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THE EXISTENCE OF REGIONAL-OWNED LIABILITY COMPANIES AS A PROFIT-ORIENTED REGIONAL-OWNED ENTERPRISES

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Abstract

Regional-Owned Enterprise ("BUMD") is a business entity owned by the regional government as a source of local revenue, especially to provide benefits to the regional economy based on Good Corporate Governance. In addition to seeking profit, Regional Companies also carry out social functions for the residents of their regions. Before the era of regional autonomy, regional companies were regulated by Law No. 5 of 1962 concerning Regional Companies. Responding to this, the government together with the People's Representative Council ("DPR") replaced the Law on Regional Companies with the Law on Regional Government and Government Regulations on BUMD. The two regulations were drafted to improve the performance of regional companies, as well as to fill the legal vacuum regarding regulations regarding BUMD. In practice, