary region. The Regional Comprehensive Economic Partnership (RCEP) is probably going to be finished soon, permitting ASEAN to help its economy amidst a trade war.

This is a positive thing for Indonesia because in the midst of a trade war, Indonesia can actually take advantage of the US-China trade war by cooperating with RCEP countries. Through this partnership, Indonesia can increase the value of exports and investments which can have a positive impact on economic growth. From a Chinese point of view, RCEP is a profitable RTA because it offers access to the markets of Japan, India and Australia, which is very useful considering the efforts to develop a partnership with the three countries have not been successful. In addition, joining RCEP is very good for China because it excludes the US that is not in it, so China can avoid US threats through TPP agreements in the Southeast Asia region. If RCEP is successfully agreed upon, then a large free trade area will be created without the United States as part of it.

Seeing the ongoing rapid growth in the future, RCEP's overall GDP will potentially grow by more than US $ 100 trillion by 2050, or about double the size of the Regional Comprehensive Economic Partnership (RCEP): Issues and Way Forward, This agreement itself is scheduled to be realized at the end of 2017, and if it is rehabilitated, it will give a very big advantage, especially China as the superpower that has the biggest influence in it considering that the US is not incorporated in this agreement.

RCEP set up various arrangements about global economic instability starting with the March meeting, which corresponded with the fortifying of US-China ties. As a matter of first importance, to address tax techniques and boundaries, just as to additionally speed up the interest supply dynamic. RCEP supports supply in all types of supply and fills in as a stage for cooperation even with surprising difficulties. The culmination likewise brought about a consent to accelerate rule-production endeavors pointed toward working with exchange and speculation while additionally advancing the expansion and profundity of local worth chains. The accentuation on the RCEP conversations' colossal potential is expected not exactly at upgrading financial development, making more positions, and working on individuals' livelihoods in the RCEP district, yet in addition at contributing significantly to worldwide exchange development.

In mid-July, RCEP held a meeting to discuss US and China negotiations to conduct negotiations that discussed RCEP negotiation agreements quickly and consistently with the guiding principles and objectives for RCEP with any policies related to unilateral trade In mid-July, the Regional Comprehensive Economic Partnership (RCEP) held a

gathering to talk about US-China exchanges. The gathering covered RCEP arrangement arrangements rapidly and reliably with the core values and targets for RCEP, just as any approaches connected with one-sided exchange exchanges and the wide ramifications of ASEAN nations in the multilateral trading framework. The 6th gathering was directed on October 13, 2018, in Singapore. The RCEP talked about various announcements connected to exchange war avoidance, the push for open market increase, and measures to limit the hole between RCEP part countries. The RCEP conversations will be done before the finish of 2018 because of the way that RCEP individuals incorporate arising nations.

Another RCEP conference was held in November 2018 to examine the trade war and track down the best arrangement. This shows that the RCEP is turning out to be more engaged with the battle against trade wars. The RCEP shows that part countries stress organization over who benefits the most. As RCEP individuals, Japan and South Korea can likewise give good monetary conditions to other RCEP individuals, especially arising nations. Since Japan and South Korea have joined ASEAN and RCEP, global collaboration is the best technique to relieve the adverse outcomes of trade wars. The November 2018 RCEP responsibility expresses that RCEP encourages commonly useful participation to fabricate a more evenhanded monetary climate. The job of the RCEP is likewise one of trust and articulation of good faith among the nations that have gone along with it. At the point when the Singaporean Prime Minister showed that he had placed his demands up and made certain of RCEP during an exchange war, an illustration of RCEP participation had the option to convey greatness.

A few realities that can be clarified incorporate the way that the RCEP nations' joined GDP is very enormous, representing 30% of worldwide GDP and that the market capability of RCEP individuals is relied upon to surpass the US $ 21.6 trillion. As per Bachrul Chairi, Director General of the Indonesian Ministry of Trade's International Trade Cooperation, the monetary force of ten ASEAN nations is presently only 5% of worldwide GDP, or generally the US $ 2.6 trillion. The RCEP has expanded the financial strength of the partaking nations to 30% of worldwide GDP, or US$ 21.6 trillion. What's more, the ASEAN market just arrives at 600 million occupants, and RCEP's market target incorporates 16 nations arriving at 3.4 billion occupants.

The importance of RCEP in fostering partnerships benefits all parties involved, as evidenced by some of the data presented above. The RCEP has the potential to become the world's mega-trade. RCEP has the ability to cover a large portion of the global market, removing tariff obstacles that constitute a concern during a trade war between the US and China, and even acting as a buffer against future trade wars.

This section shall include the Author’s analysis of the formulation of issues elucidated in the Introduction section. The analysis must be novel and original with no prior Author having analyzed the same matter discussed. The Author’s analysis/discussion must conform to its research method as prescribed previously.

4. CONCLUSION

In this, we conclude that the trade war between the United States and China is having an influence on the global economy, particularly in ASEAN member countries. The purpose

of this research is to examine how the US-China trade war affects ASEAN and Huawei Technologies. It is divided into four sections: the first will explain the concept of global exchange as it is analyzed by profession, speculation, and rivalry law; the second will explain the exchange war between the US and China as it affects ASEAN and Huawei Technologies, and the third will explain the role of the Regional Comprehensive Economic Partnership (RCEP) as a guide to ASEAN and Huawei Technologies. The analysis concludes that the trade war between the United States and China can be resolved by forming an independent organization such as the Regional Comprehensive Economic Partnership (RCEP) and that significant progress can be made to reduce reliance on the United States and China by reducing commodities and imports, as well as expanding and improving the quality of domestic goods.

The trade war between the United States and China has had a significant influence on ASEAN countries' investment and economic competition. The existence of a neutral organization in the midst of the US-China and ASEAN trade wars, namely RCEP, has an essential role to play in addressing the negative effects of the trade war, according to the findings of this study. Members of the RCEP have expressed a desire to collaborate in order to improve economic circumstances amongst countries. ASEAN member countries, particularly developing countries, are seen as capable of dealing with the trade war by attempting to take concrete steps such as reducing exports and imports, as well as increasing and improving the quality of domestic products, in order to reduce reliance on the US and China.

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LEGAL POLICY OF IMPLEMENTATION OF ORGANIZING UMRAH WORSHIP IN INDONESIA

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Abstract

Umrah is a worship for Muslims in the Holy Land of Mecca. The provision of umrah worship in Indonesia is stipulated in Law of Republic of Indonesia Number 8 of 2019 concerning the Implementation of Hajj and Umrah Worship and amended under Law Number 11 of 2020 concerning Job Creation. The hope of being able to perform worship safely and comfortably does not always go well, because in fact there are still many problems that would have to be faced by umrah pilgrims. Referring to the Directory of Supreme Court's of Indonesia, every year there are cases registered in the Court regarding the Umrah Worship Travel Organizer, both in the civil lawsuit and criminal cases, this shows that there is still weak protection for umrah pilgrims. This research aims to explore and analyze regulations regarding the conduct of umrah worship in Indonesia, implementation of regulations, as well as the ideal arrangement of umrah worship in Indonesia. Methodology of this study is based on normative legal research which carried out several approaches such as statutory approach, case approach and comparative approach. In this paper, normative legal research is also supported by empirical research. The results of this study essencially show the potential problems in the Umrah worship arrangement that result in disadvantages for Umrah pilgrims who are not get they right to assigned to holy land Macca, the weak protection provided for Umrah worship shows potential problems in the umrah worship arrangement, therefore an alignment and amendment to the implementing regulations of the Umrah worship arrangement is required, the application of the obligation to provide insurance protection of departure certainty for all umrah pilgrims with any travel package is expected to provide protection and certainty of departure umrah.

Keywords: *Umrah Pilgrims; Implementation of Regulations; Protection of Departure*

1. INTRODUCTION

In etymologically the word of umrah it's means visiting, while according to the terminology, umrah worship means visiting the Kaba in Holy Land Macca to perform a series of worship services under the stated conditions[1]. In efforts to provide protection, security, and certainty for the people of Indonesia in their departure on carrying out Umrah,[2] the Government regulates its efforts through laws and implementation[3] regulations regulated by the Ministry of Religion. Law Number 8 of 2019 concerning the Implementation of Hajj and Umrah Worship (hereinafter referred as Law 8/2019 Hajj Umrah) in conjunction with Law no. 11 of 2020 concerning Job Creation (hereinafter referred as Law 11/2020 Job Creation) stipulates that the Umrah Worship Travel Organizer (from now on referred to as PPIU). PPIU is a Travel Bureau with a special permit from the Ministry of Religion. As regulated in the Umrah Hajj Law, PPIU must meet the requirements, as follows:[4]

[1] Oyo Sunaryo Mukhlas Mukhlis, *Pranata Sosial Hukum Islam* (Bandung: PT. Rafika Aditama, 2015), 49.
[2] Government Regulation No. 38 of 2021 concerning the Escrow Account for Umrah Travel Expenses explains the meaning of Umrah worship as visiting the Baitullah outside the Hajj season to carry out Umrah, followed by performing tawaf, sai, and tahalul.
[3] Organizing Umrah Travel is a series of Umrah pilgrimage activities outside of the Hajj pilgrimage which includes guidance, service, and protection of the congregation, which is carried out by the organizers of the Umrah pilgrimage and/or the Government. Article 1 PMA 6/2021.
[4] The requirements for being the Organizer of Umrah Worship regulated in Article 89 in Law 8/2019 Hajj Umrah

1) owned and managed by Indonesian citizens who are Muslim;
2) registered as a legal travel agency;
3) have managerial, technical, personnel competence, and financial capabilities to perform Umrah with bank evidence and guarantees;
4) has a partner bureau for Umrah in Saudi Arabia that has obtained official permission from the Government of the Kingdom of Saudi Arabia;
5) has a track record as a quality travel agency with experience in organizing trips abroad; and
6) Commit to fulfilling the integrity pact to organize Umrah pilgrimages following the minimum service standards set by the Minister while continuously improving the quality of Umrah services.

As the organizer of Umrah prayers, PPIU should follow the Law in carrying out operations for accepting registration of prospective Umrah pilgrims, collecting funds, managing departure administration, and dispatching Umrah pilgrims. [5] PPIU itself has obligations to Umrah pilgrims, including: [6]

1) provide at least one worship supervisor for every 45 Umrah pilgrims;
2) provide travel documentation services, accommodation, consumption, and transportation to the pilgrims by the written agreement agreed upon between the PPIU and the Umrah Congregation;
3) have a working agreement with health care facilities in Saudi Arabia;
4) dispatching and returning Umrah pilgrims by the visa validity period of the Umrah visa in Saudi Arabia;
5) dispatching registered Umrah pilgrims in the current Hijri year;
6) follow minimum service standards and reference prices;

PPIU's obligations are set so that the implementation of Umrah can be carried out properly, and the community can carry out Umrah worship solemnly and return to their homeland safely. However, in Indonesia, there are still many people who are victims of the PPIU and were not sent to the holy land. Various cases occurred, which resulted in significant losses to tens of thousands of peoples who were not dispatched by PPIU.

Two major cases in Indonesia in 2017 were the driving factors for the enactment of Law 8/2019 Hajj Umrah, replacing Law No. 13 of 2008 concerning the Implementation of Hajj Worship, which has been in effect for more than ten years. The positive note in Law 8/2019 stipulates criminal provisions for PPIU that intentionally cause the failure of the departure, abandonment, or failure of the Umrah congregation to return.[7] However, prior to Law 8/2019, the Government amended Law 8/2019 through Article 68 of Law 11/2020 concerning Job Creation. Where Article 68 of the Job Creation Law regulates changes and additions to articles in Law 8/2019, it is interesting to examine Article 68 of the Job Creation Law which amends Law No. 8/2019 where the amendments between Article 119 and Article 120 are added to one Article, which are Article 119A wherein the Article regulates administrative sanctions in the form of (1) temporary suspension of activities; (2) administrative fines; (3) government coercion; (4) freezing of business licenses; and or (5) revocation of business license. This Article applies to PPIU's failure to the departure, abandon, or failure of the return to the Umrah Congregation. In addition to adding an article regarding the application of administrative sanctions, in Law 11/2020 concerning Job Creation also changes Article 126 so that Article 126 stipulates that if the PPIU takes action as referred to in Article

[5] the implementation of umrah worship arrangements is stipulated in the Implementing Regulations: the *Ministerial Decree of Minister of Religion* No. 5 Year 2021 on Business Activity Standards for Umrah Travel Organization and Special Hajj Organization, and Regulation of the *Ministerial Decree of Minister of Religion* No. 6 Year 2021 on the Provision of Umrah Worship and Special Hajj Worship.

[6] Right of Umrah pilgrims prescribed in Article 94 in Amendments to the Umrah Hajj Act Enacted in Article 68 of Law 11/2020 concerning Job Creation

[7] Relating to criminal regulations against PPIU prescribed in Articles 119 and 126 of the Law 8/2019 Haji Umrah

119A within a maximum of 5 (five) days does not return the Umrah Congregants to their homeland. The PPIU shall be sentenced to a maximum imprisonment of 10 (ten) years or a maximum fine of Rp. 10,000,000,000 (ten billion rupiah).

closer look at the regulation, in Article 126 in two different laws, Law 8/2019 on the Implementation of Hajj and Umrah and Law 11/2020 concerning Job Creation in protecting prospective Umrah pilgrims. This raises the question of whether this Article can provide legal protection and certainty for prospective Umrah pilgrims who are victims because of the firmness of Law 8/2019 Article 126 regarding the punishment for the PPIU that intentionally causes the failure of the departure, abandonment, or failure the return of the Umrah Congregation. The firmness of criminal sanctions has changed in Law 11/2020 Amendment Article 126, with criminal sanctions on severe punishment for PPIUs who do not return Umrah pilgrims for more than 5 (five) days. However, this still does not reflect justice for Umrah pilgrims who were not dispatched by PPIU because, in practice, the problems regarding the non-departure of prospective Umrah pilgrims are far more than the problems of not being returned on time for Umrah pilgrims from the Holy Land to Indonesia.

This problem in the organization of umrah worship is a problem that is often the concern of researchers who write scientific works, but this problem can be seen from various sides, such as research on specific matters that specifically discuss and analyze court settlement from this case, such as the case study of PT. First Anugrah Karya Wisata to Jemaah As a result of acts against the law[8], there are also studies that discuss the nature of the State's constitutional responsibility to protect the religious rights of citizens[9] who are concerned with the state's responsibility to guarantee their rights to arranging umrah trip and appoint it in the event of an extraordinary thing (especially a massive departure). There has not been a similar legal study that raised the issue of legal policy and protection of prospective Umrah pilgrims in Indonesia, which refers to the latest regulations as Law 8/2019 Hajj Umrah and its amendments to Law 11/2020 on Job Creation, making it an opportunity for researchers to conduct research and found solutions related to the problems formulated. The need for this issue to be examined is due to its relevance to protection and legal certainty for prospective pilgrims in Indonesia.

Despite the existing laws and the Government's efforts to protect the community in carrying out Umrah, there is still no precise mechanism or system, or regulation that guarantees the departure of Umrah. In short, various regulatory reforms set by the Government still have not accommodated the granting of rights for prospective Umrah pilgrims who have paid the cost of the Umrah pilgrimage to continue to be sent to the holy land if the PPIU does not carry out its obligations to dispatch Umrah pilgrims. As a result, there is no certainty about the departure of Umrah pilgrims, the number of peoples who become victims from year to year, the large number of losses to victims of PPIU fraud, uncertainty in the case settlement process, and the absence of a database that the public can access on integrated Umrah information that records the names of pilgrims. PPIU, which is responsible for organizing Umrah trips and the mechanism for checking the departure preparation process. These shortcomings lead to the need for further studies, which are defined as the following research question, first, how does the Law regulate the implementation of Umrah in Indonesia?; second, how is the implementation of regulations regarding the implementation of Umrah in Indonesia, and what problems are faced by prospective Umrah pilgrims?; and third, what is the ideal arrangement for organizing Umrah for the people of Indonesia?

From a theoretical point of view, this legal research uses Gustav Redbruch's theory of three fundamental legal pillars in enforcing the Law, which are justice, legal certainty, and expedience. The

[8] Diaz Pratiwi Mukti, "Analisis Pertanggungjawaban PT. First Anugrah Karya Wisata Kepada Jemaah Akibat Perbuatan Melawan Hukum (Studi Putusan 209/Pdt.G/2017/PN.Dpk)" (Universitas Lampung, 2018), http://digilib.unila.ac.id/37252/.

[9] Tahir Musa Luthfi Yazid, "Hakikat Tanggung Jawab Konstitusional Negara Dalam Melindungi Hak Keagamaan Warga Negara" (Universitas Mataram, 2020).

basis of the use of Gustav Redbruch's theory is that this theory does not allow a conflict between justice, certainty, and expediency. Certainty and benefit must not only be placed within the framework of justice but also placed as an integral part of justice itself. Legal certainty is no longer just a certainty of legality but the certainty of justice[10]. Likewise, the matter of benefit is no longer a benefit without a benchmark. Justice is expected to be the basis for making regulations related to the implementation of the Umrah pilgrimage so that these regulations not only facilitate and provide space for investment and businesses to organize Umrah pilgrimages but also to have a fair value for prospective Umrah pilgrims. Legal certainty is expected not only in the form of court decisions but also in the context of court decisions that reflect a sense of justice for PPIU victims.

2. RESEARCH METHOD

As explained in the background above, the focus of this research is the legal protection of the rights of prospective Umrah pilgrims to perform Umrah worship regardless of the various obstacles that may occur due to negligence or intentional negligence of the Umrah Travel Organizer. This is important because the Hajj and Umrah Law does not explicitly regulate the certainty of departure for prospective Umrah pilgrims. To analyze these problems, the methodology used in this study is normative legal research[11], with focus on reviewing the law and regulation supported by empirical legal research. Therefore, the object of research is the legal regulations themselves, focusing on reviewing the laws and their implementation regulations related to the implementation of the Umrah Worship. Various approaches can be chosen in the research, including the statute approach, case approach, historical approach, comparative approach, conceptual approach, analytical approach, and philosophical approach[12]. In this study, the approach used is a case approach and a comparative approach.

3. Analysis and Discussion

3.1. Regulations regarding the Implementation of Umrah in Indonesia

Umrah worship is the implementation of worship carried out by Muslims based on the pillars of Islam,[13] which oblige Muslims who able to do, According to the Ministry of Religion, refers to istitha'ah (capable of performing Hajj and Umrah) in terms of physical, spiritual, economic and security[14] in order to perform umrah worship perform the pilgrimage. Umrah is the choice of worship to the holy land of Mecca for Muslims. In Indonesia it self is not easy to be able to perform hajj worship because of the very long waiting period for the departure of Hajj. Besides that, the Hajj can only be performed 1 (one) time a year. a large number of Hajj registrants is a factor in the number of Hajj queues that are getting longer, which is reach 44 Years of Hajj departure waiting period in Sidrap – South Sulawesi[15], as well as the limited quota for Hajj provided by the Government of Saudi Arabia.[16] Umrah worship is an alternative to worship

[10] Heather Leawoods, "Gustav Radbruch: An Extraordinary Legal Philosopher," *Washington University Journal of Law & Policy* 2 (2000): 74, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1516&context=law_journal_law_policy.
[11] Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2010), 93.
[12] Valerine J. L. Kriekhoff, *Metode Penelitian Hukum* (Jakarta, 2015), 180.
[13] The 5 Pillars of Islam : 1. The Profession of Faith (The Shahada); 2. Daily Prayers (Sholat); 3. Alms-Giving or Charity (Zakat); 4. Fasting during Ramadhan (Saum); 5. Pilgrimage to Mecca for who can afford (Hajj). Umrah worship is often carried out as an application of Islamic law because it is carried out as a pilgrimage
[14] Departemen Agama, *Bimbingan Manasik Haji* (Jakarta: Dirjen Penyelenggaraan Haji dan Umrah, 2006), 10–11.
[15] Kementerian Agama Republik Indonesia, "Estimasi Waiting List Jamaah Haji," *Website Haji Dan Umrah*, last modified 2022, accessed April 15, 2022, https://haji.kemenag.go.id/v4/waiting-list.
[16] the Hajj quota for each country is determined by the Saudi Arabian government, so the length of waiting time for the Hajj departure is affected from the good relationship between Indonesia and Saudi Arabia in determining the number of Hajj quotas given by the Saudi Arabian government every year.

in the holy land because the implementation of Umrah can be done at any time, with no limited quota and a shorter time of the pilgrimage.

The implementation of Umrah in Indonesia was initially regulated in Law Number 17 of 1999 concerning the Organization of the Hajj Worship, which was later refined by the enactment of Law Number 13 of 2008 concerning the Organization of the Hajj Worship. In both laws, Umrah is included in the sub-regulation of the Hajj and does not regulated independently. In 2009 Law no. 13/2008 was amended by Law Number 34 of 2009 concerning the Stipulation of Government Regulation in place of Law Number 2 of 2009 concerning Amendments to Law Number 13 of 2008 concerning the Organization of the Hajj into a Law which amended 4 (four) articles in the Act. 13/2008. After approximately 10 (ten) years, it became a regulation for implementing the Hajj and Umrah pilgrimages. Finally, Law 13/2008 was declared no longer valid and replaced by Law 8/2019 concerning the Implementation of Hajj and Umrah Worship. In this Law, changes can be seen as positive vibes by stipulating in a more detailed and firm manner regarding the implementation of the Umrah worship and also providing criminal sanctions for PPIU who do not carry out their responsibilities to dispatch, manage and also return Umrah pilgrims to Indonesia. Law 8/2019 is included in the Law, which changed along with dozens of laws that also changed in Law 11/2020 concerning Job Creation.[17] Law 8/2019 was amended to provide convenience for the public, especially business sectors, in obtaining business permits from the religious sector.[18]

The Law on the Implementation of Umrah has changes, improvements, and developments in society to accommodate the community's needs in carrying out Umrah in a comfortable, safe and orderly manner following Islamic Law; however, problems experienced by prospective Umrah pilgrims still often occur. Referring to the Directory of Decisions of the Supreme Court of Republic of Indonesia, which contains online court decisions and is integrated with decisions from all Courts in Indonesia[19], as well as various media reports about cases of fraud and the non-departure of Umrah pilgrims are serious issues that must be analyzed so the main problems can be formulated to found the right solutions.

To implementing the mandate of Law 8/2019 concerning Hajj and Umrah in conjunction with Law 11/2020 concerning Job Creation, the Government issued an implementing regulation as stated in Government Regulation Number 5 of 2021 concerning the Implementation of Risk-Based Business Licensing regulates business licensing (hereinafter referred as PP 5/2021) in the religious sector as well as the application of administrative sanctions against business actors who commit violations. Furthermore, in the same year, Government Regulation No. 38 of 2021 concerning the Escrow Account for Umrah Travel Expenses (hereinafter referred as PP 38/2021). This regulates the provisions for opening a bank account[20] in specific propose intended to accommodate deposit fees for Umrah pilgrimages. In addition to regulating storage accounts in PP 38/2021, it also regulates the application of reference Umrah fees which will be determined periodically, as well as the use of Umrah pilgrims' deposit fees, which are for the provision of transportation, accommodation, consumption, guidance for Umrah worship, health, protection, administration, and documents. Furthermore, in addition to the two Government Regulations stipulated regarding Umrah worship, the Ministry of Religion assign 2 (two) Regulations for the Minister of Religion (PMA). Firstly, Ministerial Decree of Minister of Religion Number 5/2021 concerning Standards for Business Activities for Organizing Umrah Worship and Organizing Special Hajj Worships

[17] there are 78 Law Acts amended in Law No. 11 of 2020 on Job Creation or often referred to as Omnibuslaw

[18] Amendments to Law 8/2019 Hajj Umrah are stipulated in Paragraph 14 of the Religious Sector, Article 68 of Law 11/2020 Job Creation

[19] Mahkamah Agung Republik Indonesia, "Direktori Putusan," last modified 2022, accessed April 15, 2022, https://putusan3.mahkamahagung.go.id.

[20] Article 1 and Article 3 of the PP No. 38/2021 regulates that the Shelter Account is an account in the name of the PPIU at the Payment Receiver Bank (BPS) used to house umrah pilgrimage funds for the organization of umrah worship trips that are separate from the PPIU operational funds account outside of umrah activities.

(hereinafter referred as PMA 5/2021) regulates the standard guidelines for business activities for Umrah Travel Organizers (PPIU) and Special Hajj Service Organizers (PIHK). Secondly, Ministerial Decree of Minister of Religion Number 6/2021 concerning the Organization of the Umrah Worship Trip and the Implementation of the Special Hajj (hereinafter referred as PMA 6/2021), which regulates the registration and reporting of Umrah pilgrims by the PPIU to the Ministry and arrangements for depositing the cost of the Umrah pilgrimage to fulfill the Umrah pilgrimage.

The Government's efforts to harmonize laws and regulations related to providing protection, security, and comfort in carrying out Umrah worship to the community while still providing convenience for business actors to do business in the PPIU field by providing more specific requirements than the previous requirements as Law 11/2020 concerning Job Creation, is not an easy to implement. The main problem, which are the large number of prospective Umrah pilgrims who are not dispatched, shows that there are still weaknesses from the aspect of legal certainty. From a normative point of view, there is a misalignment between Article 119A and Article 126, where Article 119A regulates administrative sanctions for PPIUs that intentionally do not send pilgrims, abandon, or do not return pilgrims. Whereas Article 126 regulates the punishment for the PPIU who commits as stated in Article 119A, this is ambiguous from the purpose of the application of the sentence so that it can lead to multiple interpretations, multiple penalties, and uncertainty in the application of the Law. In the Islamic law itself, the application of the sentence is for Al-Jaza (revenge), Al-Jazru (entrepreneurship), Al-Ishlah (recovery/ improvement), Al-Istiadah (restoration)[21]m.

3.2. Implementation of Provision on Umrah Worship for Prospective Umrah Pilgrims

Performing Umrah for Muslims in Indonesia is not as easy as doing daily pray, need specific preparation because Umrah can only be performed in Mecca - Saudi Arabia, and there are inherent rights and obligations between prospective Umrah pilgrims as consumer and PPIU as travel agent. Currently, only PPIU and the Government can carry out Umrah travel arrangements, the Government it self can only perform umrah in an emergency condition,[22] so it can be said that people who want to carry out Umrah must choose PPIU, the agent that accommodates the trip. Problems occur when the PPIU does not carry out its obligations to send prospective Umrah pilgrims to Mecca. legal certainty, justice, and benefits are obtained by the people who are victims of the PPIU.

In the ideal legal perspective, prospective Umrah pilgrims who have registered and paid for the umrah fee will be registered by the PPIU no later than 3 (three) working days from receiving the BPIU deposit in the online data collection of the Ministry of Religion through the application of the Computerized Integrated Management System for Umrah and Special Hajj (hereinafter referred as SISKOPATUH). PPIU is also obliged to protect prospective Umrah pilgrims in the form of sharia-based travel insurance, which must also be reported in SISKOPATUH. However, prospective Umrah pilgrims cannot access the system information whether they are registered or not in the Ministry of Religion data because only PPIU can access the existing integrated information system, so Umrah pilgrims cannot monitor the process of registration.

Law 8/2019 provides positive changes by implementing an insurance system to protect Umrah pilgrims. This is also stated in the implementation regulations in the PMA 5/2021. However, the insurance system provided focuses on travel insurance that the protection start from Departure to Mecca until arriving back to Indonesia. With the basic insurance protection that start valid from Departure time, its still not give solution while the main problem is the risk of not being dispatched by the PPIU, so they

[21] Mardani, *Hukum Pidana Islam* (Jakarta: Prenada Media Group, 2019), 7.
[22] Article 2 of the PMA 6/2021 regulates that the Umrah Worship Travel Organization may be conducted by the Government in exceptional circumstances or emergency conditions prescribed by the President.

cannot perform Umrah. Further referring to Article 97 and Article 98 of the Law 8/2019 Haji Umrah, concerning the provision of insurance to Umrah pilgrims, the Government provides the flexibility for PPIU to determine the insurance package that can be chosen. The insurance protection clause does not require the guarantee of departure or refund from pilgrims who are not dispatched. Furthermore, to find out how the rights of prospective Umrah pilgrims are protected, an evaluation is carried out from an empirical perspective by conducting case studies on 2 (two) significant cases that occurred in the last five years, which are the case of PT. First Anugerah Karya Wisata (First Travel) and the case of PT. Amanah Bersama Umat (Abu Tour), as follow:

1) PT. First Anugrah Karya Wisata / First Travel case has permanent legal force (Inkrah)
    1. District Court Decision: No. 83/Pid.B/2018/PN.Dpk
    2. High Court Decision: No. 195/PID/2018/PT.BDG
    3. Supreme Court Decision: No. 3096 K/Pid.Sus/2018

    Defendant 1: Andika Surachman (President Director)
    Defendant 2: Anniesa Desvitasari Hasibuan (Director)
    Number of Victims: 63,310 (sixty-three thousand three hundred ten) prospective Umrah pilgrims who were not departed
    Total Loss: Rp 905,333,000,000- (nine hundred five billion three hundred thirty-three million rupiah)
    The outline of the Decision of the Panel of Judges at the district court, appeal, and cassation level is as follows:
    1. Defendants 1 and 2 were found guilty of committing the crime of "Together Committing Fraud and Money Laundering as a Continuing Action."
    2. The defendant 1 was sentenced to imprisonment for 20 (twenty) years and a fine of Rp. 10,000,000,000,- (ten billion rupiah)
    3. Defendant 2. Anniesa Desvitasari Hasibuan with imprisonment for 18 (eighteen) years and a fine of Rp. 10,000,000,000,- (ten billion rupiah)
    4. Determine evidence, 1 to 529 consisting of objects that have economic value and several original documents and photocopies confiscated by the State
    5. Refused the appeal request from the Public Prosecutor and the Defendants and upheld the Depok District Court Decision No. 83/Pid.B/2018/PN.Dpk, May 30, 2018
    6. Rejecting the Cassation Application from the Cassation Petitioner I/Public Prosecutor at the Depok District Attorney and also Rejecting the Cassation Application from Cassation Petitioner II/Defendant I and Defendant II

2) The case of PT. Amanah Bersama Umat / Abu Tour has permanent legal force (Inkrah)
    1. District Court Decision: No. 1235/Pid. B/09/2018/PN.Makassar
       Defendant: Muhammad Hamzah Mamba as President Director
    2. District Court Decision: 1377/Pid.B/2018/PN.Makassa
       Defendant: H. Muh. Kasim Sunusi Bin Sunu Dg. Nompo as Finance Manager
    3. District Court Decision: 1378/Pid.B/2018/PN.Makassa
       Defendant: Chaerudin or Pak Heru Bin M. Latang as Commissioner
    4. Commercial Court Decision: 4/Pdt.Sus-PKPU/2018/PN Mks
       Bankruptcy Respondent: PT. Amanah Bersama Umat / Abu Tour, Muhamamad Hamzah Mamba, Nursyariah Mansyur

    Total Number of Victims: 96,976 (Ninety-six thousand nine hundred and seventy-six) prospective Umrah pilgrims who were not departed

Total Losses: 1,214,091,220,242,- (one trillion two hundred fourteen billion ninety-one million two hundred twenty thousand two hundred forty-two rupiah).

The outline of the Decision of the Panel of Judges at the district court and Commercial Court Judges is as follows:

1. The Defendants were proven legally and convincingly guilty of committing the crime of "Embroidery and Money Laundering Together as Continuing Actions."
2. Defendant Muhammad Hamzah Mamba, as the President Director, was sentenced to 20 (twenty) years in prison and paid a fine of Rp. 500,000,000.- (five hundred million rupiah), Defendant H. Muh. Kasim Sunusi Bin Sunu Dg. Nompo, as Finance Manager, was sentenced to 16 (sixteen) years in prison and paid a fine of Rp. 100,000,000.- (one hundred million rupiah), the Defendant Chaerudin alias Pak Heru Bin M. Latang as Commissioner was sentenced to 14 years imprisonment. (fourteen) years and pay a fine of Rp. 100,000,000.- (one hundred million rupiah)
3. Evidence in the form of objects of economic value, money, and valuable documents returned to the rightful through the Curator appointed based on the Makassar Commercial Court Decision Number 4/Pdt.Sus-PKPU/2018/PN.Mks dated September 20, 2018
4. In the Decision of the Commercial Court Number 4/Pdt.Sus-PKPU/2018/PN.Mks dated September 20, 2018, which states that the Respondent has postponed the Obligation of Payment of Debt (PKPU) PT. Trust with the Ummah (Abu Tours), Muhammad Hamzah Mamba, and Nursyariah Mansyur, bankrupt with all the legal consequences;

Analyzing the two decisions through a case study, the case decision in the First Travel case is much different from the decision in the Abu Tour case, while the owners of the two PPIUs are both proven to have committed criminal acts that resulted in losses to hundreds of thousands of Umrah pilgrims who were not dispatched with a loss value of hundreds of thousands billions of rupiahs. However, it is felt that the victims still have not received justice because hundreds of thousands of pilgrims who have been harmed have lost their right to perform Umrah, lost their money for the payment of Umrah fees, some victims did not get their money back and some received a small refund for the bankruptcy decision. Following the bankruptcy rules and a relatively long process in settlement of the bankruptcy bundle and different rights priorities between concurrent, separatist, and preferred creditors. From the analysis of this decision, it can be seen the shortcomings that exist in Indonesian Law regarding the protection of the rights of Umrah pilgrims in the implementation of Umrah worship, which are:

1. Where is the legal certainty fair for the Umrah pilgrims who are victims of not being dispatched by the PPIU? Because, in reality, they carry out the same process, which are registering and paying the Umrah fees. However, the Umrah pilgrims must accept the results of court decisions that are much different due to differences in the legal process adopted, the articles being prosecuted, and the decisions handed down.
2. There is no standard mechanism regarding the problem-solving process for prospective Umrah pilgrims whom the PPIU does not dispatch. So each person, either individually or collectively, chooses their respective legal steps, such as making police reports, civil lawsuits, bankruptcy lawsuits, or other legal steps they deem appropriate because the Government has not implemented a standard mechanism for resolving PPIU problems.
3. There is no solution to the main problems felt by Umrah pilgrims who are not dispatched. Which are, the main goal is to carry out Umrah worship to the Baitullah. Because in the end, from the two decisions, the community still did not get their right to go for Umrah because the concepts of justice, legal certainty, and benefit, as reflected in the decision, were sentencing certainty. At the same time, the community desires to carry out Umrah so that the decision does not reflect justice and expediency.

3.3. THE IDEAL ARRANGEMENT FOR ORGANIZING UMRAH IN INDONESIA

Research on a problem is not only carried out to find out the cause of the problem but is also expected to provide a solution to the existing problems so that the solution is expected to anticipate the recurrence of the same problem, reduce the risk of losses caused by the problem, and provide benefit to others.

A comparative study was conducted to see and learn how other countries regulate the implementation of the Umrah pilgrimage to provide a broad perspective. Comparative studies were conducted by comparing the mechanism for problem-solving in organizing Umrah in Indonesia, Malaysia, and Singapore. It has been discussed in the juridical analysis and case studies in this discussion regarding problem-solving in Indonesia. As a comparative study of the implementation of Umrah in Malaysia and Singapore, it can be explained as follows:

1. Malaysia

Malaysia is a country with a majority of Muslims, just like Indonesia. The implementation of the Umrah pilgrimage in Malaysia is overseen by Majesty Kawal Selia Umrah (hereinafter referred as MKSU), which was established on August 28, 2014, under the Ministry of Travel, Arts & Culture[23]. MKSU, with the Department of Waqf Zakat and Hajj Malaysia (hereinafter referred as JAWHAR), issued an Umrah Package Fraud Awareness Guide regulation. In the regulation regarding the Umrah Package Fraud Awareness Guide, the Malaysian Government provides information that there are 3 (three) primary forms of fraud that occur in Malaysia, which are[24]:

1. Fraud with the intention of not performing Umrah worship or not sending Umrah pilgrims;
2. Umrah worship is not following the agreement;
3. Other fraudulent methods related to Umrah packages include lucky draws, lifetime cards, Multi Level Marketing (MLM), and Sponsors.

The Malaysian Ministry of Travel, Arts & Culture issued a directive for compensation for user complaints through the Malaysian User Claims Tribunal (hereinafter referred as TTPM). TTPM is a Dispute Settlement / Remedy Act imposed by the Malaysian Government for prospective Umrah pilgrims or users to make demands easily, low cost, and fast and get free & fair decisions. The requirements for submitting a claim to the TTPM are that the claim is filed with a claim value of not more than RM 25,000.00 - (twenty-five thousand Malaysian Ringgit).

2. Singapore

Regulations related to Muslims in Singapore are regulated in the Administration of Muslim Law Act (hereinafter referred as AMLA). AMLA is a law relating to Muslims in Singapore and contains provisions governing Islamic religious affairs[25]. The implementation of the Hajj and Umrah pilgrimages in Singapore is regulated by the Islamic Religious Council of Singapore or the Singapore Islamic Ulema Council (hereinafter referred as MUIS). It was established as a legal entity in 1968 when the AMLA came into force. Under AMLA, MUIS is authorized to advise the President of Singapore on all matters relating

[23] "Information on Umrah and Pilgrimage," *Malaysian Government Portal*, accessed March 18, 2020, https://www.malaysia.gov.my/portal/content/30453.
[24] "Penipuan 3 Bentuk Utama," *Majlis Kawal Setia Umrah*, accessed March 18, 2020, http://umrahmksu.motac.gov.my/panduan/kesedaran-penipuan-pakej-umrah.
[25] *Singapore Administration of Muslim Law Act* (Chapter 3), original Enhactment: Act 27 of 1966, Revised Edition 31 October 2009.

to Islam in Singapore. The role of MUIS is to regulate and safeguard the interests of the Singapore Muslim community[26].

All Singaporean travel agent companies that handle the implementation of the Umrah pilgrimage are members of the Association of Muslim Travel Agents Singapore (AMTAS). AMTAS was founded in 1996 and currently consists of 49 (forty-nine) Muslim Travel Agents who are members. AMTAS supports and cooperates with the Embassy of the Kingdom of Saudi Arabia to ensure that Umrah visas for Singaporean pilgrims are applied, processed, and issued on time and by the requirements set by the Saudi authorities.

Singapore establishes a mechanism for registering prospective pilgrims through a Travel Agent determined by MUIS and published to the Singaporean public. The determination of the travel agent is based on the proposal and presentation of the travel agent company and travel consortium presented to MUIS. The information submitted to MUIS includes the price of the Hajj package and all accommodations that will be provided based on the price offered. From this proposal, MUIS examines and determines Authorized Travel Agents For 2019 – 2020 (1440h – 1441h) And Approved Packages For Haj 2020 (1441h)[27]. Publication and disclosure of clear and easily accessible information for Singaporean Muslims is one of the keys to the successful implementation of Umrah in Singapore.

Looking at the three countries, which are Indonesia, Malaysia, and Singapore, in organizing Umrah worship and overcoming its problems, it can be seen that in Indonesia, there is still no standard for problem-solving mechanisms as Malaysia who protect prospective umrah pilgrim with dispute settlement by the Malaysian TPPM. Information disclosure about the packages offered strictly important in Singapore, but is not a priority in Indonesia. The flexibility provided and the opportunity for PPIU to offer Umrah package prices below the reference from the Ministry of Religion is again a way for untrusted PPIU to setting the crime by promoting very low price of umrah Package as promotion trick. Moreover, low prices attract prospective Umrah pilgrims, as is often the case in Indonesia.

Adapting the other country regulation regarding implementation umrah will give the other view of dispute resolution to increase the problem of umrah pilgrams in Indonesia. with strict dispute settlement apply, all the victim of PPIU can follow the government instruction to settle the problem with PPIU, also insurance protection that provide for all prospective umrah pilgrims to ensure every person who registered as umrah pilgrims will get the right to do umrah worship with PPIU services or by the arrangement from the insurance protection cover.

4. CONCLUSION

Considering the above discourse analysis with the conclusion:

4.1. Amendments to Law 8/2019 concerning the Implementation of Hajj & Umrah, which are amended in Article 68 of Law 11/2020 concerning Job Creation, seem rushed and undeveloped in considering changing the provisions of Article 119 and Article 126 well as the addition of Article 119A. Furthermore, the implementation of Law 8 /2019 has not been regulated yet until amended with Law 11/2020, so it cannot be evaluated whether the application of criminal sanctions in violations committed by the PPIU is appropriate and creates a deterrent effect for PPIUs in Indonesia so that they are more responsible and careful in managing the money deposited by umrah pilgrims. Furthermore, administrative sanctions overlap with criminal sanctions, which can lead to different perspectives and the application of Law to the problems carried out by the PPIU.

[26] "Rule and Functions of Majelis Ugama Islam Singapura," *MUIS Official Website*, last modified 2020, accessed April 23, 2020, https://www.muis.gov.sg/About-MUIS/Roles-Functions.

[27] "Authorised Travel Agents For 2019 – 2020 (1440h – 1441h) And Approved Packages For Haj 2020 (1441h)," accessed April 23, 2020, http://www.muis.gov.sg/Haj.

4.2. From case studies conducted on several court decisions related to 2 (two) significant cases in Indonesia. Which are, in the First Travel case and the Abu Tour case, it can be concluded that Indonesia still does not have a standard mechanism for resolving the Umrah problem. So, the two cases resulted in 2 (two) different decisions due to different legal processes, which are criminal and bankruptcy. Furthermore, the court's decision may fulfill the element of justice in giving an appropriate punishment in imprisonment for an extended period, which is more than 10 (ten) years for PPIU perpetrators. However, true justice is still not felt for prospective Umrah pilgrims because they do not get they rights to be able to perform the Umrah worship. The insurance clause required as protection for prospective Umrah pilgrims does not regulate the protection to coverage umrah pilgrim certainly of umrah departure, so it focuses more on minimum facilities within the scope of travel insurance. Still, it does not provide departure guarantee protection for Umrah pilgrims.

4.3. The results of the comparative study show that there are differences in the mechanism for organizing the pilgrimage in Indonesia, Malaysia, and Singapore. On the one hand, Malaysia has a particular dispute settlement for umrah issues, and Singapore chooses to prioritize supervision and information disclosure through the publication of all packages offered by umrah travel so that the public knows the standards set and permitted by the Government. On the other hand, in Indonesia, based on the latest regulations, Law 11/2020, which applies administrative sanctions and criminal sanctions, the integrated information system SISKOPATUH is also used for government monitoring of the registration of prospective Umrah pilgrims. However, unfortunately, this information data can only be accessed by the PPIU and also the Ministry of Religion, so the public does not can access information related to their umrah data collection.

4.4. From the normative legal research conducted on the laws on the implementation of the Hajj and Umrah pilgrimages, a comparative study of the implementation of the Umrah pilgrimage in Indonesia, Malaysia, and Singapore, as well as case studies that occurred. In connection to the conclusion as mentioned earlier, it is advisable to do as follows:

1. Amend the provisions on Umrah insurance which previously gave the PPIU flexibility access to determine a protection clause. Amended by requiring a clause on protection for the guarantee of the departure of Umrah pilgrims. This insurance aims to divert the risk of not being handed out umrah, so the insurance cover the risk and provide umrah services to all prospective umrah pilgrims who cover by the insurance. With this method the prospective umrah pilgrims are guaranteed in the certainty of their departure if the PPIU does not carry out its obligations to dispatch Umrah pilgrims by the Umrah departure time limit as stipulated in law.
2. Establish a mechanism for dispute settlement in specific for umrah problems stipulated in the legal system in Indonesia to provide justice, certainty of the law and benefit of society.
3. Creating an integrated information database that can be accessed by all people in Indonesia, where the database contains information that provide the information about prospective umrah pilgrims, information about PPIU who organizes the umrah, the date of registration, the price of packages, and facilities obtained, and the estimated time of departure. With this information disclosure, the public will easily monitor the process of organizing their Umrah until the departure time to avoid a reoccurrence of departure delays that lead to the absence of prospective Umrah pilgrims.

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LEGAL PROTECTION FOR CONSUMERS OF LIFE INSURANCE PRODUCTS DURING COVID-19 PANDEMIC IN INDONESIA

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Abstract

Despite life insurance penetration rate has increased from year to year and the total premium income of the life insurance industry had reached trillions of Indonesian Rupiah by the end of 2020, it is undeniable that legal protection for consumers of life insurance products still has its shortcomings. This can be seen from the issuance of Law Number 8 of 1999 concerning Consumer Protection, in which its issuance was more or less influenced by the International Monetary Fund (IMF) during the 1998 monetary crisis. In contrast, regulation related to insurance has been stipulated decades before Indonesia's independence through *Kitab Undang-Undang Hukum Dagang* (KUHD / *Wetboek van Koophandel voor Indonesie*) or the Indonesia Commercial Code. A detailed regulation regarding life insurance was introduced through Law Number 2 of 1992 concerning Insurance Business which focuses on insurance companies and their supporting institutions. However, there was no specific regulation regarding protection for insurance consumers until 2013 when Financial Services Authority (OJK) issued Regulation Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector which regulates consumer protection not only for insurance company, but also for other financial institutions including banks, securities company, investment advisor, pension fund, and financing company. Later, the Government of Indonesia (GoI) issued Law Number 40 of 2014 concerning Insurance in which, according to its elucidation, reflected great attention and support to protect consumers of insurance services. In 2020 during the global COVID-19 pandemic, the financial services sector was greatly affected and consequently, the condition also affected how insurance companies interact with their consumers due to some restrictions during the pandemic. In this regard, this study attempts to analyze regulations issued by GoI during COVID-19 related to consumer protection of life insurance products, within the scope of Law Number 8 of 1999, OJK Regulation Number 1/POJK.07/2013, and Law Number 40 of 2014.

Keywords: *Life Insurance; Consumer Protection Law; Insurance Law; COVID-19 pandemic.*

1. INTRODUCTION

It was March 2, 2020, when Indonesia confirmed its first cases of coronavirus. There were two Indonesians, a 64-year-old woman and her 31-year-old daughter, who tested positive after being in contact with an infected Japanese national, who lived in Malaysia and had tested positive after returning from a trip to Indonesia.[1] Following the incident, the Government of Indonesia (GoI) declared the Corona Virus Disease 2019 (COVID-19) emergency through the issuance of Presidential Decree Number 11 of 2020 concerning the Determination of Public Health Emergency COVID-19 on 31 March 2020.

Later, Indonesia Financial Services Authority or *Otoritas Jasa Keuangan* (OJK), as the supervisor of insurance companies in Indonesia, issued the OJK Letter Number S-7/D.05/2020 of 2020 Concerning Relaxation of the Deadline for Submitting Reports from

[1]Reuters. "Indonesia confirms first cases of coronavirus." Published on 2 March 2020, from: https://www.bangkokpost.com/world/1869789/indonesia-confirms-first-cases-of-coronavirus accessed on 18th November 2021.

Non-Bank Financial Services Institutions to OJK on March 23, 2020. This letter mentioned that OJK was aware that several Non-Bank Financial Services Institutions (NBFI) have implemented work from home policies for their employees and thus caused a potential to become an obstacle for the NBFI to fulfill their obligation to submit periodic reports in a timely manner to OJK. Based on this consideration and to support the GOI's efforts to minimize the spread of the coronavirus, OJK provided relaxation on the deadline for submitting periodic reports for NBFI.[2]

A week later, OJK issued the OJK Letter Number S-11/D.05/2020 of 2020 concerning Countercyclical Policy to the Impact of Outbreak of the Corona Virus Disease 2019 (COVID-19) for Insurance Companies dated March 30, 2020 (OJK Letter S-11/D.05/2020) which is followed by the issuance of OJK Regulation Number 14/POJK.05/2020 concerning the Countercyclical Policy to Mitigate the Impact of Coronavirus Disease 2019 upon NBFI (POJK 14/2020) that came into force on 17 April 2020 and served as the basis, among others, for NBFI to provide debt restructuring to its consumers. This OJK regulation was then amended through the issuance of OJK Regulation Number 58/POJK.05/2020 concerning Amendment of OJK Regulation Number 14/POJK.05/2020 which was effective as of 16 December 2020 (POJK 58/20) and amended for the second time in January 2021 by OJK Regulation Number 30/POJK.05/2021 concerning Second Amendment of OJK Regulation Number 14/POJK.05/2020.

While the OJK Letter S-11/D.05/2020 only focused on 3 (three) issues, namely: extension of the deadline for a periodic report, implementation of fit and proper test for the primary party, and calculation of solvency level for insurance companies[3], POJK 14/2020 as amended lastly by POJK 30/2021 has broadened the scope. According to Article 3 paragraph (1) of POJK 14/2020, the types of countercyclical policies impacting the spread of COVID-19 regulated in the POJK shall include:

a. deadline for submission of periodic reports;
b. implementation of fit and proper test;
c. determination of asset quality in the form of financing and restructuring of financing;
d. calculation of the solvency level of insurance companies, sharia insurance companies, reinsurance companies, and sharia reinsurance companies;
e. calculation of the quality of funding for pension funds that organize defined benefit pension plans;
f. implementation of the provisions on asset management according to the age of the participant group (life cycle fund) for pension funds that organize defined contribution pension plans;
g. insurance company communication mechanism;
h. training and development costs for employees of financing companies and sharia finance companies;
i. working capital financing business activities using business capital facilities;

[2] Otoritas Jasa Keuangan, *Letter Number 7/D.05/2020 of 2020 Concerning Relaxation of the Deadline for Submitting Reports from Non-Bank Financial Services Institutions to OJK, 2020*

[3] Otoritas Jasa Keuangan, *Letter Number Number S-11/D.05/2020 of 2020 Concerning Countercyclical Policy to the Impact of Outbreak of the Corona Virus Disease 2019 (COVID-19) for Insurance Companies, 2020*

j. issuance of securities by financing companies and sharia finance companies;
k. equity provisions for insurance brokerage companies and reinsurance brokerage companies;
l. actuarial valuation provisions for employer's pension fund (DPPK);
m. loan restructuring for information technology-based lending service providers; and
n. other policies determined by the OJK through the Chief Executive of the Insurance Supervisory Board, Pension Funds, Financing Institutions, and Other Financial Services Institutions.[4]

It is quite rare to see a counter-cyclical regulation that applies to insurance companies in Indonesia. This type of regulation was primarily found in the banking sector rather than insurance. So, what is the purpose of counter-cyclical regulation? The International Center for Monetary and Banking Studies (2009) mentioned that:

> "The main objective of counter-cyclical regulation should be to reduce the systemic risk that fluctuations in the conditions of an institution, or market, would have on the rest of the system. Systemic institutions (markets) should be regulated in direct proportion to their systemic risk."[5]

In addition, according to Patricia A. McCoy from Boston College Law School in 2016, countercyclical regulation offers pre-commitment devices and objective tests to help insulate regulators from political pressure not to act.[6] Therefore, the issuance of POJK 14/2020 and its amendments reflected an immediate action from OJK to respond to changes in risks that occurred to the financial industry due to COVID-19 in Indonesia.

For general insurance, COVID-19 will have a definite impact on the amount of premium that will be borne by the customers due to the extension of the loan tenor in connection with the credit restructuring.[7] But how does COVID-19 impact the life insurance sector? Unlike general insurance, a life insurance contract or as we know as life insurance policy, is a long-term contract and requires the policyholder to pay premiums during the policy term, which sometimes for certain insurance contracts, the payment term shall be throughout the lifetime or until the death of the insured.[8] Thus, the COVID-19 pandemic will have little to no impact for the life insurance consumer to obtain relaxation to pay the premium late or to have the

[4] Otoritas Jasa Keuangan, *Regulation Number 30/POJK.05/2021 Concerning Second Amendment of OJK Regulation Number 14/POJK.05/2020 Concerning Countercyclical Policy to Mitigate the Impact of Coronavirus Disease 2019 for Non-Bank Financial Services Institutions, 2021.*

[5] Brunnermeier, Markus., et.al. "The Fundamental Principles of Financial Regulation." Geneva Reports on the World Economy 11 (2009).

[6] Patricia A. McCoy. "Countercyclical Regulation and Its Challenges." Arizona State Law Journal 47, no.5 (2016): 1181-1237.

[7] According to OJK's Things to Know About Credit Restructuring in Financing Companies Guide, Indonesia's General Insurance Association or *Asosiasi Asuransi Umum Indonesia* (AAUI) has stated that the insurance premium related to vehicle financing cannot be waived, however the premium can be calculated to be as light as possible considering the pandemic situation. From: https://www.ojk.go.id/id/berita-dan-kegiatan/Documents/Pages/informasi-covid-19/Hal%20yang%20Perlu%20Kamu%20Tahu%20Mengenai%20Restrukturisasi%20Perusahaan%20Pembiayaan.pdf accessed on 18th November 2021.

[8] This applies to whole-life insurance product which is a permanent life insurance policy guaranteed to remain in force for the life of the insured as long as the premiums are paid. As cited from: https://www.lhlic.com/consumer-resources/how-does-whole-life-insurance-work/ accessed on 18th November 2021.

amount of premium reduced due to the underwriting process, which determined the premium, has been stipulated at the beginning of insurance contract. On the other hand, COVID-19 has impacted the number of life insurance policy surrenders. According to Indonesia Life Insurance Association or *Asosiasi Asuransi Jiwa Indonesia* (AAJI), in Q1 2021, the number of policy surrender of life insurance policies had increased 30.61% year on year (YoY) to IDR 28.54 trillion from IDR 21.85 trillion. The Chairman of AAJI, Budi Tampubolon, mentioned that increase in the number of policy surrenders was expected due to the need for funds of consumers. One of the life insurance companies that also experienced growth in total surrender claims was BRI Life which had IDR180 billion total surrender until June 2021 and most of them are unit-link products. President Director of BRI Life, Iwan Pasila, said the total surrender claims increased due to the possibility of being influenced by the need for funds to deal with the pandemic.[9]

This study will attempt to show several legal issues that need to be addressed within the life insurance sector besides the legal or compliance obligation related to periodic mandatory reports, fit and proper test and solvency level calculation during the COVID-19, specifically that related to consumer protection of life insurance product.

2. RESEARCH METHODS

This research is normative or doctrinal legal research supported by the empirical legal study, including research on the principles of law, sources of law, legislation, the academic paper that analyzed the matters discussed and supported by data from OJK, AAJI, National Law Development Agency (*Badan Pembinaan Hukum Nasional* or *BPHN*), and also court decision published by the Supreme Court (*Mahkamah Agung*). This research was conducted to provide legal arguments as a basis for determining whether the purpose of regulations has been achieved, with a focus on examining the legal concept of consumer protection for the life insurance business during the COVID-19 pandemic. As mentioned by E. Saefullah Wiradipradja, quoting Peter Mahmud Marzuki, basically legal science is a prescriptive and applied science in addition to descriptive or sociological ones. As a prescriptive science, legal science studies the purpose of the law, values of justice, validity of the rule of law, legal concepts, and legal norms. As an applied science, legal science establishes standard procedures, provisions, and signs in carrying out the rule of law.[10]

The legal issue encountered in this study is finding legal cases that specifically related to consumer complaints of the purchase of life insurance products during the COVID-19 pandemic due to the issuance of the countercyclical regulations. Submission of consumer complaints through OJK online system is confidential and not available to the public. Although according to OJK from January 1 to November 25, 2021, there were 595,521 consumer complaints to the OJK in total, there were only 5,783 complaints regarding insurance, which included the complaints related to difficulties in insurance claims, products,

[9] Adrianus Octaviano. "Masih Pandemi, Klaim Tebus Polis di Asuransi Jiwa Masih Terus Meningkat.", Kontan 14 Juli 2021. From: https://keuangan.kontan.co.id/news/masih-pandemi-klaim-tebus-polis-di-asuransi-jiwa-masih-terus-meningkat accessed on 2 December 2021.

[10] E. Saefullah Wiradipradja. *Penuntun Praktis Metode Penelitan dan Penulisan Karya Ilmiah Hukum, Cetakan Kedua*. (Bandung: CV Keni Media, 2016), p. 24

or services that did not match the offer, and disputes between parties. Most of the consumer complaints reported to OJK during the COVID-19 pandemic in 2021 are related to financial technology (fintech) services with 50,413 complaints, exceeding complaints in banking services of 49,205.[11] These numbers are probably due to an increase in the number of fintech lending (online loan) or credit restructuring.

3. ANALYSIS AND DISCUSSION

3.1. Principles and Objectives of Consumer Protection

Who is the consumer and what is consumer protection? Is there any universally agreed definition of these terms? Consumer protection, as defined by the Association of Southeast Asian Nations (ASEAN) and *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) GmbH in its Handbook on Consumer Protection Laws and Regulations (2021), shall refer to the measures that aim to protect and promote the well-being and/or financial interests of consumers. Although the ASEAN Handbook emphasized that there is no standard or universally agreed definition of the term 'consumer' as different laws of countries might define differently depending on the varying purposes, contexts, and needs, the consumer shall be generally understood as: a purchaser of goods and services for the personal satisfaction of themselves or other members of their households, as distinct from use to generate further income.[12]

Why did the consumer need to be protected? It is because, according to the United Nations Conference on Trade and Development (UNCTAD) in 2016 from its Guidelines for Consumer Protection, consumers often face imbalances in economic terms, educational levels, and bargaining power and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable, and sustainable economic and social development and environmental protection.[13]

Dr. David M. L. Tobing, S.H., M.Kn., a prominent consumer protection lawyer in Indonesia, in the scope of relation between consumer and business actor in Indonesia, mentioned that:

> "In the idea of consumer protection and standard clauses contained in the Academic Papers of the 1980-1981 Consumer Protection Bill, it was identified one of the consumer's weak points in relationship with producers, namely negative business practices carried out by producers in carrying out their business activities. Actions that harm consumers are called

[11] Novita Intan. "OJK: Pengaduan Konsumen di 2021 Mayoritas Mengenai Fintech." Republika 4 Desember 2021. From: https://www.republika.co.id/berita/r3lf2b414/ojk-pengaduan-konsumen-di-2021-mayoritas-mengenai-fintech accessed on 5 December 2021.

[12] The ASEAN Secretariat. "Handbook on ASEAN Consumer Protection Laws and Regulations, Second Edition." Jakarta (2021). https://aseanconsumer.org/read-news-asean-launches-the-2nd-edition-of-the-handbook-on-asean-consumer-protection-laws-and-regulations., p. 3.

[13] The United Nations Conference on Trade and Development. "United Nations Guidelines for Consumer Protection." Geneva (2016). https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf., p. 6.

negative business practices. In the literature, this negative business practice is known as the abuse of circumstances (*misbruik van omstandigheden*)."[14]

David Tobing also provided that the idea of negative business practices prohibition, such as prohibition to exoneration clause, is a policy from the GoI to provide limitation against the principle of freedom of contract and the recognition of doctrines that have been established in the legal practices but have a negative impact on the interests of consumers.[15]

3.2. Regulatory Framework of Protection for Consumers of Life Insurance Product

3.2.1. Consumer Protection Law Number 8 of 1999

Although based on the principle of *lex specialis derogat legi generali*[16] the insurance company shall not implement the consumer protection based on Consumer Protection Law Number 8 of 1999 (Consumer Protection Law), Consumer Protection Law is still the main legal foundation for consumer protection in Indonesia and set the benchmark for business actors on how the consumers should be treated and protected. Therefore, it is essential to discuss how consumer protection is defined and implemented based on this law.

Consumer Protection Law defined consumers' protection as all means which guarantee the legal security to protect the consumers. Consumer shall be each individual user goods and/or services available in society, for the benefit of themselves, family members, other people, and other living creatures and which are not for trading.[17] This definition resembles the one given by the ASEAN in its handbook. The principles of consumer protection are provided in Article 2 of Law Number 8 of 1999 which mentioned that consumer protection is based on the following principles, that are relevant to Indonesia's national development:

1. Principle of benefit (*asas manfaat*) which is intended to mandate that all efforts in the organization of consumer protection shall provide maximum benefit for the overall interests of the consumer and business actor.
2. Principle of fairness (*asas keadilan*) is intended so that the participation of all people can be realized maximally and to provide opportunities for consumer and business actor to obtain their rights and fulfill their obligations in a fair manner.

[14] David M.L. Tobing, *Klausula Baku: Paradoks Dalam Penegakan Hukum Perlindungan Konsumen,* (Jakarta: Gramedia Pustaka Utama, 2019), p. 82-83

[15] *Ibid.*

[16] *Lex specialis derogat legi generali* is the principle of legal interpretation which states that special laws (lex specialis) override general laws (lex generalis).
From: https://www.djkn.kemenkeu.go.id/artikel/baca/12716/Lelang-Bersifat-Lex-Specialis.html accessed on 12 December 2021.

[17] Indonesia, *Law Number 8 of 1999 concerning Consumer Protection*, 1999.

3. Principle of balance (*asas keseimbangan*) is intended to balance the interests of the consumer, business actor, and the government materially and spiritually.
4. Principle of consumer security and safety (*asas keamanan dan keselamatan konsumen*) is intended to guarantee the security and safety of consumers in the usage, consumption, and utilization of goods and/or services that are consumed or used.
5. Principle of legal certainty (*asas kepastian hukum*) is intended so that both business actors and consumers will comply with the law and obtain justice in the organization of consumer protection, and the state to guarantee legal certainty.[18]

Ahmadi Miru and Sutarman Yodo (2004), by using the 3 (three) legal pillars theory by Gustav Radbruch's The Legal Philosophy, mentioned that the 5 (five) principles mentioned in article 2 of Law Number 8 of 1999, can be categorized into 3 (three) groups of principles as follows:

1. Principle of purposiveness (*asas kemanfaatan*), which includes the principle of customer security and safety;
2. Justice principle (*asas keadilan*), which includes the principle of balance; and
3. Legal certainty principle (*asas kepastian hukum*).

Although Ahmadi Miru and Sutarman Yodo mentioned that the principle of justice (*asas keadilan*) will be the focus of both legislation and other various activities related to the consumer protection movement conducted by its involving parties[19], however if we referred to the Bank Indonesia Regulation (PBI) Number 22/20/PBI/2020 concerning Consumer Protection of Bank Indonesia which is effective from 22nd December 2020, the definition of 'consumer protection' shall be: all efforts to ensure legal certainty to provide protection to consumers.[20] Therefore, from Bank Indonesia's perspective, as the PBI itself is considered as an achievement of consumer protection reformation[21], the principle of legal certainty (*asas kepastian hukum*) shall be the focus of consumer protection, specifically for Bank Indonesia consumers, instead of the principle of justice (*asas keadilan*).

[18] *Ibid.*
[19] Ahmadi Miru and Sutarman Yodo, *Hukum Perlindungan Konsumen,* (Jakarta: Rajagrafindo Persada, 2004), p. 26-27
[20] As defined in the Article 1 paragraph 3 of Bank Indonesia Regulation Number 22/20/PBI/2020 Concerning Bank Indonesia Consumer Protection. Although in Article 7 of Bank Indonesia Regulation Number 22/20/PBI/2020 it is mentioned that the principles of consumer protection shall include: a. equality and fair treatment; b. openness and transparency; c. education and literacy; d. responsible business conduct; e. protection of consumer assets against abuse; f. protection of consumer data and/or information; and g. effective handling and complaints resolution, but the principle of legal certainty was put first as part of the definition of Bank Indonesia consumer protection and thus has formulated the purpose of the PBI itself.
[21] Bank Indonesia Press Release : Importance of Consumer Protection in the Digital Economy Era, published on 12 April 2021. From: https://www.bi.go.id/en/publikasi/ruang-media/news-release/Pages/sp_239621.aspx accessed on 25th November 2021.

Article 4 of Law Number 8 of 1999 provides the rights of the consumers are:

a. to obtain comfort, security and safety in using or consuming the goods and/or service;
b. to choose the goods and/or services and obtain goods and/or services in accordance with the promised conversion value and condition and warranty;
c. to obtain correct, clear end honest information on the condition and warranty of the goods and/or services;
d. to be heard in expressing opinion and complaints on the goods and/or services they use or consume;
e. to obtain proper advocacy, protection, and settlement in the consumer's protection dispute;
f. to obtain consumer's training and education;
g. to receive proper and honest and nondiscriminatory treatment or service,
h. to obtain compensation, redress and/or substitution, if the goods and/or services received are not in accord with the agreement or not received as requested,
i. to obtain rights as regulated in the other provisions of the law.

Unfortunately, the reception of the Consumer Protection Law was not quite good. Some researchers stated that the law was drafted in a relatively short time after President Soeharto signed a Letter of Intent with IMF in order to secure loans in 1998, and was passed by both the House of Representatives (*Dewan Perwakilan Rakyat* / DPR) and executive branch of the GoI after only 3 to 4 months[22]. Az. Nasution in 2002 mentioned that if counted from the discussion of Consumer Protection Bill in DPR, it seemed as if the time used to ratify the Consumer Protection Bill into Consumer Protection Law was only around 3-4 months (December 1998 - March 30, 1999). In fact, various efforts that "took a lot of time, energy, and thought" have been carried out by various parties related to the formation of the law and consumer protection. Both from the governmental, non-governmental organizations, the Indonesian Consumers Foundation (YKLI), together with universities, who feel "called" to realize the Law on Consumer Protection. Some of these activities including the Seminar on the Center for Commercial Law Studies, Faculty of Law, University of Indonesia on Consumer Protection Issues which was carried out on 15 - 16 December 1975 and the research on consumer protection in Indonesia which was conducted during 1979 - 1980 by National Legal Development Agency (*Badan Pembinaan Hukum Nasional* / BPHN) from Ministry of Justice of the Republic of Indonesia[23].

[22] Ira Aprilianti, *Protecting People: Promoting Digital Consumer Rights* (Jakarta, 2020), 12, https://repository.cips-indonesia.org/publications/310040/protecting-people-promoting-digital-consumer-rights.
[23] Az Nasution, "PERLINDUNGAN KONSUMEN; TINJAUAN SINGKAT UU NO. 8/1999 - L.N. 1999 NO. 42," *Jurnal Hukum & Pembangunan* 32, no. 2 (June 19, 2017): 112–113, http://jhp.ui.ac.id/index.php/home/article/view/1329.

Nevertheless, the law was far from perfect, especially regarding the authority of the Consumer Dispute Settlement Agency (*Badan Penyelesaian Sengketa Konsumen* or BPSK). Although the Minister of Trade and Industry of the Republic of Indonesia has issued the Decree Number 350/MPP/KEP/12/2001 concerning Implementation of the Duties and Authorities of the Consumer Dispute Settlement Agency (KEPMEN 350/2001)[24], in 2006 Minister of Trade and Industry of the Republic of Indonesia submitted request to the Supreme Court (*Mahkamah Agung*) stating that Law Number 8 of 1999 cannot be applied optimally due to various obstacles in its application, especially those related to its procedure (procedural law). Therefore, the Supreme Court issued the Supreme Court Regulation (PERMA) Number 1 of 2006 concerning Procedures for Filing an Objection to the Decision of the BPSK dated 13 March 2006.[25]

However, the issue regarding the authority of BPSK continues. Even though according to KEPMEN 350/2001 and its amendment(s), it has been stipulated that authority of BPSK shall only be limited to the disputes between business actors and consumers who demanded compensation over damages, pollution and/or suffer losses as a result of consuming goods and/or utilizing services produced or traded[26], which shall fall under tort (*perbuatan melawan hukum*), the consumer still filed for their disputes regarding breach of contract (*wanprestasi*) with business actors to BPSK which ended up the nullification of BPSK Decision by the District Court.[27] More discussion is still needed in order to decide the competence of BPSK and the District Court to settle the consumer dispute from the basis of its lawsuit.

Considering that the law was enacted in 1999, it is understandable that Consumer Protection Law did not regulate consumer protection for goods or services purchased through online or electronic systems. E-commerce is currently regulated under Law Number 7 of 2014 concerning Trade, and its implementing regulation, Government Regulation Number 80 of 2019 concerning Trading Through Electronic Systems. However, the scope of regulation in Law 7/2014 and GR 80/2019 included all trading activities carried out using various modes and types of electronic communication systems, both online and offline. This will

[24] This regulation was then amended several times and lastly by the Minister of Trade of the Republic of Indonesia Regulation Number 72 of 2020 concerning Consumer Dispute Settlement Agency dated 14 September 2020.

[25] See Badan Litbang Diklat Hukum dan Peradilan Mahkamah Agung RI. "Artikel Sinopsis Naskah Akademis tentang Perlindungan Konsumen." From: https://bldk.mahkamahagung.go.id/id/component/content/article/53-puslitbang-kumdil/publikasi-litbang/203-naskah-akademis-tentang-perlindungan-konsumen.html accessed on 6 December 2021.

[26] See definition of Consumer Dispute in Article 1 of Minister of Trade and Industry of the Republic of Indonesia Decree Number 350/MPP/KEP/12/2001 concerning Implementation of the Duties and Authorities of the Consumer Dispute Settlement Agency and definition of Consumer Dispute in Article 1 of Minister of Trade of the Republic of Indonesia Regulation Number 06/M-DAG/PER/2/2017 as amended by Minister of Trade of the Republic of Indonesia Regulation Number 72 of 2020.

[27] See Decision of North Jakarta District Court Number 689/Pdt.Sus-BPSK/2019/PN Jkt Utr dated 2 December 2019.

include legal relations between business to business and business to consumers and may not be fully applicable or linked into the consumer protection area.

Based on the academic paper of the draft of Consumer Protection Law published by BPHN in 2020, the issue of e-commerce has been a part of communication technology improvement. In e-commerce, electronic agreements, e-contract, or digital contracts are always used. The characteristics of an e-contract or digital contract are as follows:

a. standardized contract;
b. (using) digital signatures;
c. paperless;
d. faceless (business actor and the consumer did not meet/have a face-to-face meeting);
e. cashless (payments are made digitally without cash);
f. borderless (agreements can occur across countries);
g. multiple jurisdictions (applicable law may include laws from many countries).[28]

However, although the insurance services (*jasa / layanan asuransi*), including the insurance contract/policy and insurance consumer disputes, were mentioned several times in the 2020 Consumer Protection Bill, the bill did not mention whether the consumer protection for insurance sector (or financial services sector) will be regulated under the Consumer Protection Law instead of OJK regulations.

3.2.2. Consumer Protection under OJK Regulatory Regime

Since the establishment of Indonesia Financial Services Authority or OJK in 2011 through Law Number 21 of 2011 concerning Indonesia Financial Services Authority, as of 31 December 2012 the functions, duties, and authority to regulate and supervise financial services activities in the Capital Market, Insurance, Pension Fund, Financing Institution, and other financial services institutions sector shifted from the Minister of Finance of the Republic of Indonesia and the Capital Market and Financial Institutions Supervisory Agency (*Badan Pengawas Pasar Modal dan Lembaga Keuangan*) to OJK.[29] Therefore, insurance company shall comply with the rules and guidelines issued by OJK during its day-to-day operation, including the consumer protection implementation.

According to POJK 1/2013, consumer protection is the protection of consumers within the scope of the behavior of financial services business actors. The consumers are defined as parties who place their funds and/or take advantage of the services available at financial services institutions including customers in banking, investors in the capital market, insurance policyholders, and participants in Pension Funds, based on the laws and regulations in the financial services

[28] Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia, *Hasil Penyelarasan Naskah Akademik Rancangan Undang-Undang Tentang Perlindungan Konsumen 2020,* p. 150-151.
[29] Article 55 of Law Number 21 of 2011.

sector.[30] The definition of consumer in POJK 1/2013 is the same as the definition of the consumer given in Law Number 21 of 2011 concerning OJK. And through the definition, we may see that the focus of OJK shall be the behavior of financial services institutions, which may lead to the implementation of market conduct from each institution.

Based on POJK 1/2013, financial services institution as the consumer protection providers are obliged to incorporate transparency (*transparansi*), impartial treatment (*perlakuan yang adil*), trustworthiness (*keandalan*), privacy and safety of customer data/information (*kerahasiaan dan keamanan data/informasi konsumen*), and simple treatment of complaints and customer disagreement resolution into their operations, along with fast and inexpensive charges (*penanganan pengaduan serta penyelesaian sengketa konsumen secara sederhana, cepat dan biaya terjangkau*).[31]

POJK 1/2013 did not specifically regulate consumer protection in purchasing financial products or services through online or electronic systems. In fact, there is only 1 (one) provision that mentions the use of electronic media by financial services business actors (*Pelaku Usaha Jasa Keuangan / PUJK*) in POJK 1/2013, which mentioned that PUJK was allowed to use the standardized contract (*perjanjian baku*) offered through digital or electronic media.[32] Its implementing regulation, namely OJK Circular Letter Number 13/SEOJK.07/2014 concerning Standard Agreement (SEOJK 13/2014) also did not regulate further on how the standardized contract can be offered electronically and whether or not the financial services institution has to fulfill certain conditions to enable them to offer their products through electronic media. From the POJK 1/2013, it is also unclear whether the phrase "affixing signature" of the consumer, as a proof of consent, will apply to digital signature for standard contract offered electronically.[33]

As part of the series of consumer protection, one of the most anticipated parts of consumer protection shall be the dispute settlement. In the view of POJK 1/2013, OJK issued the OJK Regulation Number 1/POJK.07/2014 concerning the Alternative Dispute Resolution Institution in the Financial Services Sector (*Lembaga Alternatif Penyelesaian Sengketa di Sektor Jasa Keuangan*). The list of alternative agencies for dispute resolution was initially released in 2015 and amended in 2016. These dispute resolution bodies included *Badan Mediasi dan Arbitrase Asuransi Indonesia* (BMAI), *Badan Arbitrase Pasar Modal Indonesia*

[30] Otoritas Jasa Keuangan, *Regulation Number 1/POJK.05/2013 Concerning Consumer Protection of the Financial Services Sector, 2013*

[31] Sukarela Batunanggar. 2019. Fintech Development and Regulatory Frameworks in Indonesia. ADBI Working Paper 1014. Tokyo: Asian Development Bank Institute. From: https://www.adb.org/publications/fintech-development-regulatory-frameworks-indonesia., p. 7. These are the principles of consumer protection in financial services sector as regulated in Article 2 of POJK 1/2013.

[32] See Article 22 paragraph (2) of OJK Regulation Number 1/POJK.07/2013 concerning Consumer Protection in Financial Services Sector

[33] See Article III paragraph 6 (b) of OJK Circular Letter Number 13/SEOJK.07/2014 concerning Standard Agreement.

(BAPMI), *Badan Mediasi Dana Pensiun* (BMDP), *Lembaga Alternatif Penyelesaian Sengketa Perbankan Indonesia* (LAPSPI), *Badan Arbitrase dan Mediasi Perusahaan Penjaminan Indonesia* (BAMPPI), *Badan Mediasi Pembiayaan, Pegadaian dan Ventura Indonesia* (BMPPVI) as its official agencies.[34] In 2020, during the COVID-19 pandemic, those agencies are integrated into a single dispute resolution body under the Alternative Dispute Resolution Body for Financial Services Sector (*Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan*) or LAPS-SJK based on OJK Regulation Number 61/POJK.07/2020 (POJK 61/2020) and began its operation as of 1 January 2021.

In the time of Investment-linked Insurance Products (*Produk Asuransi Yang Dikaitkan dengan Investasi* or PAYDI)-related dispute that was ongoing between consumers and several life insurance companies[35], the establishment of new LAPS-SJK had given new hope for consumers protection, especially in the insurance industry to have an efficient dispute settlement out of the court.[36] However, although LAPS-SJK is recognized under the law as an independent body and its operation is approved by OJK, LAPS-SJK's budget is sourced from member fees (which is including insurance companies), grants, donations or non-binding assistance, and other receipts that do not conflict with the articles of association and/or the provisions of laws and regulations.[37] Thus, there was rejection from the life-insurance consumers to settle the PAYDI-related case in the LAPS-SJK for the reasons of, inter alia, OJK should be the one who settled the dispute instead of LAPS-SJK, the LAPS-SJK is funded by insurance companies, and some cases had been processed in Criminal Investigation Agency *(Badan Reserse Kriminal*) or Bareskrim of Indonesian Police Force.[38] However, in March 2022, the Chairman of LAPS-SJK claimed that some consumers of PAYDI who were under the dispute with the insurance company had agreed to settle their cases in LAPS-SJK.[39]

It is too early to judge whether or not LAPS-SJK is the best forum to settle the dispute related to the unit-linked consumers, considering that until the date of

[34] Otoritas Jasa Keuangan, *Board of Commissioners Decision Number KEP-6/D.07/2016 dated December 20, 2016 concerning List of Alternative Dispute Resolution Agencies in Financial Services Sector, 2016.*

[35] At the time this paper was being made, there were 3 (three) insurance companies that are currently facing disputes with a group of unit-linked consumers, namely PT Prudential Life Assurance, PT AIA Financial, and PT AXA Mandiri Financial Services. The three have announced a settlement scheme through an arbitration process at LAPS-SJK. The settlement will be carried out in stages for one customer at a time and the process will begin around mid-February 2022. Sourced from: https://finansial.bisnis.com/read/20220211/215/1499321/ojk-monitor-penanganan-unit-linked-lewat-laps-sjk accessed on 11 April 2022.

[36] Suara Pembaruan, "Ketua LAPS SJK Ingin Penyelesaian Sengketa di Sektor Keuangan Lebih Efisien," published on 29 March 2021, from: https://suara-pembaruan.com/ketua-laps-sjk-ingin-penyelesaian-sengketa-di-sektor-keuangan-lebih-efisien/ accessed on 10 April 2022.

[37] See Article 20 of OJK Regulation Number 61/POJK.07/2020.

[38] Selvi Mayasari. "Komunitas Korban Asuransi Unitlink Bersikukuh Tolak Penyelesaian Kasus di LAPS SJK", Kontan 16 Februari 2022, from: https://keuangan.kontan.co.id/news/komunitas-korban-asuransi-unitlink-bersikukuh-tolak-penyelesaian-kasus-di-laps-sjk?page=2 accessed on 10 April 2022.

[39] Yosi Winosa. "LAPS SJK: Sejumlah Pemegang Unit Link Sudah Bersedia Tempuh Jalur Arbitrase," Tren Asia 24 Maret 2022, from: https://www.trenasia.com/laps-sjk-sejumlah-pemegang-unit-link-sudah-bersedia-tempuh-jalur-arbitrase accessed on 10 April 2022.

publication of this paper, LAPS-SJK was still in the process of requesting feedback from industry and public, on the draft of circular letter on the approval of LAPS-SJK Regulation (*Rancangan Surat Edaran OJK tentang Persetujuan Peraturan LAPS-SJK*) and draft of circular letter on the approval of LAPS-SJK Annual Work Plan and Budget *(Rancangan Surat Edaran OJK tentang Persetujuan Rencana Kerja dan Anggaran Tahunan LAPS-SJK*)[40] which indicates that LAPS-SJK is still in the process of settling their own rules and secretariat as a new institution. Based on the draft of circular letter on Annual Work Plan and Budget, it was mentioned that the member fees or *iuran anggota* is the main source of income.[41] Further, it was also mentioned in LAPS-SJK website that the variables that are used as the basis for calculating the membership fees allocation are: assets and the proportion of assets, as well as the opportunity for disputes to occur, noted that the absolute dominance over the voting rights of the members is not allowed.[42]

Lastly, OJK released the long-awaited regulation regarding PAYDI or commonly known as unit-link products through OJK Circular Letter Number 5/SEOJK.05/2022 (SEOJK 5/2022) on 14 March 2022. Through this SEOJK 5/2022, OJK encouraged the insurance companies to emphasize the explanation (to consumers or prospective consumers) that PAYDI is an insurance product with the aim of providing protection benefits against risks, as well as providing an explanation of the benefits associated with balanced investment between the potential return on investment and investment risk. OJK also set certain criteria for insurance companies that can market the PAYDI to customers, the criteria included the human resources capabilities, adequate information technology system capabilities, and meeting capital requirements with a certain minimum amount of equity based on Indonesian financial accounting standards, as listed in periodic reports submitted to OJK.[43] Based on this new regulation, from the aspect of compliance and substantial analysis as part of OJK's assessment during the product filing, it is also required for insurance companies to put LAPS-SJK as an alternative dispute resolution body in its policy.[44]

3.2.3. Law of the Republic of Indonesia Number 11 of 2008 on Electronic Information and Transactions as amended by Law Number 19 of 2016

Although Law Number 11 of 2008 on Electronic Information and Transaction as amended by Law Number 19 of 2016 (EIT Law) did not regulate the mechanism of consumer protection; however, this is the only and current

[40] AAJI Letter Number SE No. 046/PRI/AAJI/III/2021 of 11th March 2022 concerning Request for Feedback on 2 (two) RSEOJK related to LAPS-SJK.
[41] Appendix 1 of Draft of OJK Circular Letter concerning Approval of LAPS-SJK Annual Work Plan and Budget. From: https://www.ojk.go.id/id/regulasi/otoritas-jasa-keuangan/rancangan-regulasi/Pages/Lembaga-Alternatif-Penyelesaian-Sengketa.aspx accessed on 11 April 2022.
[42] Iuran Anggota LAPS-SJK, from: https://lapssjk.id/iuran-anggota/ accessed on 11 April 2022.
[43] See Article II and V of OJK Circular Letter Number 5/SEOJK.05/2022.
[44] *Ibid., Appendix III.*

regulation that specified the sanction for any person who knowingly and without authority disseminates false and misleading information resulting in consumer loss in electronic transactions.[45] As a comparison, the implementing regulation of POJK 1/2013 which is supposed to regulate how to handle consumer personal data and/or information within the financial services sector, namely OJK Circular Letter Number 14/SEOJK.07/2014 concerning Confidentiality and Security of Consumer Data and/or Personal Information (SEOJK 14/2014) did not regulate the sanction of misuse of consumer data/personal information conducted by financial services institution. The SEOJK 14/2014 only required financial services institutions to obtain consumer consent for the purpose of disseminating the consumer's personal data and/or information to third parties.

EIT Law can be applied when a consumer of an insurance company suffers a loss due to misuse of his personal data related to insurance products purchased online. The focus of Law Number 11 of 2008 on Electronic Information and Transaction as amended by Law Number 19 of 2016 shall be the personal data protection in the scope of information technology utilization.

3.3. Technical Adjustment based on OJK Letter Number S-18/D.05/2020 & OJK Regulation Number 14/POJK.05/2020

IMF mentioned that the adoption of e-commerce and digital financial services has increased rapidly amidst COVID-19 related lockdowns and social distancing, mitigating the economic fallout. The authorities of Indonesia have facilitated this expansion through regulatory measures. However, to tap its potential, important challenges need to be addressed in the areas of digital infrastructure, worker skills, regulations, with due regard to financial stability and integrity, and consumer protection.[46] Specifically, within the life insurance industry, insurance agent, as the representative of insurance company, has been a key player in contributing the insurance company's income by marketing the insurance product directly to consumers. However, during the COVID-19 pandemic, GoI has restricted the face-to-face meeting and limited certain activities of the people through the issuance of Government Regulation Number 21 of 2020 on Large-Scale Social Restrictions to Accelerate the Handling of COVID-19 Pandemic (GR 21/2020) and thus, affected the role of insurance agents in selling through the face-to-face meeting to (prospective) consumers.

As a response to the issuance of GR 21/2020 that regulated the restrictions in schools, workplaces, entertainment areas, religious activities, and/or activities in public places or facilities, as well as in responding to the request from AAJI, OJK issued OJK Letter Number S-18/D.05/2020 concerning Technical Adjustments of the Marketing of Investment-Linked Insurance Products (*Produk Asuransi Yang Dikaitkan Dengan*

[45] See Article 28 paragraph (1) and 45A paragraph (1) of Law Number 19 of 2016.
[46] International Monetary Fund Asia and Pacific Dept. "Indonesia : 2020 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for Indonesia." From: https://www.imf.org/en/Publications/CR/Issues/2021/03/01/Indonesia-2020-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-50131., p. 22 accessed on 6 December 2021.

Investasi / PAYDI) in Responding to the Impact of the Spread of Corona Virus Disease 2019 for Life Insurance Companies and Sharia Life Insurance Companies on 27 May 2020 (OJK Letter No. S-18/2020).

Through this regulation, OJK tried to address several difficulties in implementing other OJK regulations regarding the selling of insurance products. Those regulations are OJK Regulation Number 23/POJK.05/2015 concerning Insurance Product and Marketing of Insurance Product (POJK 23/2015) and OJK Circular Letter Number 32/SEOJK.05/2016 concerning Bancassurance (SEOJK 32/2016). In December 2020, OJK issued the POJK 58/2020 which amended several provisions both in POJK 14/2020 and OJK Letter No. S-18/2020 accordingly.[47]

Some technical adjustments according to OJK Letter No. S-18/2020 which was amended by POJK 58/2020 that impacted the marketing of insurance products shall be as follows:

a. Marketing of Investment-Linked Insurance Products (PAYDI) through Electronic System.

   Based on POJK 23/2015, the marketing of PAYDI through long-distance communication media must be followed up by a face-to-face meeting.[48] However, during the COVID-19 Pandemic, OJK allowed insurance companies to conduct the follow-up meetings through digital means or electronic media such as video conferencing, video calls, or a combination of these media.[49] Through the issuance of SEOJK 5/2022 in March 2022, insurance company is required to document the marketing of PAYDI, including the explanation of insurance product and statement of prospective policyholder stating their understanding of the insurance product, in the form of recorded video and/or audio. Such record must be verified, kept and maintained in accordance with each company's policy so that the documentation can be used as the evidence during the dispute with consumers.[50]

b. Digital Signature in Consumer's Statement Letter.

   Based on SEOJK 32/2016, it is required to affix a prospective consumer's wet signature in a statement letter mentioning that the prospective consumer (policyholder, insured, or participant) has obtained an explanation and understands the benefits, costs, and risks of the insurance product. However, OJK allowed that a wet-signature be replaced with an electronic signature as stipulated in the provisions of the regulation regarding electronic information and transactions.

[47] OJK did not amend the provisions of technical adjustment of the marketing of Investment-Linked Insurance Product (PAYDI) in the POJK 30/2021 concerning the Second Amendment of POJK 14/2020.

[48] See Article 47 paragraph (3) of OJK Regulation Number 23/POJK.05/2015 concerning Insurance Product and Marketing of Insurance Product.

[49] OJK Letter Number S-18/D.05/2020 concerning Technical Adjustments of the Marketing of Investment-Linked Insurance Products (PAYDI) in Responding to the Impact of the Spread of Corona Virus Disease 2019 for Life Insurance Companies and Sharia Life Insurance Companies on 27 May 2020.

[50] See Article V paragraph A section 6 and 7 of OJK Circular Letter Number 5/SEOJK.05/2022.

In order to implement the non-face-to-face meeting with consumer insurance company needs to fulfill several requirements which, among others: having an adequate information and infrastructure system—which backed with the statement letters from IT services providers or demo and statement letter from a director or its equivalent who is responsible for risk management function, having a standard of procedure to support the digital marketing, obtaining a documented statement from prospective consumers of their willingness to have a non-face-to-face meeting and have obtained the explanation of the insurance product (in the form of video and audio), having the supportive infrastructure to authenticate the electronic signature, and the policy schedule/ certificate is still required to be delivered in hardcopy to the consumers.[51]

The insurance company is also obliged to fulfill other regulations such as insurance law, laws on the electronic transaction, electronic signature, electronic information, and electronic document, the law on consumer protection in the financial services sector, and anti-money laundering and counter-terrorist funding regulation. OJK also emphasized that insurance companies cannot implement technical adjustments as a reason to reject the policyholder's claim.[52] The countercyclical policy related to the marketing of insurance products as mentioned above shall remain valid in line with the status of emergency for COVID-19 as set by the GoI.

However, based on those technical adjustments, there are still several issues that need to be addressed such as:

a. Issues regarding digital signature in prospective consumer's statement letter.

   Based on the current regulation, Indonesia still acknowledges 2 (two) types of digital signature, namely certified (*tanda tangan elektronik tersertifikasi*) and non-certified digital signature (*tanda tangan elektronik tidak tersertifikasi*), in which the latter was made without using the services from Indonesian electronic certification operator.[53] Both types are acknowledged under the law, however, the certified digital signature will have stronger evidentiary value and shall be equivalent to a wet signature.[54] However, rooting in the scope of consumer protection, the digital signature will be prone to fraud and has issues with its reliability. Thus, it should be regulated by OJK which type of digital signatures will suffice the aspect of consumer protection. As we know, one of the principles of consumer protection in the financial services sector shall be trustworthiness (*keandalan*), which means anything that can provide accurate services through reliable systems, procedures, infrastructure, and human resources. Unsure whether the non-certified digital signature will fulfill this trustworthiness aspect as it was generated by each organization's electronic system and thus the digital

[51] See Article 20B of OJK Regulation Number 58/POJK.05/2020 concerning Amendment of OJK Regulation Number 14/POJK.05/2020.
[52] *Ibid.*
[53] See Article 60 of Government Regulation Number 71 of 2019 concerning Implementation of Electronic System and Transaction
[54] Direktorat Jenderal Aplikasi Informatika - Kementerian Komunikasi dan Informatika Republik Indonesia, "Kuntungan Pakai TTE Tersertifikasi", from: https://tte.kominfo.go.id/blog/60f0f35a7eec0973a8711c38 accessed on 17 December 2021.

signature may vary. As the regulation regarding digital signature is currently under the domain of the Minister of Communication and Informatics of the Republic of Indonesia (KOMINFO), OJK needs to address the issue of digital signature in the scope of consumer protection in the financial services sector.

b. Issues regarding implementation of the electronic/digital insurance policy.
As the continuation of successful insurance product offering and selling (whether it is conducted offline or online), the insurance company will issue the insurance contract or policy to its consumers. However, based on current regulations and the countercyclical policy POJK 58/2020, OJK still implements the obligation for insurance companies to deliver insurance schedule/certificates in hardcopy (or in paper) to consumers despite the selling being conducted online/electronically. This obligation also applies to the policy of micro-insurance products which had simpler and shorter provisions. Amid COVID-19 and the development of insurtech, conversion to a paperless insurance policy should be considered. Other than that, a paperless policy will also increase the accessibility for the consumer to receive their insurance contract and be more cost-effective. However, these issues are not accommodated by OJK, even during the COVID-19 outbreak. If the issuance of an electronic insurance policy (e-policy) has been agreed upon by the consumer, the e-policy shall not be considered to have violated any of the principles of consumer protection as regulated under POJK 1/2013.

3.4. Other Unsettled Issue on Consumer Protection in Insurance Industry that Relevant with COVID-19 Pandemic

The unsettled issue that linked the current Insurance Law with insurance company's consumer protection should be the establishment of a policy guarantee program (*program penjaminan polis*) as mandated by Chapter XI Article 53 of Law Number 40 of 2014 concerning Insurance (Law 40/2014). The implementation of the policy guarantee program shall be set by the law, which shall be formed at the latest 3 (three) years after the Law 40/2014 is promulgated. Unfortunately, until the end of 2021, the draft of the policy guarantee program law has not been released to the public.

The elucidation of Article 53 provided that the policy guarantee program is intended to guarantee the refund of part or all the rights of policyholder, insured, or participant from an insurance company whose business license is revoked and liquidated.[55] During the COVID-19 pandemic, insurance companies faced a high number of claims which impacted their financial condition. According to the Indonesian Life Insurance Association (AAJI), industrially health claims and deaths related to COVID-19 until June 2021 that have been paid reached IDR 3.74 trillion.[56] If the insurance company is unable to pay the high number of claims due to Covid-19, then the company is very likely to have its license revoked and liquidated under applicable regulations. If this happens, the consumer of the insurance company will suffer a loss. Thus, the law on policy guarantee program will greatly help the condition of the insurance industry as well as strengthen consumer protection in the future.

4. CONCLUSION

The implementation of protection for life insurance consumers is regulated under OJK regulations instead of Consumer Protection Law. The spirit of consumer protection under Consumer Protection Law has been adjusted by OJK under its scope of consumer protection in the financial services sector. During the COVID-19 OJK has issued the countercyclical policy to cater to some restrictions made by GoI against the global pandemic. However, some adjustments to the countercyclical policy are necessary to help insurance companies keep selling the insurance product as well as providing protection for their consumers. Nevertheless, some adjustments or tentative measures are worth considering to be permanent, especially related to the development and the rise of information technology utilization in the insurance industry. Paperless insurance policy is not only relevant during the COVID-19 pandemic, but also will be efficient for the industry in the future. Utilization of information technology shall be increased even after the COVID-19 pandemic ended, therefore it is important to connect and regulate the relationship between utilization of information technology in the insurance sector with its consumer protection aspect so that the application of sanctions and law enforcement can be carried out properly. Lastly, the mandate of Insurance Law to the issuance of policy guarantee program law must be

[55] Elucidation of Article 53 paragraph (1) Law Number 40 of 2014 concerning Insurance.

[56] Adrianus Octaviano, "Perusahaan Asuransi Terus Berkomitmen Bayarkan Klaim Covid-19," Kontan.co.id 21 September 2021, from: https://keuangan.kontan.co.id/news/perusahaan-asuransi-terus-berkomitmen-bayarkan-klaim-covid-19 accessed on 5 December 2021.

accelerated to help the insurance industry in Indonesia as well as to increase public confidence and interest in using insurance products and services.

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THE ANALYSIS OF CORPORATE CRIME IN INDONESIA'S INTELLECTUAL PROPERTY LAWS

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Abstract

White-collar crime is a type of crime that involves a large number of individuals, is carried out in a structured, large-scale manner, and results in significantly greater losses than conventional crimes. Given the growing number of organizations, the potential for white-collar crime is currently reasonably high. Corporations are able to commit various crimes, particularly those motivated by profit, such as infringements on intellectual property rights. Given that many of today's intellectual property rights holders are corporations, corporations and intellectual property rights have a strong link. This is understandable given that firms have more resources and cash to invest in developing new products that can be protected by intellectual property rights. As a result of the tight relationship between intellectual property rights and corporations, the government must be aware of potential intellectual property rights violations committed by corporations. This article aims to see if the current set of intellectual property rights legislation can handle corporate crimes. The method employed in this research is a normative juridical method with a statutory approach to produce clear findings from the formulation of corporate crime under intellectual property rights regulations. The study's findings demonstrate how unprepared existing clusters of intellectual property regulations are to deal with prospective corporate criminal activities. The criteria and system of corporate responsibility, as well as alternative consequences for firms, are pretty minimum in these numerous statutes, starting with the framing of the issue of punishment. As a result, based on vicarious liability theory and the corporate culture model, this article proposes that corporations be recognized as punishable entities under all laws controlling intellectual property rights and the establishment of firm standards and corporate obligations. In addition, this study offers suggestions for the types and amounts of punishments that might be appropriate for corporations.

Keywords: *Corporation, Crime, Intellectual Property Rights*

1. INTRODUCTION

According to Article 1 paragraph (3) of the 1945 Constitution, Indonesia is a legal state. As a result, Indonesia must prioritize human rights in its domestic policy. This is consistent with Julius Stahl's idea of *rechtsstaat*, according to which one of the qualities of the rule of law is the assurance of human rights protection.[1] Human rights protections are included in Articles 28A through 28J of the Second Amendment to the 1945 Constitution, which includes civil and political, economic, social, and cultural rights. Many new things have become obstacles for the state in its efforts to defend human rights as the times have changed.

The protection of intellectual property rights is one of the current challenges. Intellectual property must be preserved as a kind of embodiment of Article 28C paragraph (1) of the 1945 Constitution in terms of human rights in Indonesia. According to Agus Sardjono,

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[1] Ridwan HR, *Hukum administrasi negara* (Depok: Rajawali Pers, 2020), 5.

intellectual property rights are rights emerging from human intellectual pursuits, such as those in the sectors of industry, art, science, and literature.[2] Sudikno Mertokusumo explained that intellectual property rights are intangible assets or groups of intangible material rights.[3] The advent of new, more organized, and large-scale criminal modes and patterns has made defending intellectual property rights more difficult. It is no longer just the possibility for blue-collar crime but also the potential for white-collar criminality. White-collar crime refers to crimes done by people with a high or respectable social level tied to their jobs and differs from those committed by people with a low social status. Edwin H. Sutherland coined the word in 1939 in front of the American Sociological Society.[4] Crime by corporations is one form of this white-collar crime.

Companies play a critical role in a country's economy as a source of tax income, employment, output, and market price determination.[5] Of course, it will be hazardous if a company commits a crime for which the law is unprepared to penalize it. Even in the September 2019 edition of the RKUHP, corporations are recognized as criminal subjects, as stated in Article 45 of the RKUHP, with the consideration that corporations are becoming increasingly important and can commit criminal acts, either as a crime for corporations or criminal acts for the benefit of corporations or corporate criminals, namely corporations. In England, the corporation as the subject of punishment has long been known, namely in the 1842 case of the Birmingham & Glocester Railway Co.[6] Whereas in Indonesia, cases involving corporations can be considered very few even though the formulation of corporations as the subject of punishment has been recognized in the Act since Law No. 7 Drt 5 concerning Investigation, Prosecution, and Judiciary of Economic Crimes (Economic Crimes).[7]

Whereas, in Indonesia, there have been various battles over intellectual property rights involving corporations, particularly in the area of intellectual property. However, no one has yet named a corporation as a defendant. As in the Supreme Court Decision No. 1331/K/Pid.Sus/2013 concerning PT. Sunlon Kapasindo's director Ali's dispute over the design of the "charmi" ear cleaning business.[8] Similarly, the Pontianak District Court Decision No. 244/PID.SUS/2012/PN.PTK involves the brand "Cap Badak" and the defendant

[2] Maria Alfons, "Implementasi Hak Kekayaan Intelektual Dalam Perspektif Negara Hukum," *Jurnal Legislasi Indonesia* 14, no. 3 (2018): 305.
[3] Taufik H. Simatupang, "Hak Asasi Manusia dan Perlindungan Kekayaan Intelektual dalam Perspektif Negara Hukum." *Jurnal HAM* 12, no. 1 (2021): 118.
[4] Theodora Yuni Shah Putri, "Pertanggungjawaban Korporasi Dalam Tindak Pidana Pelanggaran HAM Berat" (PhD diss., FH-UI, 2007), 34-35.
[5] Togi Pangaribuan "Perkembangan Bentuk Pertanggungjawaban Korporasi Dalam Tindak Pidana Korporasi," *Law Review* 19, no. 1 (2019): 2.
[6] Aulia Ali Reza, "Pertanggungjawaban Korporasi Dalam Rancangan Kitab Undang-Undang Hukum Pidana." *Jakarta: Institute for Criminal Justice Reform* (2015): 5, http://mappifhui.org/2016/12/22/pertanggungjawaban-korporasi-dalam-rancangan-kuhp/.
[7] *Ibid.,* 8.
[8] Erwin Radon Ardiyanto. "Kebijakan Hukum Pidana Tentang Subyek Hukum Korporasi Di Bidang Hak Kekayaan Intelektual (HKI)." (PhD diss., Universitas Islam Indonesia, 2016): 137.

Haryanto, a director of PT. Tri Havian Prosperous is applicable.[9] Actually, there are other such examples that, if investigated further, have the potential to be entrapped by businesses for their acts, but law enforcement at the local level is limited since the legislation does not accommodate appropriately related to corporate punishment. It is expected that the lack of rules that can criminalize corporations will impact corporate fraud, which will, in turn, harm business competition, investment climate, and economic conditions.

Unfortunately, the information presented in this study demonstrates how unprepared all of our intellectual property laws are to deal with the threat of corporate crime. Law no. 13/2016 on Patents, Law no. 29/2000 on Plant Variety Protection, Law no. 20/2016 on Marks and Geographical Indications, Law no. 28/2014 on Copyright, Law no. 30/2000 on Trade Secrets, Law no. 32/2000 on Layout Design of Integrated Circuits, and Law no. 31/2000 on Industrial Design are all part of the intellectual property rights group. Only four of the seven statutes in the intellectual property family that regulate companies as criminal targets show this lack of readiness. Patent, trademark, and geographical indications laws, plant variety protection laws, and copyright laws are the four. Even after the changes that were made by Law no. 11/2020 on Job Creation none of them makes the requirements for corporate criminal activities or the accountability mechanism explicit. As can be observed from the *strafsoort* and *strafmaat* of the four laws, the sanctions imposed still use the personal paradigm as the sole topic of punishment. The use of cumulative sanctions in the Plant Variety Protection Act, meaning combining imprisonment and fines, is still in place. However, the corporation is a legal fiction that cannot be imprisoned. Furthermore, the fines that are threatened under the four statutes that recognize companies as punishable are pretty small, which is manifestly unfair to be imposed on businesses.

Imperfection in making norms in legislation is a fatal error that can have long implications. When the norms made have weaknesses, it will hinder the law at the *in concreto* stage.[10] For example, how can a business be named as a defendant since the public prosecutor is only allowed to file accusations in the form of imprisonment and penalties, which are constituted cumulatively at the same time under the Plant Variety Protection Law, and companies cannot be imprisoned. Furthermore, with such minor fines for businesses, the choice of indicting corporations is primarily irrelevant, given that the types of sanctions available are confined to fines of extremely small sums. Certainly not comparable to crimes perpetrated by huge organizations, which are sometimes large-scale and necessitate a lengthy investigation and punishment process. Things like this encourage the creation of impossible or detrimental articles to apply.

As a result, the urgency of corporate punishment being accepted into the law that is part of the intellectual property rights group will be explained at the start of this paper. It will also be described in terms of the formulation of norms that should be followed in intellectual property law, both in terms of the formulation of the topic of punishment, the criterion for

[9] *Ibid.,* 139.
[10] *Ibid.,* 23.

corporate criminal conduct, and the accountability system to the formation of punishments. The paper will conclude to address the issues raised by the intellectual property rights legal family that has not implemented corporate punishment.

2. RESEARCH METHODS

The research method employed in this work is a statutory approach normative juridical research method. This method was chosen in order to be able to analyze in-depth the regulation of corporate criminal acts in the intellectual property rights law family, namely Law no. 13/2016 concerning Patents, Law no. 29/2000 on Plant Varieties Protection, Law no. 20/2016 concerning Marks and Geographical Indications, Law no. 28/2014 concerning Copyright, Law no. 30/2000 on Trade Secrets, and Law no. 32/2000 concerning Layout Design of Integrated Circuits. In addition, this study also compares several provisions of corporate crime with other laws such as Law no. 8/2010 concerning the Crime of Money Laundering and Law no. 31/1999 Jo. UU no. 20/2001 on the Eradication of Corruption Crimes.

3. ANALYSIS AND DISCUSSION

3.1. Crime by Corporation

At first, many people assumed that crimes were only committed by those who were less educated and came from the lower class of the economy. However, this assumption is broken by the fact that crime does not only come from the lower classes, but also by those who are educated and come from the upper classes or what is known as white-collar crime.[11] This white-collar crime is more dangerous considering that the crimes committed usually consist of many people are carried out in a structured, large scale and cause losses that are far from ordinary crimes.[12] Often, white-collar crime makes it difficult for law enforcement officers to carry out investigations and prosecutions. The characteristics of white-collar crime include the following:

1. Invisible;
2. Very complex;
3. Unclear criminal liability;
4. Unclear victims;
5. Vague or unclear legal rules;
6. Difficult to detect and prosecute.[13]

Muladi explained that the form of white-collar crime is like organized crime and corporate crime.[14] In addition to the aforementioned qualities, corporate crime is extremely dangerous due to the fundamental role of corporations in a country, particularly in the economic sector. Economic sectors like employment and state revenue from taxes are inextricably linked to the corporation's survival. Furthermore, businesses frequently control

[11] Theodora Yuni Shah Putri, "Pertanggungjawaban Korporasi Dalam Tindak Pidana Pelanggaran HAM Berat," 34
[12] Togi Pangaribuan, "Perkembangan Bentuk Pertanggungjawaban Korporasi," 2.
[13] Theodora Yuni Shah Putri "Pertanggungjawaban Korporasi Dalam Tindak Pidana Pelanggaran HAM Berat," 35.
[14] *Ibid.*

the manufacturing industry and significantly influence setting market prices.[15] With such a significant role, it would be hazardous if carried out by corporations in illegal ways. This will only trigger unfair business and create a bad investment climate.

3.2. Corporations in the Vortex of Intellectual Property Rights and State Economic Interests

Indonesia has long been aware of intellectual property rights; even during the Dutch East Indies era, *Auteurswet* 1912, the Dutch copyright regulation, was known, as was Law no. 21 of 1961 concerning Corporate Marks and Commercial Marks, the first law in the field of intellectual property rights after independence. The Dutch, as well as other colonial countries, substantially impacted and inherited the development of intellectual property rights regulation in Indonesia. For their own success, they were interested in spreading the idea of protecting intellectual property rights.[16] Despite this, intellectual property rights rules in Indonesia at the time were deemed ineffectual in combating intellectual property infringement, as well as a lack of public understanding of intellectual property protection, resulting in pervasive intellectual property piracy. As a result, Indonesia has been added to the United States Trade Representative's ("USTR") Priority Watch List.[17]

The United States, which at that time urged Indonesia to renew the Copyright Law, was ignored because at that time, Indonesia was enjoying the high selling price of oil until when oil prices fell, and the Indonesian government needed new resources for investment funds and new foreign exchange, the Government of Indonesia. began to consider policies that could be profitable and could attract foreign investors.[18] Therefore, the protection of intellectual property rights in a country affects the level of incoming trade and investment[19]. Stronger protection of intellectual property rights will encourage imports and foreign investment to enter the country.[20] Before investing in a country, a company will check to see if the protection of intellectual property rights in that country is adequate so that their products will be safe if they enter that country. A company will not hesitate to threaten to withdraw from a country if the protection of intellectual property rights they desire is not met; this is what Monsanto, an agrochemical and agricultural biotechnology company based in the United States, did. They threaten to leave Argentina and India when the governments of these countries do not provide intellectual property rights protection as they want.[21] This is caused by intellectual property rights which are now a precious asset for a company, especially for companies engaged in technology and industry, even G. Richard Thoman, CEO of Xerox at the end of 1999, once said, "I am convinced that the management of intellectual property is how value-added that are good at managing IP will win. Those ones

[15] Togi Pangaribuan, "Perkembangan Bentuk Pertanggungjawaban Korporasi," 2.
[16] Achmad Zen Umar Purba, *Hak Kekayaan Intelektual Pasca TRIPS* (Bandung: Alumni, 2011),7.
[17] *Ibid.*, 9.
[18] Tim Lindsey *et al., Hak Kekayaan Intelektual Suatu Pengantar* (Bandung: Alumni, 2013), 67.
[19] Rod Falvey, David Greenaway, and Neil Foster, "Intellectual Property Rights and Economic Growth," *SSRN Electronic Journal* (2004): 3, http://www.ssrn.com/abstract=715982.
[20] *Ibid.*, 17.
[21] Shalini Bhutani, *"Two Countries, One Corporation and Its Intellectual Property Rights"* Economic and Political Weekly Vol. 51, No. 37 (September 2016): 16.

that aren't going to lose".[22] As time goes by and technology develops, companies become the holder of the most intellectual property rights, especially in patents and industrial designs far more than individuals, this is because a company has a large budget to conduct research to produce an intellectual work.

In Indonesia, too, corporations in the form of legal entities such as corporations and other institutions, rather than individuals, dominate intellectual property holders. Beijing Xiaomi Mobile Software co., ltd and Kai OS Technologies (Hong Kong) Limited, for example, have the most registrants for industrial designs in 2020. Honda Motor Co., Ltd. and Huawei Technologies Co., Ltd. had the most registrants for the patent in 2020. Hardwood PTE ltd and PT Indonesia Entertainment Group are the companies behind the brands.[23]

As can be seen from the information above, companies control the majority of intellectual property. This is logical, given how valuable intellectual property is to a company's ability to safeguard its goods or discoveries. Based on the information presented above, it is sad that our laws do not adequately protect the aforementioned corporations from crimes committed by other corporations. It is conceivable that an entity as massive as a structured business, with vast resources and a market reach far more significant than an individual, would infringe on another party's intellectual property without being held accountable.

This happened in the first instance, verdict No. 1733 K/Pid.Sus/2012 on behalf of the Defendant Budi Mulyono Hadi Winarto bin Hadi Winarto who is the Director of PT Garamada Semarang, intentionally or without rights, has made a bench with the same configuration as the bench made by PT. Mamagreen Pacific obtained an Industrial Design Certificate dated April 7, 2009, the bench design was exported by PT Garamada Semarang to Australia. This clearly causes losses for PT Mamagreen Pacific as the legal owner of the industrial design certificate for the bench design. Unfortunately, the punishment imposed for the act of exporting goods that violated the industrial design rights was only one year in prison and a fine of 5 million rupiahs to Budi Mulyono.

In another case, the first instance, verdict No. 881 K/PID.SUS/2010, the Defendant Samuel Hartono Subagio Bakti as Director of PT. Legong Bali sells its product, prawn crackers NY. SIOE packaging has a similarity to NY.SIOK prawn cracker packaging which belongs to Julius Julianto Tjahyono. For this, Julius Julianto Tjahyono suffered a loss of around 500 million rupiahs. However, the verdict handed down to Defendant was only sentenced to 4 months in prison and a fine of 2 million rupiahs. This certainly does not reflect a sense of justice for the victim.

[22] Kevin G. Rivette and David Kline, *"Discovering New Value in Intelectual Property"* Harvard Busines Review January-February 2000, https://hbr.org/2000/01/discovering-new-value-in-intellectual-property.
[23] DJKI, "Laporan Tahunan Direktorat Jenderal Kekayaan Intelektual 2020", *KEMENKUMHAM*, 2020, https://dgip.go.id/unduhan/laporan-tahunan?tahun=2020.

3.3. Criminal Approach to Corporations in the Intellectual Property Rights Cluster Law

The use of a criminal approach or efforts to criminalize corporations in Indonesia can be considered slow compared to the criminalization of other economic crimes.[24] This can be seen from the lack of regulation of corporate crime in our laws.[25] And although it has been regulated by around 100 (one hundred) laws regarding corporate criminal liability, there are still many shortcomings and inconsistencies in the formulation of the law[26]. One of them is the law in the intellectual property rights group which is still inconsistent in including corporations as the subject of punishment and although it has been recognized as the subject of punishment, there is no regulation at all on the criteria and system of accountability and the provision of alternative sanctions.

In legal science, on the other hand, the criminal approach is feared because of its tragic nature. Therefore, it is frequently utilized as a last resort, or what is known as the *ultimum remedium.* At the very least, taking a criminal approach to corporate crimes can be a preventive and repressive tactic to combat corporate crime. According to the author, the criminal approach to corporate crime is vital for at least two reasons.

First, as can be seen from the characteristics of the criminal law itself, according to J. van Kan, the criminal law threatens breaches with a unique kind of punishment. This extraordinary misfortune refers to sanctions in criminal law that are harsher than other laws. So that lawmakers can use crime as a means of strengthening norms so that they are obeyed in other laws because of their nature. Van Bemmelen called it a servant to other laws.[27]

Second, it cannot be denied that with the existence of harsh sanctions, viewed from the point of view of the *utilitarian prevention: deterrence* theory proposed by Bentham, humans are hedonistic so that all their actions are based on profit and loss. So if there is a sanction that brings greater sorrow than the benefit of doing the act, then people prefer to avoid it.[28] This is in accordance with the pattern of criminal acts committed by corporations that tend to be economically motivated.[29] Perpetrators will certainly think many times in advance regarding profits and losses before committing a criminal act if the sanctions given are able to threaten the sustainability of a corporation.

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[24] K. Kristian, "Urgensi Pertanggungjawaban Pidana Korporasi." *Jurnal Hukum & Pembangunan* 44, no. 4 (2014): 590.
[25] *Ibid*., 590.
[26] Bahari Sanjaya, Muladi, and Ratna Kumala Sari, "Inkonsistensi Pertanggungjawaban Pidana Korporasi Dalam Peraturan Perundang-Undangan Di Luar KUHP," *Pandecta Jurnal Penelitian Ilmu Hukum* 15, no. 2 (2020): 222, https://journal.unnes.ac.id/nju/index.php/pandecta/article/view/23013.
[27] J.M.Van Bemmelen, *Hukum Pidana 1 Hukum Pidana Material Bagian Umum, diterjemahkan oleh Hasnan* (Bandung: Binacipta, 1986), 53.
[28] *Ibid.*
[29] M.Kemal Darmawan, *Teori Kriminologi* (Jakarta: Universitas Terbuka, 2007), 12.

Furthermore, the issue of awareness to make corporations the subject of widespread punishment actually arose decades ago. In the results of their study, the Criminal Law Study Team, in the report on the results of the 1980-1981 Legal Field Assessment, explained that[30]:

> *"If the sentence is only for the management. It is not enough to carry out the repression of offences (criminal acts) committed by or with a corporation because the crime is quite large or the loss caused to society or its competitors is very significant."*

Apart from that, we can also draw out several other reasons why corporate entities must be criminally liable:

1. The profits obtained by the corporation as well as the losses to the community have the potential to be so large that it is not appropriate if the corporation is only subject to civil sanctions;
2. Corporations have an important role in the world economy so that an approach through criminal law is considered the most effective way to influence corporate actions;
3. Corporate actions through their agents often cause no small harm to the community, so that the existence of criminal sanctions is expected to be a preventive measure;
4. The regulation of corporate punishment is one of the efforts to avoid criminal acts against the employees themselves;
5. Punishment of the management alone is not enough to carry out repressive measures against offences committed by or with a corporation. Therefore, it is also necessary to have a system of accountability that allows for criminalizing corporations;
6. Considering that in the socio-economic life, corporations are increasingly playing an important role;
7. There must be the presence of criminal law to enforce the norms and provisions that exist in society.[31]

Meanwhile, there are numerous views as to why a criminal method can be used to defend intellectual property rights, especially from potential criminal activities performed by businesses, when seen from the standpoint of preserving intellectual property rights. The liberal-individualistic theory and the moral theory are two ideas that can at least serve to support the protection of intellectual property rights that must be maintained by public law.[32] In individualistic liberal theory, the benchmark for state intervention in regulating society lies in the losses suffered by others caused by an action. So that if there are actions that harm the interests of others, the state has the authority to make restrictions on these actions.[33] This was put forward by John Stuart Mill in his book *On Liberty*. Moeljatno argues that the goal of the individualistic liberal view is to achieve the freedom and safety of each individual so that an action can be prohibited when it results in a restriction on that freedom and the

[30] Kristian, "Jenis-Jenis Sanksi Pidana Yang Dapat Diterapkan Terhadap Korporasi," *Jurnal Hukum & Pembangunan* 44, no. 1 (February 26, 2014): 102, http://jhp.ui.ac.id/index.php/home/article/view/16.
[31] K.Kristian, "Urgensi Pertanggungjawaban Pidana Korporasi," 592-593.
[32] Erwin Radon Ardiyanto, "Kebijakan Hukum Pidana," 102.
[33] *Ibid.,* 103.

individual's safety.[34] Based on the above theory, the state can intervene in the preservation of intellectual property rights since violations of intellectual property rights plainly create damages to the owners of intellectual property rights because intellectual property rights are also included in intangible assets.

Whereas in moral theory, an act can be punished if the act violates moral values so that it interferes with moral feelings that exist in society.[35] Infringement of intellectual property rights, which is an invention coming from human intellectual activity that takes time, effort, and frequently a significant amount of money, is immoral conduct that does not demonstrate appreciation for other people's hard work. From the above discussion, it is clear that a criminal approach to companies is critical, both practically and philosophically. Because of the strong relationship between corporations and intellectual property rights, it is vital to include corporate criminal conduct in intellectual property law.

Regulations	**Corporations as the subject of law**	**Criteria for the corporate crime**	**Accountability system**	**Type of punishment *(straafsoort)***	**Length or amount of punishment *(Strafmaat)* *taken from the minimum and maximum values of various offenses in the criminal provisions chapter**
Law Number 13 Year 2016 Concerning Patent	Article 1 (13)	-	-	Fine	500 Millions - 3,5 Billions Rupiah
Law Number 29 Year 2000 Concerning Plant Variety Protection.	Article 6 (1)	-	-	Imprisonment and Fine	7 years imprisonment and Fine 2,5 Billinos Rupiah
2016. Law Number 20 Year 2016 Concerning Trademarks and Geographical Indication.	Article 1 (19)	-	-	Fine	200 Millions - 5 Billions Rupiah

Tabel 1 Regulation of Corporate Criminal Acts on Intellectual Property Rights

From the table 1.1, it can be seen that the regulation of corporate criminal acts in the context of the intellectual property rights law. It is essential to know that making criminal arrangements for corporations must begin with a paradigm shift between people and corporations as legal subjects. This is important to avoid misguided thinking when drafting provisions in the relevant laws. De Maglie stated that in order to convict corporations, there are several issues that must be considered, namely regarding what kind of organization can be charged with criminal responsibility. What kind of criminal acts are considered to be

[34] *Ibid.,* 103.
[35] *Ibid*., 104.

committed by a corporation and what criteria can be used to attribute criminal liability to the corporation[36]. Because the link between intellectual property rights crimes and corporations was explained in the previous discussion, the author will not explain the criteria for criminal acts such as what corporations can do in the following explanation. Furthermore, the author believes it is critical to discuss what types of sanctions are proportional in punishing corporations, given that the *strafsoort* and *strafmaat* in the law are still formulated with the paradigm of only *natuurlijk persoon* as the only *adressatnorm.*

First, to begin with, the four clusters of intellectual property rights laws that regulate corporations as the subject of punishment use the term "legal entity" to describe what type of organization can be charged with criminal liability. This means that the term "corporation" in this law refers only to legal entities such as corporations. When compared to other laws that recognize legal subjects other than individuals, such as money laundering, it is clear that the definition is very broad, encompassing an organized collection of people and/or assets, both legal and non-legal entities. The author agrees with the four existing laws regarding the meaning of corporation in terms of intellectual property rights law. In the context of intellectual property rights, the dominant legal entity is involved in intellectual property rights. This can be seen from the highest number of registrants for intellectual property rights as in the data in the previous discussion. Although intellectual property rights violations can be carried out by entities that are not legal entities, the authors feel that this is nothing to worry about because one of the main objectives of being convicted of a corporation is so that the profits from criminal acts owned by the legal entity can be touched. This is clearly different when viewed in the context of not being a legal entity because there is no separation of assets between the people involved in it and the association. So that, in fact, there is no need to be punished through a separate entity. It is enough to just criminalize the person or management. As a result, the author suggests that inconsistencies in the formulation of criminal subjects in the intellectual property rights law can be immediately uniformed by using the term legal entity as the *addressatnorm.*

Second, to explain what criteria can be used to attribute criminal liability to corporations, it is necessary to explain the theory of corporate punishment first. Basically, the theory of corporate punishment can be seen from two significant dichotomies, namely the theory that moves from the point of view that corporations can be punished because of the mistakes of their management. Secondly, corporations can be punished because of the corporation's mistakes as a separate entity. Theories that draw corporate errors from their administrators are *vicarious liability, identification theory* and *aggregation theory.* At the same time, the theory that draws the error of corporations by seeing corporations as separate entity is the theory of the *corporate culture model*

[36] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi: Mencari Bentuk Pertanggungjawaban Korporasi Dan Pemimpin/Pengurus Korporasi Untuk Kejahatan Lingkungan Di Indonesia?," *Jurnal Hukum & Pembangunan* 46, no. 2 (June 30, 2016): 152, http://jhp.ui.ac.id/index.php/home/article/view/74.

3.3.1. Vicarious Liability

This theory originates from the concept of civil law, namely *respondeat superior*, namely when there is a relationship between workers and employers where the employer is responsible for the mistakes made by the workers.[37] Simply put if at any time there is an error made by a worker that causes harm to another party, that party can sue the employer to be responsible for the error.[38] However, with the record that the worker's error is still within the scope of his work or authority.[39] In the corporate context, this concept is the most widely used concept of corporate responsibility by various countries. In this case, the corporation is responsible for the actions taken by its management regardless of the person's position in the corporation in question, and the action is still within the *scope of authority* of the work.[40] Regarding the *scope of authority* owned by the worker, it is not necessary to see that the corporation explicitly gives permission for the worker to commit a criminal act, but it is sufficient to show that in committing the crime the worker is carrying out his duties and authorities.[41] Apart from the requirement that an employee of the corporation makes a mistake, the *Australian Criminal Code* also stipulates that the crime be committed to benefit the corporation. In terms of this requirement, the intent of the perpetrator's actions, whether they were carried out solely for personal gain or for the benefit of the corporation in question, can be determined.[42] In addition to Australia, the United States, Germany, the Netherlands, Canada, and France all require the same thing. Unlike the UK, which does not require an intention to benefit the corporation in the case of *DPP v. Kent and Sussex Contractors Ltd.*[43]

[37] Aliansi Nasional Reformasi KUHP, "Pertanggungjawaban Korporasi," 19.
[38] *Ibid.*
[39] *Ibid.*
[40] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi," 155.
[41] *Ibid.,* 156.
[42] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi," 158.
[43] *Ibid.*

3.3.2. Identification Theory

Gobert stated that this theory is a form of *vicarious liability* theory, but the difference is the qualifications of the management who can attribute their mistakes to corporate responsibility, which is limited to the leadership of the corporation.[44] Regarding the crime, must be within the scope of the management's authority and to benefit the corporation remains a requirement as in the theory of *vicarious liability.*[45] The leader in question is a person who can be considered the *"directing mind"* in a corporation, namely a person who is at the *"top-level management"* in the corporation. This can be seen from the official documents of the corporation.[46] However, testing through the document received criticism from Stern. Stern explains that in modern corporate structures, often, the leader or the central organ of the corporation only approves of the actions of its agents. So that if it is limited to approval only, then the act done will not be included in the act that can be withdrawn as an act from the corporation.[47] Therefore, Stern proposed that the test be carried out in two stages.[48] The first is whether the action is carried out "as" action from the corporation, and the second is whether the action is included in the scope of work of the perpetrator.[49]

3.3.3. Aggregation Theory

This theory, according to Gobert, is a theory that bridges the direction of the withdrawal of errors through the corporate entity itself.[50] This is because this theory draws corporate error from the aggregation of the state of mind of individuals within the corporation.[51] This means that individual faults are not required to fulfil a crime perfectly but are collected from several individuals in the corporation.[52] Therefore Gobert said that corporations can still be held responsible even though no one has committed a crime in it.[53]

3.3.4. Corporate Culture Model

Cristina de Maglie explained that this theory is a theory that attracts corporate errors so that corporations can be criminally responsible based on the corporate entity itself.[54] If in the previous theory the fault was drawn from the management within the corporation, this time what is seen from the corporation, according to de Maglie, is corporate policy, corporate culture, preventive faults and reactive corporate faults.[55]

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[44] *Ibid.,* 159.
[45] Andreas N. Marbun, *Pertanggungjawaban Tindak Pidana Korporasi* (Depok: Mappi FHUI), chap. 23.
[46] *Ibid.*
[47] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi," 162.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] Andreas N. Marbun, *Pertanggungjawaban Tindak Pidana Korporasi,* 27.
[55] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi," 164.

In corporate policy, corporations are responsible for criminal acts because there is no compliance program from corporations, even policies owned by corporations tend to encourage criminal acts by individuals within the corporation itself.[56] Furthermore, for corporate culture, corporations are responsible for their mistakes which fail to develop a good work culture and comply with regulations made by the government and tolerate violations committed by individuals within the corporation.[57] Then in preventive fault, the corporation is considered to have failed in taking preventive actions that should have been taken to prevent and detect the occurrence of criminal acts within the corporation itself.[58] While the last one is regarding reactive corporate fault, an error on the part of the corporation so that it must be responsible for criminal acts that occur, seen from the reaction of the corporation itself when it finds out that a crime has been committed by its employees within its scope of work.[59]

From the several theories above, it turns out that in various laws in Indonesia, there are various approaches to the theory used to criminalize corporations. Nani Mulyati divides the various approaches based on various articles from several laws into three models.[60]

No.	Model 1	Model 2	Model 3
1.	performed by people based on work relationships or based on other relationships	performed by people who act for and/or on behalf of the corporation	performed or ordered by the corporate controller
2.	within legal entity environment	or for corporate interests	and performed in the context of fulfilling the purposes and objectives of the corporation
3.	individually or together	based on employment or other relationships	and performed in accordance with the duties and functions of the perpetrator or the giver of orders
		within corporate environment	and performed with the intention of providing benefits to the corporation
		individually or together	-

Tabel 2 Approach on Criminal Corporation

The first model of corporate criminal responsibility comes from Law no. 31/1999 Jo. Law no. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, Law no. 10/1995 jo. Law no. 17/2006 on Customs, Law no. 11/1995 jo. Law no. 39/2007 on Excise, Law no. 15/2003 concerning Stipulation of PP in Lieu of Law No. 1/2002

[56] Andreas N. Marbun, *Pertanggungjawaban Tindak Pidana Korporasi,* 27.
[57] *Ibid.,* 29.
[58] *Ibid.*
[59] *Ibid.*
[60] Nani Mulyati, "Korporasi Sebagai Subjek Hukum dan Pertanggungjawaban Pidananya Dalam Hukum Pidana Indonesia," (Doctoral diss., Universitas Indonesia, Januari 2018), 251.

concerning the Eradication of Criminal Acts of Terrorism into law and Law no. 44 of 2008 concerning Pornography.[61]

The corporate criminal liability model for the second criterion comes from Law no. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons, Law no. 1 of 2009 concerning Aviation and Law no. 17 of 2008 concerning Shipping.[62] While the third model comes from Law no. 8 of 2010 concerning the Crime of Money Laundering Law no. 40 of 2014 concerning Insurance.[63]

In the first model, it is seen that the vicarious liability approach does not require the position of the corporate management itself. In contrast, there is a combination of identification theory and vicarious liability in the second model with the phrase "performed by people acting for and/or on behalf of the corporation".[64] While the third approach uses an identification theory approach in fixing corporate responsibility.[65] In the first model, we have a law against corruption, which is similar to the intellectual property rights crime, both of which are economic crimes; in the third model, we have a law against money laundering, which is also an economic crime. So, despite the fact that the pattern of criminal acts is the same, different approaches are taken. The author argues that the approach that should be used is vicarious liability considering that if an identification approach is used, it will be complicated to convict a corporation if it is only seen from its leaders. Moreover, it is not uncommon for corporate leaders to only be limited to the approval stage while the actual actions are carried out by management who are at lower levels.

In fact, the author proposes that the model approach to the criteria for corporate criminal acts be added to the theory of the corporate culture model so that corporations can be held accountable. The prosecutor's office and the judiciary's internal regulations were enacted, namely PerJa 28/14 and Perma 13/16. Apart from adopting several provisions based on vicarious liability and identification theory, the corporate culture model theory was also adopted in this internal regulation by adding criteria such as whether preventive measures are in place, how the corporation reacts when a crime occurs, and whether the corporation has ensured compliance with applicable regulations. The author believes that adopting this theory can encourage corporations to improve good work culture to avoid criminal entanglement. Further, on who is responsible when a corporation can be prosecuted, Sutan Remy Sjahdeni divides it into four classifications:

[61] Nani Mulyati, "Korporasi Sebagai Subjek Hukum," 246.
[62] Nani Mulyati, "Korporasi Sebagai Subjek Hukum," 247.
[63] *Ibid.,* 248.
[64] *Ibid.,* 251-252.
[65] *Ibid.,* 253.

> "(a) managers as responsible at once makers (b) corporations as responsible manager makers, (c) corporation as a maker as well as a responsible (d) management and corporation as a maker and both are responsible."[66]

Related to this, the author does not agree on point b. The author agrees with the opinion of Prof. Andri Gunawan Wibisana that there has been a misunderstanding in understanding the corporation as a separate and distinct entity from individuals.[67] The interpretation of point b obscures the position of the corporation as a legal subject. In the case of a corporation that is made a defendant in the trial room, the decision handed down by the judge must be addressed to the corporation itself as a legal subject who bears rights and obligations. This becomes strange when a corporation is charged with punishment but can be imposed on people within the corporation who have no relevance to the decision because they do not have the status of a defendant. Prof Andri Gunawan Wibisana views that this may be due to several factors, namely:

1) There is a mistake in understanding between corporate responsibility and the responsibility of corporate leaders/management so that sometimes the two things are often equated or mixed up.;
2) Unclear criteria in terms of determining when and for whose actions the corporation can be held responsible;
3) The absence of clear criteria in terms of when and for whose actions the leaders/management of the corporation can be held responsible.[68]

As a result, the author proposes that when formulating corporate responsibility norms, there should be no formulation of norms that delegate punishments or judges' verdicts to individuals who are not defendants in the trial. If you want to convict the management, you will need to hold a trial where the administrator is a defendant. Not by entrusting the corporation's decision to management.

Then, regarding what sanctions are appropriate and proportional to be imposed on corporations, we can see from the purpose of the sanctions themselves. J. Van Kan said that criminal law is the law of sanctions itself.[69] As a result, it is reasonable to conclude that sanctions play a critical role in criminal law because sanctions help to achieve the criminal's objectives. As a result, if careless sanctions are enacted, the criminal law will be rendered ineffective. According to Jeremy Bentham, the criminal law should not be used because it is groundless, needless, unprofitable or inefficacious.[70] Table 1.1 shows that the formulation of sanctions in the Intellectual Property Rights Law which recognizes corporations as criminal subjects, can be criticized for several things:

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[66] Erwin Radon Ardiyanto, "Kebijakan Hukum Pidana," 58
[67] Andri G. Wibisana, "Kejahatan Lingkungan Oleh Korporasi," 189.
[68] *Ibid.*
[69] Farid, AZ Abidin, and Andi Hamzah, "Bentuk-Bentuk Khusus Perwujudan Delik dan Hukum Penitensier," *Raja Grafindo Persada, Jakarta* (2006), 277.
[70] Lilik Mulyadi, "Pergeseran Perspektif dan Praktek dari Mahkamah Agung Republik Indonesia Mengenai Putusan Pemidanaan," *Majalah Varia Peradilan* (2006): 3.

1. There is still a compilation of cumulative sanctions norms.
2. The tiny amount of fine.
3. There are no additional criminal-related regulations for corporations.

The formulation of norms in the Plant Variety Protection Law, for example, is cumulative despite the fact that it recognizes that criminal acts are not limited to individuals but can also include legal entities. When the sanctioned norm includes corporal punishment and the subject is a corporation, it is evident that something is wrong. Because corporations are essentially legal fictions, how can intangible things be subjected to corporal punishment? As a result, considering that the primary punishment for corporations is exemplary, the formulation of norms should be changed to an alternative.

Furthermore, the peculiarity can be seen in the small nominal fine imposed by the intellectual property rights law, which recognizes corporations as punishable entities. Of course, it becomes ineffective and appears to be ambivalent about the law's goal of criminalizing corporations. Just compare it to the Money Laundering Law (UU TPPU), which governs the most severe criminal offences for corporations with annual revenues exceeding 100 billion. The way the nominal sanctions are written is hugely concerning, and it must be corrected immediately, or the goal of punishing corporations will be defeated. Corporations are large entities that involve many parties and are structured in such a way that they can result in massive losses.

Then regarding the absence of additional criminal arrangements for corporations in the Intellectual Property Rights Law, it is also odd considering that several other laws have already regulated this matter. In addition, additional penalties are essential as an alternative if it turns out that the corporation is unable to pay the required fine. In Article 7 of the Money Laundering Law (UU TPPU), for example, there are additional criminal provisions, namely:

1. announcement of judge's decision;
2. suspension of part or all of the business activities of the corporation;
3. revocation of business licence;
4. dissolution and/or prohibition of the corporation;
5. confiscation of Corporate assets for the state; and/or
6. takeover of the corporation by the state.

It is imperative to change the paradigm from individuals to corporations in determining sanctions, considering that the approaches to types of sanctions are also different. Like the death penalty in an individual, if adopted into a corporation, it is a revocation of a license and imprisonment or imprisonment can be adopted as corporate imprisonment "revocation of all or part of certain rights," for example.[71]

As a result, the author believes it is critical to change the formulation of cumulative sanctions norms by juxtaposing corporal punishment with fines on corporations, given

[71] K. Kristian. "Jenis-Jenis Sanksi Pidana Yang Dapat Diterapkan Terhadap Korporasi," 112.

that corporations are legal fictions that do not exist. Furthermore, the author sincerely hopes for a minor reduction in the fine that the corporation will receive when it commits a crime. This adjustment is needed in the context of the progress of the times and a reflection of a sense of justice. Finally, the author hopes that additional criminal penalties for corporations are formulated in the Intellectual Property Rights Law to be more flexible and reflect a sense of justice for crimes committed by corporations.

4. CONCLUSION

Recognition of corporations as subjects of punishment is becoming increasingly important amid the strengthening of the role of corporations, especially in the economic sector, moreover in the field of intellectual property rights where corporations currently dominate the ownership of intellectual property rights. This is pretty reasonable considering that corporations have more significant resources and funds than individuals. Amid the strengthening of corporations' role and their close relationship with the field of intellectual property rights, it turns out that our legislative products are not ready to face it yet. This is reflected in the fact that only four of the seven laws specifically mention corporations as a subject of criminal prosecution. Not to mention that none of the four laws has formulated what criteria are so that corporations can be criminally responsible, then what kind of accountability system is there, and there is no adjustment of sanctions for corporate punishment.

The author proposes that corporations be treated as criminal subjects under all intellectual property laws. The criteria for criminal acts committed by corporations are determined using a *vicarious liability* approach and a *corporate culture model*. When it comes to who can be held liable for criminal acts committed by corporations, the clear answer is that the corporation cannot be held liable. It is also necessary to adjust the form of sanctions so that there is no longer a cumulative norm formulation by combining corporal punishment and fines on corporations when imposing sanctions. Furthermore, additional penalties for corporations must be regulated, and the nominal fines that can be imposed if the corporation commits the crime must be reformulated. As a result, it is hoped that a good law will serve as both a preventive and repressive tool in the case of corporate criminal acts involving intellectual property rights.

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BORROWING COMPANY NAMES IN THE PRACTICE OF PROCUREMENT OF GOODS AND SERVICES IN INDONESIA

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Abstract

Normatively, regulations regarding the procurement of goods and services contribute significantly to the efficiency of state spending and the national economy. But in practice, there are still deviations that have the potential to violate the law. This article examines the borrowing of company names in the practice of procurement of government goods and services from the perspective of the applicable law, and the perspective of Dignified Justice. The research methodology used is normative legal research with a literature study using primary, secondary, and tertiary legal materials. As a theoretical basis, this research uses the Theory of Dignified Justice. This article shows that borrowing company names in the practice of procuring government goods and services are contrary to applicable legal norms, and can be a criminal element for providing false or fraudulent information. Existing regulations are not able to touch the practice of borrowing company names in practice. From the perspective of Dignified Justice, it is also identified as contrary to morals, nor does it meet the criteria of good faith in the agreement. To guarantee legal certainty, the practice of borrowing company names must be strictly prohibited by law, but it needs to be done without conflicting with the economic objectives referred to by the constitution.

Keywords: *Government procurement of goods/services; Borrowing company names; Dignified Justice*

1. INTRODUCTION

Government procurement of goods and services is an activity to obtain goods/services by the Ministry/Institution/Regional Apparatus/Institutional Work Unit which the process starts from planning needs until completion of all activities to obtain goods/services. Service.[1] The government's procurement of goods/services is also intended to achieve benefits that are economically beneficial not only for Ministries/Institutions/Regional Apparatuses as users but also for the community. Another goal is to significantly reduce the negative impact on the environment throughout its entire life cycle.

The ability to obtain goods and services using the principle with the least sacrifice of various alternatives.[2] These procurement efforts are carried out without ignoring the quality standards that have been set. These efforts become a benchmark for government agencies to innovate in the procurement process. In this procurement process, the government and the private sector meet in the form of an engagement. From the government side, it has the authority to choose and determine with whom to carry out transactions for the procurement of goods and services.

[1] Pemerintah Negara Republik Indonesia, *Peraturan Presiden Republik Indonesia Nomor 16 Tahun 2018 Tentang Pengadaan Barang/Jasa Pemerintah*, *Lembaran Negara Republik Indonesia No.33*, 2018. It is contained in Article 1 of Presidential Regulation 16 of 2018 concerning Government Procurement of Goods/Services.

[2] The principle of efficient procurement of goods and services as stated in Article 6 of Presidential Regulation 16 of 2018 concerning Government Procurement of Goods/Services.

An ideal government that is well managed will place competent, honest, and responsible employees in the unit that manages the procurement of goods and services so that transactions with providers do not harm the state. On the other hand, the provider (generally private) strives to fulfill the terms of the contract, as well as the provisions of the relevant laws (example: payment procedures or taxation).

Often found in the practice of procurement of goods and services, government providers of goods/services use other business entities to overcome administrative obstacles. The practice of borrowing a company name (in practice in Indonesia it is often referred to as *"flag" borrowing*) carried out in the procurement of government goods and services is common and commonplace.[3] Borrowing the name of the company is carried out between other parties, both individuals and other companies as the borrower of the name with the company that owns the name. The agreement between the two companies is bound by a form of agreement that is carried out by involving a Notary, without a notary, even without a written agreement. In cases involving a Notary, the agreement that arises between the two parties is stated in the form of an agreement. The agreement is technical which clarifies the rights and obligations of both parties.

Two issues will be discussed related to borrowing company names in the practice of government procurement of goods and services. *First*, how to borrow company names in the practice of procurement of government goods and services from the perspective of the applicable law, and the *Second*, how to borrow company names in the practice of procurement of government goods and services from the perspective of Dignified Justice.

2. RESEARCH METHODS

This research is normative legal research with qualitative analysis that examines the rules or regulations of law as a system related to a legal event.[4] This research was conducted to provide legal arguments as a basis for determining whether or not an event was true and how the event should be interpreted according to law and focused on examining the legal concept of a criminal act that violates comprehensive regulations or laws regarding applicable buildings. at the moment. Normatively, this legal concept has been regulated in the applicable law. However, the regulation still has many weaknesses, both in terms of substance and implementation.

The legal issue faced in this research is the emergence of the act of borrowing the name of the company in the process of procuring government goods and services. Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services only regulates subcontract work. Subcontracting arrangements are not able to touch the practice of borrowing company names, so the aspects of certainty, fairness, and legal benefits in these practices are not optimal or ineffective. The type of research used is normative legal

[3] HRS, "Perusahaan Nazaruddin Kerap Pinjam Bendera," *Www.Hukumonline.Com*, last modified 2012, accessed February 20, 2019, https://www.hukumonline.com/berita/baca/lt50c9d36340cd9/perusahaan-nazaruddin-kerap-pinjam-bendera. This practice has attracted public attention and has become popular with the term "borrowing flags", especially since the bribery case involving Nazaruddin. Yulianis, one of the witnesses, explained that there were 25 loan companies. Each company is then paid a fee of one percent of the project value.

[4] Mukti Fajar ND and Yulianto Ahmad, *Dualisme Penelitian Hukum*, Cetakan 1. (Yogyakarta: PT. Raja Grafindo Persada, 2010). p.34.

research. This legal research is conducted by examining library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. The materials are arranged systematically, studied, then a conclusion is drawn concerning the problem under study.[5]

3. ANALYSIS AND DISCUSSION

The term borrowing name in some cases is often referred to as a *nominee*. Referring to *Black's Law Dictionary*, explained from the *nominee* (borrow name) is[6],

> "one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in the representation of another, or as the grantee of another."

From this understanding, it can be concluded that a *nominee* is someone who is appointed to act on behalf of another party as a representative in a limited sense. *Nominees* only act as representatives of other parties or as guarantors of other parties.

Borrowing company names in business practice has become a common thing. The parties are jointly aware of and secretly taking legal actions that deviate from what should be.[7] The parties to the loan agreement are aware and deliberately as if a certain legal action has occurred, while it is secretly agreed that no agreement will be formed or any legal consequences.[8]

In business practice, the loan agreement may only touch the civil aspect. New legal problems arise, for example when there is a default. However, in the practice of government procurement of goods and services, which are related to the scope of public law, problems have arisen since before the contract took place. In-state administration, legal relations between legal subjects cannot be equated with private law, but are part of public law. It refers to the actions of the basic state administration that is to protect the public interest.[9]

In several trials of non-corruption cases and special civil cases related to the procurement of goods and services, the term “borrowing flags” is often used by parties, including law enforcement to refer to the practice of borrowing company names. The following are some decisions of the Supreme Court related to borrowing company names/borrowing flags in government procurement of goods and services.

In the case of the Tresna Werda Nirwana Puri Social Home Development Project (Panti Nursing) Samarinda is supervised by a Supervisory Consultant, namely CV. PEC who "lent" the company to the defendant. Against this case, the Supreme Court with its decision Number 2356 K /Pid.Sus/2011 stated that the Defendant's actions as regulated and threatened with criminality in Article 3 of Law no. 31 of 1999 concerning the Eradication of Corruption

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[5] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (RajaGrafindo Persada, 2010). p.13-14.

[6] Bryan A Garner, “Black’s Law Dictionary With Guide to Pronunciation, Cet. 7” (West Publishing, St. Paul, 1999). p. 1072.

[7] Habib Adjie, *Kompilasi I Persoalan Hukum Dalam Praktik Notaris Dan PPAT*, I. (Surabaya: Indonesia Notary Community, 2016). p. 54.

[8] H Budiono, *Ajaran Umum Hukum Perjanjian Dan Penerapannya Di Bidang Kenotariatan* (Bandung: Pt.Citra Aditya Bakti, 2009). p.86.

[9] S.F Marbun and Moh. Mahfud MD, *Pokok-Pokok Hukum Administrasi Negara* (Yogjakarta: Liberty, 2009). p. 69.

Crimes 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 in conjunction with Article 55 paragraph (1) 1 of the Criminal Code.

In the case of Procurement of Educational Quality Improvement Facilities in SD/SDLB, Procurement of ICT Facilities, and Procurement of Interactive Learning Media at the Education Office, Probolinggo Regency, East Java Province, in the Fiscal Year 2012 there was a practice of borrowing company names by the Supreme Court with Decision Number 758 K/Pdt. Sus-KPPU/2015 has been proven to have conspired in conducting a tender offer, which violates the provisions of Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This is reinforced by the criminal decision in the same case which has permanent legal force through the Supreme Court Decision Number 1727 K/Pid.Sus/2016 so that the defendants are considered guilty of committing the Corruption Crime as regulated in Article 2 paragraph (1) of Law Number 31 of 1999 *in conjunction with* Law Number 20 of 2001 *in conjunction with* Article 55 paragraph (1) of the 1st Criminal Code.

Previous research using the Theory of Dignified Justice can be mentioned here such as; Abdulajid in his research revealed that criminal sanctions for corruption have had a quantitative and qualitative impact in eradicating corruption in Indonesia. Dignified Justice Theory is used to parse solutions to weaknesses in the regulation of criminal sanctions for perpetrators of criminal acts of corruption.[10] Dignified Justice Theory explains that efforts to realize justice are not solely carried out with a legal norm approach, but also need to enforce social-societal norms including ethical norms. Fradhana uses the Theory of Dignified Justice to unravel the conflict between legal norms and ethical norms in the case of the Election Organizing Honorary Council (DKPP) decision that dismissed Evi Novida Ginting as a KPU member.[11]

Jeferson Kameo and Teguh Prasetyo's research discusses anxiety arising from the development of economic law (international). The theory of dignified justice (*the dignified justice theory*) as a pure legal theory becomes a *tool kit* to describe the concept of economic law (International) so as not to worry about conflicts with national law. Every country is free to receive approval before the rules and principles of law are applied and enforced. At the approval stage, screening is carried out by the legal values in the soul of the nation (*Volksgeist*) as a form of upholding the sovereignty of a nation and state as well as to select economic law (international).[12]

[10] Syawal Abdulajid, "Rekonstruksi Sanksi Pidana Terhadap Pelaku Tindak Pidana Korupsi Berbasis Nilai Keadilan Bermartabat (Studi Terhadap Putusan Pengadilan Perkara Tindak Pidana Korupsi)" (Universitas Islam Sultan Agung, 2019). http://repository.unissula.ac.id/17271/

[11] Fradhana Putra Disantara, "Perspektif Keadilan Bermartabat Dalam Paradoks Etika Dan Hukum," *JURNAL LITIGASI (e-Journal)* 22, no. 2 (2021): 205–229. http://dx.doi.org/10.23969/litigasi.v22i2.4211

[12] Jeferson Kameo and Teguh Prasetyo, "Hakikat Hukum Ekonomi (Internasional) Dalam Perspektif Teori Keadilan Bermartabat," *Jurnal Hukum Ius Quia Iustum* 27, no. 2 (2020): 308–327. https://doi.org/10.20885/iustum.vol27.iss2.art5

3.1. Borrowing Company Names in Applicable Legal Perspectives

Borrowing company names is an act that arises in the process of procuring government goods and services regarding several aspects including the occurrence of:

1) Conspiracy
2) Acts against the law

The process of borrowing a company name can be done with or without going through a notary. The company name loan agreement is an understanding between the company owner and the Individual/Business Entity. In many cases, borrowing the name of the company is done with an underhand agreement (*onderhands)*. The legal subject of the agreement or both parties generally already know each other or are sub-employees/subcontractors of the company. In terms of sub-contract work, there are positive elements for the company owner to increase experience, income and develop the capacity of the company's sub-work.[13]

As in general contracts, there are provisions regarding the rights and obligations that must be fulfilled by the parties, namely between the Budget User Authorization (KPA)/Commitment Making Officer (PPK) representing the government/work unit as the executor of the procurement of goods and services, and the company winning the auction. or selected provider. The contract is then followed up with a work agreement, or it could be another form of the contract according to regulations.[14] In addition, there is also an agreement between other individuals/business entities and the company as the winner of the auction or the selected provider in the procurement of goods and services as an agreement to borrow the name of the company. The pattern of this relationship can be described as follows.

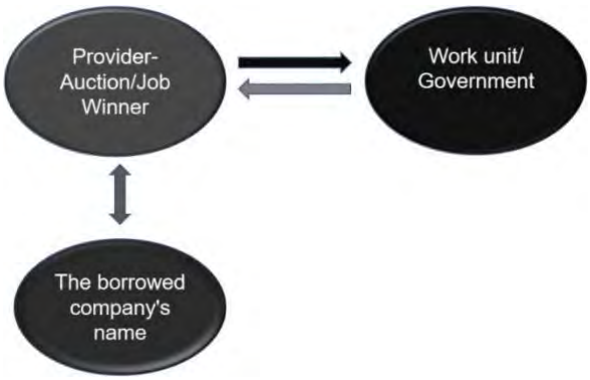

Figure 1. Borrowing the name of the company on the initiative of the Provider

[13] Muhammad ; Ilyas ; Adwani Isra, "Perjanjian Pinjam Nama Perusahaan Dalam Pelaksanaan Lelang Pengadaan Jasa Konstruksi Pemerintah Provinsi Aceh," *AT-TASYRI'* X, no. 1 (2018): 1–8. http://www.ejournal.staindirundeng.ac.id/index.php/Tasyri/article/view/128

[14] Pemerintah Republik Indonesia, *Peraturan Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Republik Indonesia Nomor 12 Tahun 2021 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah Melalui Penyedia*, *Berita Negara Republik Indonesia Tahun 2021 Nomor 593* (Indonesia, 2021).

Formation of an agreement that binds both parties and perfectly fulfills the elements of Article 1320 of the Civil Code, agreeing with the law for the parties who bind themselves. This agreement becomes a necessity or law for both parties to carry out the rights and obligations that arise based on the agreement to be carried out reciprocally. From this scheme, the borrower of the company name is the party responsible for completing a work package. All workmanship/procurement of goods and services charged to the company becomes the responsibility of the borrower of the company name. This position is usually confirmed by a power of attorney so that the borrower can do everything on behalf of the company being borrowed. Thus, all risks of working/procuring goods and services are borne by the borrower of the name of the company, and losses arising from not completing the work, or the occurrence of default are the responsibility of the borrower of the name of the company.

The pattern as described above shows that there are 2 (two) forms of agreement. The validity of the first agreement between the KPA/PPK and the provider is unquestionable. However, it is necessary to question the position and status of the agreement between the provider/auction winner/recipient of the work order and the company lending the name whether it complies with the provisions of Article 1338 of the Civil Code. There are normative provisions of Article 1338 of the Civil Code that:

1) All contracts are made legally valid as law for those who make them.
2) The contract cannot be withdrawn other than by agreement of both parties, or for reasons which are stated to be sufficient by law.
3) Contracts must be executed in good faith.

Article 1338 Paragraph (3) of the Civil Code stipulates that the agreement must be executed in good faith. The implementation of the agreement in good faith means that the agreement is carried out based on justice and propriety. Subjectively, good faith can be interpreted as honesty, namely what intentions lie in someone when legal action is held. Meanwhile, in an objective sense, good faith is understood as the implementation of a legal agreement based on compliance norms or everything that is considered appropriate in society.[15]

In line with the above description, regarding simple contracts, William T. Major mentions several basic elements of simple contracts, namely[16]:

1) Agreement of
2) Intention (faith, intention, or meaning)
3) Consideration, in the form of a promise/reciprocal benefit based on an agreement.

William T. Major was of the view that intentions should be expressed in the terms of the contract. Besides the need to be clear in the contract that the benefits obtained by each party, because this is the essence of bargaining activity.[17] The practice of borrowing the name of the company in the schematic image above is according to William's explanation, namely that there is a disconnected relationship between

[15] R Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 1987). p.25
[16] William T. Major, *Hukum Kontrak*, ed. Purwanto, 1st ed. (Bandung: Nuansa Cendikia, 2018). p.15-16
[17] Ibid. p. 16

KPA/PPK (Government Party) and the company whose name is borrowed. In this condition, aspects of the agreement can still be identified, for example in a contract in the form of a Work Order, but the government's intention to borrow the name of the company whose name is borrowed by the auctioneer/winner is unknown. Likewise, the consideration between the government and the companies whose names are borrowed is not transparent or even does not appear at all.

Regarding good faith, Subekti explained that Article 1338 paragraph (3) of the Civil Code is one of the most important aspects of a contract so that judges have the power to oversee the implementation of a contract so that there is no violation of propriety and justice. With this understanding, the judge has the authority to deviate from the contract if the execution of the contract violates the feeling of justice (*recht gevoel) of* one of the two parties. The principle of good faith requires the existence of propriety and justice, so the demand for legal certainty in the implementation of the contract must not violate the norms of propriety and the values of justice.[18]

Good faith as a legal principle contained in Article 1338 paragraph (3) of the Civil Code (BW) in several studies often leads to the conclusion that good faith only exists in the implementation of contracts. Understanding good faith as a rule of law and good faith as a principle of contract law is very important to answer differences of opinion regarding the obligation of good faith at the pre-contract stage.[19] If good faith is interpreted as a concrete legal rule with grammatical interpretation, it means that it only exists at the stage of contract implementation.[20] In contrast to good faith, it is interpreted as the principle of contract law with the scope of application not only limited to the implementation of the contract but at all stages of the contract, namely the pre-contract stage, contract implementation, and dispute resolution.[21]

In contracts, good faith essentially means honesty and decency/fairness, this means that it contains elements of trust, transparency, autonomy, obeying norms, without coercion, and without deceit. As a concrete rule, honesty in positive legal rules is manifested in Articles 530, 531, 533, and 548 of the Civil Code concerning *beziter* with good intentions; Articles 1963, 1966, and 1977 of the Civil Code concerning ownership related to expiration; Article 1320 of the Civil Code as a condition of agreement and a lawful cause. Property/justice is embodied in Articles 1321, 1323, 1328 of the Civil Code concerning mistakes, coercion, and fraud in contract making; Article 1348 of the Civil Code concerning payments with intention.[22]

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[18] Muhammad Syaifuddin, *Hukum Kontrak: Memahami Kontrak Dalam Perspektif Filsafat, Teori, Dogmatik, Dan Praktik Hukum (Seri Pengayaan Hukum Perikatan)* (Bandung: CV. Mandar Maju, 2016). p. 94.

[19] Miftah Arifin, "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian," *Jurnal Ius Constituendum* 5, no. 1-April (2020): 66–82. http://dx.doi.org/10.26623/jic.v5i1.2119

[20] Novran Harisa, "Asas Itikad Baik Dalam Perjanjian Arbitrase Sebagai Metode Penyelesaian Sengketa," *Aktualita* 1, no. 1-Juni (2018): 261–279. https://web.archive.org/web/20200506080634id_/https://ejournal.unisba.ac.id/index.php/aktualita/article/download/3722/pdf_1

[21] Ricardo Simanjuntak, *Hukum Kontrak-Teknik Perancangan Kontrak Bisnis* (Jakarta: Kontan Publishing, 2011). p.231.

[22] Arifin, "Membangun Konsep Ideal Penerapan Asas Iktikad Baik Dalam Hukum Perjanjian." Loc.cit.

According to Wirjono Prodjodikoro, good faith is more synonymous with the term "honesty" and distinguishes it from "property". Honesty must occur at the time of the entry into force of legal relations, such as honesty in holding goods as one of the conditions for obtaining ownership of the goods held in the past during "*verjaring*". Honesty is an estimation in one's heart that the conditions for starting a legal relationship have been met.[23] When applied to the practice of borrowing company names, it is quite clear that the practice of borrowing company names does not meet the criteria of good faith as stated by Wirjono.

The discussion on the status of good faith in the practice of borrowing the name of the company above will become clearer if the initiator of the name borrowing is carried out by KPA/PPK/Government Parties. Borrowing a company name with an initiator from the government can be described as follows.

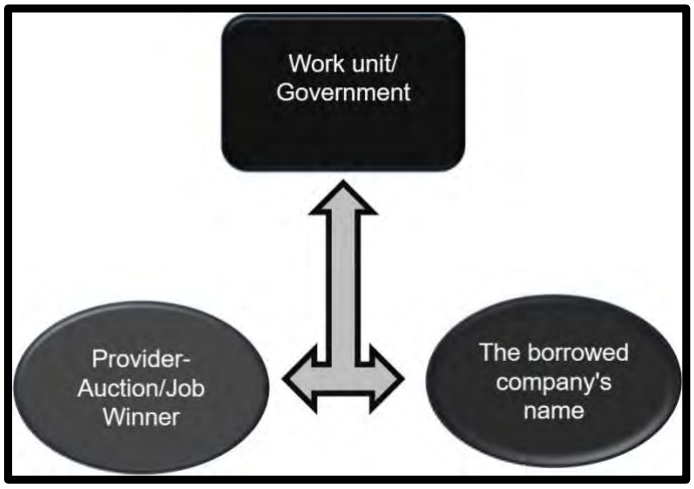

Figure 2. Borrowing Company Names on the Initiative of Government Officials

The above scheme depicts the government apparatus acting to regulate the entire process of borrowing company names. The normative provisions in Article 1338 of the Civil Code regarding the freedom to make contracts are also limited by the limitation provisions in Article 1337 of the Civil Code. This article prohibits contracts whose substance is contrary to the law, public order, and morality. So, every agreed contract remains valid if it fulfills the requirements determined by laws and regulations, public order, and decency. In this second scheme, government officials have violated the code of ethics as State Civil Apparatus (ASN) as referred to in Article 5 of Law Number 5 of 2014 concerning State Civil Apparatus.[24] In particular, he has violated discipline as a Civil Servant, at least has committed an act of abusing his authority, as well as being an intermediary for personal and/or other people's gain by using the authority of others as

[23] Wirdjono Prodjodikoro, *Asas-Asas Hukum Perjanjian* (Bandung: CV. Mandar Maju, 2011). p.102-107.
[24] Pemerintah Negara Republik Indonesia, *Undang-Undang Republik Indonesia Nomor 5 Tahun 2014 Tentang Aparatur Sipil Negara*, *Lembaran Negara Republik Indonesia No.5*, 2014.

referred to in Article 4 of Government Regulation Number 53 of 2010 concerning Civil Servant Discipline. Civil.[25]

Referring to Article 1320 number (4) in *conjunction with* Article 1337 of the Civil Code, it is found that the parties are not justified in entering into contracts based on non-halal causes. Causes that are not lawful are those that are prohibited or contrary to the law, or contrary to public order and morality. Contracts made based on unlawful causes are invalid. Thus, borrowing the name of the company at the initiative of the PPK/government party (in the second scheme) above, because it violates several regulations related to the State Civil Apparatus can be considered to contain an illegal cause, or at least the level of honesty of the parties is doubtful.

The statement, "an agreement must be executed in good faith." is part of the principle of *freedom of contract* as contained in Article 1338 Paragraph 3 of the Civil Code. The statement is interpreted that since the agreement is made and takes effect, it must not be intended to harm the interests of the parties. Article 1338 Paragraph 3 of the Civil Code is in line with Article 1339 of the Civil Code which states that an agreement does not meet the requirements of good faith and propriety, it is appropriate to be void and not binding.[26]

Presidential Regulation Number 16 of 2018 has anticipated the practice of delegating work to other companies that do not participate in the auction through job subcontracting arrangements. *First*, in paragraph (5) Article 65 of Presidential Regulation Number 16 of 2018, it is stated that non-small business providers who carry out work can carry out business cooperation with small businesses in the form of partnerships, subcontracts, or other forms of cooperation if there are small businesses that have the ability in the relevant field. *Second*, paragraph (3) Article 63 of Presidential Regulation Number 16 of 2018 which regulates foreign business entities participating in International Tenders/Selections are required to conduct business cooperation with national business entities in the form of consortia, subcontracts, or other forms of cooperation. *Third*, Article 53 paragraph (3) of Presidential Regulation Number 16 of 2018 which regulates the mechanism for payment of work performance, requires Providers who submit part of the work to subcontractors, to complete payment requests with proof of payment to sub-contractors following the realization of their work.

The provisions on subcontracting the regulation:

1) Delegation of work to small businesses, caused no major job/parent
2) Liabilities delegation of business entities nationwide for international tenders
3) All the activities of the subcontract should be known by the CO as representative of the government

while when compared to the activity of lending and the name of the company contains the following elements:

[25] Pemerintah Republik Indonesia, *Peraturan Pemerintah Nomor 53 Tahun 2010 Tentang Disiplin Pegawai Negeri Sipil*, *Lembaran Negara Republik Indonesia No. 74*, 2010.
[26] P Patrik, *Asas Iktikad Baik Dan Kepatutan Dalam Perjanjian* (Semarang: Badan Penerbit Undip, 1986). p.8.

1) Not merely delegating work to small entrepreneurs, but for several reasons, for example; does not have a company, the company does not meet the qualifications as a provider, avoids administrative obstacles related to payment terms and taxation, and others.[27]
2) Not a job/auction is required for subcontracting.
3) The name borrowing agreement is unknown or has permission from the PPK/government party.

It is clear from this comparison that the subcontracting activities cannot be considered the same as the company name borrowing activities in the two schemes above. Mudjisantosa is of the view that borrowing a company name is more appropriately considered the same as a subcontract that is not permitted by law, or a subcontract that is not known to the PPK.[28] This means that borrowing the name of the company is contrary to Article 1320 Paragraph (4) *jo.* Article 1337 of the Civil Code. As stated in Article 1320 Paragraph (4) that one of the conditions for a valid agreement is if it is carried out for a lawful cause. Likewise, Article 1337 of the Civil Code states that a cause is prohibited, if it is prohibited by law, or if it is contrary to good decency or public order.

From the description above, when using the approach to the view that good faith means honesty as in Wirjono's view, borrowing the name of a company in the procurement of government goods and services does not meet the agreement with the criteria of good faith. Likewise, if using the approach used by Subekti which defines good faith as propriety, borrowing a company name is contrary to the norms of decency and fairness.

Every vendor/provider who will carry out the work of procuring goods and services is asked to make an integrity pact[29], as a consequence of this, the vendor/provider must fulfill honesty, commitment, and professionalism in the process of procuring goods and services. LKPP Regulation Number 12 of 2021 concerning Guidelines for the Implementation of the Procurement of Goods/Services Through Providers also requires that providers who will conduct consortium/operational cooperation/partnerships/other forms of cooperation must have a consortium agreement/operational cooperation/partnership/other forms of cooperation. Borrowing company names do not have the criteria as referred to in the LKPP Regulation 12 of 2021. The agreement to borrow the name of the company is carried out solely to fulfill the required qualifications by way of engineering in terms of formalities.

The legal relationship thaat occurs between the provider and the third party in the first scheme (Figure 1.) may contain elements of criminal fraud. The provider, bidder, or auction winner is present in front of PPK using the identity of another

[27] Isra, "Perjanjian Pinjam Nama Perusahaan Dalam Pelaksanaan Lelang Pengadaan Jasa Konstruksi Pemerintah Provinsi Aceh.". Loc.cit.
[28] Mudjisantosa, "Pinjam Bendera Adalah Tipikor?," *Www.Mudjisantosa.Net*, last modified 2017, accessed June 24, 2021, http://www.mudjisantosa.net/2017/05/pinjam-bendera-adalah-tipikor.html.
[29] Pemerintah Republik Indonesia, *Peraturan Lembaga Kebijakan Pengadaan Barang/Jasa Pemerintah Republik Indonesia Nomor 12 Tahun 2021 Tentang Pedoman Pelaksanaan Pengadaan Barang/Jasa Pemerintah Melalui Penyedia*.

person/company. The provider who borrows the name of such a company must provide benefits or *fees* to the company whose identity is used/borrowed. Meanwhile, the company did nothing. Borrowing names carried out by providers like this is intended to trick the government/PPK to gain profit for him and the company whose name is borrowed. As Article 378 of the Criminal Code states:

"Whoever to benefit himself or another person by going against his rights, either by using a false name or false circumstances, either by reason and deceit or by making up false words, persuades people to give something, making debt or writing off a debt, is punished for fraud with a maximum imprisonment of 4 (four) years.[30]

There are two objective and subjective elements related to fraud (*bedrog*) in Article 378 of the Criminal Code. Among the objective elements are to benefit oneself or others unlawfully, by using a false name or false dignity, by deceit, or by a series of lies. The definition of "false name or false dignity" here is a name that is not a real name but the name of another person, as well as dignity or position that is not by accordance with the actual situation.[31] In the *Penal Code* French on fraud, the term "using" a false name is applied, not "using" a false name.[32] Both Article 378 of the Criminal Code and the *Penal Code* French in viewing a "false name or false dignity" are not related to job performance, but the benchmark is to benefit oneself or others. In the agreement to borrow the name of the company in the practice of government procurement of goods and services (first scheme), at the same time the state should be able to pay less for the transaction. Likewise, if it is related to conspiracy or business competition, then other parties are harmed.[33] Thus, borrowing a company name in the first scheme above can be categorized using a fake name, as an element that is contrary to Article 378 of the Criminal Code.

One of the tools to move others in the objective element in deception (*bedrog*) is "a series of lies/deceit". As for the "series of lies" is an act that is not enough with one lie, but several lies that make other people affected or deceived.[34] In the second scheme, borrowing company names is an initiative of the PPK/KPA/Government Parties. The PPK/KPA in the scheme "moves" other people to commit a series of lies or fraudulent acts. In this second scheme, it is also clearer that there is an "intention" or goal desired by the perpetrator and the consequences that will occur are also known. This "intention" fulfills a subjective element in the form of intentional gain against the law.[35]

[30] Tim Visi Yustisia, *KUHP: Kitab Undang-Undang Hukum Pidana*, I. (Jakarta: VisiMedia, 2016).
[31] Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan* (Jakarta: Prenada Media, 2017). p.113.
[32] Starting from a difference of opinion at the Hoge Raad June 19, 1855, W.1785 a man mobilized a messenger, who came to deliver a package to be handed over to a woman, claiming that he had a daughter with the name on the package, when in fact not so. The person is then convicted of fraud by means of using a false name and using false dignity.
[33] In comparison, there is insider trading in the capital market which is identified as market manipulation and fraud. The act of fraud due to the existence of information or circumstances that are not true will be able to harm other parties without having to have consequences for the manipulated market. (notice at Hatiwiningsih and Lushiana Primasari, *Hukum Pidana Ekonomi* (Tangerang Selatan: Penerbit Universitas Terbuka, 2015). p.1.10)
[34] Yahman, *Karakteristik Wanprestasi & Tindak Pidana Penipuan*. Op.cit. p.113-114.
[35] Ibid. p.121.

In the second scheme, PPK/KPA know their duties and are required to be accountable to the public. PPK/KPA is responsible to the people represented by the state/government, in this context it is responsible for the successful implementation of government procurement of goods/services. As a government apparatus, PPK/KPA knows and is bound by at least Law Number 28 of 1999 concerning State Administration that is Clean and Free from KKN and Law Number 5 of 2014 concerning State Civil Apparatus.[36]

The PPK or the authorized apparatus that initiates the borrowing of the company's name in the process of procuring government goods and services, of course, knows the risks or impacts that their actions are contrary to the law. Moreover, if the motive for the initiative to borrow the name of the company contains the intention of gaining benefits for oneself or others so that it is included in a criminal offense of corruption. Can be an opportunity to be identified as fraud with intentional features as certainty (*Suchopzet bij zekerheidsbewustzijn*intention), or deliberate as a possibility (*opzet bij mogelijkheidsbewustzijn*) or often called *dolus eventualis*. [37]

As a *dolus eventualist,* Moeljatno offers an approach with the "*inkauf nehmen*" theory or the "what can be done" theory.[38] Whatever the motive for the actions of the PPK or government officials in the second scheme is a deviation or non-compliance with the principles of the State Civil Apparatus such as professionalism, proportionality, and accountability. Similar principles are also contained in Law Number 17 of 2003 concerning State Finance and Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services such as: transparent, open, competitive, fair, and accountable**.** PPK/government representative who engineered borrowing a name in a condition at first may only intend to commit administrative violations, but he certainly knows the risks that will arise not only from the administrative aspect, it can be state losses, state losses, or conspiracy (vertical). In such a situation, the PPK/government representative must be brave enough to take the risk. This is by Moeljatno's opinion placing the condition that there is intentionality in the pattern *dolus eventualis* :

1) The defendant is aware of the possible consequences/circumstances that constitute an offense.
2) His attitude towards the possibility if it does arise, is what can be done, can be approved, and dare to take the risk.[39]

[36] Abu Samman Lubis, "Akuntabilitas Pejabat Pembuat Komitmen (PPK) Dalam Proses Pengadaan Barang/Jasa Pemerintah," *Bppk.Kemenkeu.Go.Id*, last modified 2018, accessed July 3, 2021, https://bppk.kemenkeu.go.id/content/berita/balai-diklat-keuangan-balikpapan-akuntabilitas-pejabat-pembuat-komitmen-ppk-dalam-proses-pengadaan-barangjasa-pemerintah-2019-11-05-eb0c9313/.

[37] Exemplified by Moeljanto, someone wants to shoot a wild boar. But at the sametime he understood that around the location there were many villagers who were chasing the pig. As a result, the one who was shot was not only the wild boar, but also one of the villagers (or the wild boar was not hit at all), so the death of that person is said to be intentional. If he is conscious and aware of the certainty that the shooting of the person was intentional, then the result is called intentional as certainty. But if it is realized only as a possibility, it is called intentional as a possibility. (Moeljatno, *Asas-Asas Hukum Pidana*, 7th ed. (Jakarta: Rineka Cipta, 2009). p.178.)

[38] Ibid. p.175.

[39] Ibid. p.76.

3.2. Borrowing Company Names in the Perspective of Dignified Justice

Dignified justice as a legal theory was put forward by Teguh Prasetyo. The concept of Dignity Justice contains several previous thoughts such as the Theory of Natural Law proposed by St. Thomas Aquinas. Such as the attempt to translate the "mind" of God. It's just that there is a difference in the Theory of Dignified Justice separating the period of God's mind before the existence of the state and after the existence of the state. [40] Teguh Prasetyo also explained that there was a wedge of thought with Thomas Aquinas earlier, such as the conception of *divine law* and *eternal law*, up to the third layer which still places divinity when a contract occurs and is known as the contractual sanctity principle. [41]

Regarding the statement that *human law, is supported by reason, and enacted for the common good*, Dignified Justice views that what is meant by common good is justice. [42] In summary, it can be described, The Theory of Dignified Justice states that the source of law comes from thought (*reason*), and *reason* uses a conception that is by the spirit of the Indonesian nation or *volkgeist*, namely Pancasila. [43]

Implementation of the Dignified Justice in the legal system can be explained as the application of Pancasila in the national legal system. The philosophy of dignified justice views that the national legal system is the result of systemic philosophical thinking. The legal system that is formed is undeniably a compromise of the legal system of civilized countries. This does not mean that the Indonesian legal system imitates the laws of other countries. Indonesian law grows from the soul of the *nation* and from within Indonesia itself. The similarity that occurs is solely due to the objective and universal similarity by the values in Pancasila.[44]

Borrowing company names (or borrowing flags) that occur in the procurement of government goods and services needs to be analyzed with a more dignified approach, in this context not as an ordinary engagement, because it is faced with the public sphere. The view on the practice of borrowing company names is given proper direction and placement in the legal system on issues related to the procurement of goods and services, at least related to:

1) The concept of the Indonesian economy is the indirect goal of government procurement of goods and services,
2) views on-state losses, and
3) views on honesty and good faith in the implementation of the procurement of goods and services.

As an element of fiscal policy, the procurement of goods and services aims to drive the economy by creating jobs, increasing competitiveness, and increasing economic

[40] Teguh Prasetyo, *Legal Reform: Perspective of Dignified Justice Theory* (Malang: Setara Press, 2017). p.18.
[41] Teguh Prasetyo, *Dignified Justice: Legal Theory Perspectives*, Issue II. (Bandung: Nusa Media, 2019). p.26-27.
[42] Ibid.
[43] Teguh Prasetyo, *Legal Reform: Perspective of Dignified Justice Theory* (Malang: Setara Press, 2017). p.15.
[44] Teguh Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*, Cetakan II. (Bandung: Nusa Media, 2019). p.81-82.

growth.[45] The procurement of government goods and services is in a series of processes to realize state goals. At the end of the process, due to the relinquishment of rights and obligations, namely payment and delivery of work/goods, it will be crucial in the event of fraud.

The economy in the constitution of the 1945 Constitution of the Republic of Indonesia contains the concept of a family system. The country's economic system is expressed as a form of joint business carried out in a family way.[46] With this concept, the regulation of the government's procurement of goods and services should be appropriate if it favors the business entities referred to in Article 33 of the 1945 Constitution of the Republic of Indonesia, namely Micro, Small Business, and Cooperatives.

State losses according to Article 1 paragraph (22) of Law Number 1 of 2004 concerning the State Treasury are alack of money, securities, and goods *real* and *definite* as a result of unlawful acts, whether intentional or negligent. The explanation of the word "shortage" means a reduction in the amount of money that has been allocated for certain benefits. The phrase state loss in Law Number 1 of 2004 should not be compared with the understanding of "profit" or an increase in state money.[47]

Understanding state losses should also be interpreted as optimizing the value of the benefits of money and not the value of money. Value *for money* means performance, namely the efforts of every rupiah issued by the government to provide maximum benefit in achieving public welfare. The state's understanding of the calculation of profit and loss, as happens in business, needs to be avoided so that it does not become a "price" calculation. Thus, the perception that the state "trades" with its people can be avoided.[48]

In terms of good faith in contracting, the practice of borrowing company names in the procurement of government goods and services does not guarantee the validity of the contract status under these conditions. Because of the classical theory of contract law, it can be applied to situations where the agreement has fulfilled certain conditions. This doctrine does not protect those who suffered losses in the pre-contract stage or stages of the negotiations, because in this phase of the agreement there have not been to meet certain conditions.[49]

Wirjono Prodjodikoro's view of good faith is related to "honesty" and is distinguished from "property". Wirjono explained that honesty must occur at the time

[45] Maria Avilla Cahya Arfanti, "Pelaksanaan Sistem E-Procurement Dalam Pengadaan Barang Jasa Pemerintah Untuk Mencegah Terjadinya Persekongkolan Tender (Studi Di Dinas Pekerjaan Umum, Perumahan, Dan Pengawasan Bangunan Kota Malang)," *Jurnal Universitas Brawijaya* (2014): 1–22, http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/374.

[46] Teguh Prasetyo and Arie Purnomosidi, *Membangun Hukum Berdasarkan Pancasila*, II. (Bandung: Nusa Media, 2018). p.53.

[47] For example, in the condition that the certificate of guarantee for the performance of the work cannot be disbursed (due to non-fulfillment of the contract or other reasons). cannot be immediately included in the clause on reduced state money or state losses. Moreover, it makes the potential for disbursement of guarantees a profit/income factor for the state. What is at issue here is not the validity of state revenues for the disbursement of the guarantee, but the perception of the state's "benefit" derived from job failure or non-fulfillment of contracts.

[48] Samsul Ramli, *Bacaan Wajib Mengatasi Aneka Masalah Teknis Pengadaan Barang/Jasa Pemerintah*, Cetakan 1. (Jakarta Selatan: Transmedia Pustaka, 2014). p.102.

[49] Suharnoko, *Hukum Perjanjian Teori Dan Analisis Kasus* (Jakarta: Prenada Media, 2015). p.5.

of the entry into force of legal relations, such as honesty in holding goods as one of the conditions for obtaining ownership of the goods held in the past during "*verjaring*". This honesty is in the form of estimation in one's heart that the conditions for starting a legal relationship have been fulfilled.[50] Wirjono's view is very clear that the practice of borrowing company names in the procurement of government goods and services does not meet the criteria of good faith.

Good faith in contracting, which is discussed in the practice of borrowing company names, is described based on a dignified justice perspective starting from the initial thought that all positivism must be based on God Almighty (Natural Law perspective).[51] The moral element is the main concern in legal relations based on the view of the theory of dignified justice. In this case, dignified justice is in line with the opinion of Domat and Pothier as adherents of the teachings of Roman natural law which dominate the thought of the substance of the contents of the *Civil Code. The* French do not agree with the distinction between *iudicia stricti iuris* and *iudicia bonae fidei* . Domat and Pothier stated that natural law and customary law dictate that every contract is *bonae fidei*, because honesty and integrity must always exist in all contracts that require the fulfillment of the contract by the following propriety.[52]

Polemics about the meaning of good faith and the existence of different benchmarks from the perspective of time, place, and person, are generally often associated with *fairness, reasonable standards of fair dealing, decency, reasonableness, a common ethical sense, a spirit of solidarity, and community standards*.[53] Against these views, Dignified Justice tends to mean the meaning of good faith as the terms mentioned above are conditions that must exist before the occurrence of a contract.

Belief in Dignified Justice that law must be based on morals, and morality is the law itself.[54] Thus, borrowing the name of the company in the procurement of goods and services in the perspective of Dignified Justice is an act that does not show honesty, is inappropriate, and or does not have good intentions, while also violating several principles of the procurement of goods and services themselves, namely openness, competition, and transparency.[55]

4. CONCLUSION

Borrowing the name of the company as one of the issues that occur in the process of procurement of goods and services, is an act of procurement actors so that administratively they can meet procurement requirements or qualifications. Borrowing a company name does

[50] Prodjodikoro, *Asas-Asas Hukum Perjanjian*. p.5.
[51] Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*. Op.cit. p.117
[52] Ridwan Khairandy, *Iktikad Baik Dalam Kontrak Di Berbagai Sistem Hukum*, 1st ed. (Yogjakarta: FH UII Press, 2017). p.129.
[53] Agasha Mugasha, "Good Faith Obligations in Commercial Contracts," *International Business Law* 27 (1999): 355. https://heinonline.org/HOL/LandingPage?handle=hein.journals/ibl27&div=83&id=&page=
[54] Prasetyo, *Keadilan Bermartabat: Perspektif Teori Hukum*. p.179.
[55] Pemerintah Negara Republik Indonesia, *Peraturan Presiden Republik Indonesia Nomor 16 Tahun 2018 Tentang Pengadaan Barang/Jasa Pemerintah*. It is contained in Article 6 Presidential Regulation of the Republic of Indonesia Number 16 regarding the Principles of Procurement of Goods/Services.

not meet the requirements of good faith in terms of the agreement, and can be a criminal element for providing false information, or hiding your true identity, or as an act of fraud. Borrowing company names also do not uphold the principles of transparency, openness, competition, and fairness. Current regulations do not explicitly prohibit the practice of borrowing company names, only appearing in the prohibition of subcontracting. Meanwhile, the regulation on subcontracting in Presidential Regulation Number 16 of 2018 does not touch the practice of borrowing company names.

From the perspective of the Theory of Dignified Justice, the view of borrowing company names in the practice of procurement of government goods and services refers to and is consistent with the intent of the constitution. The legal system in the theory of dignified justice puts something in its place. The moral is law, the law is moral, a person is punished for violating morals, and vice versa cannot be punished if he does not violate morals.

Borrowing the name of the company in the view of Dignified Justice is against the honesty and disclosure of the true dignity of the parties. Thus, borrowing a company name is seen as unfair, disgraceful, and should be strictly prohibited by law in the field of government procurement of goods and services. Simultaneously, the application of sanctions and law enforcement needs to be carried out carefully so as not to interfere with economic objectives. The core interest of the targeted economic regime is the economy based on joint and family business, so regulations must continue to support small, micro, and cooperative businesses. Likewise, the interpretation of the definition of state losses must be returned to its basic understanding, including the application of the criminal act of corruption that must be carried out consistently by its basic philosophy

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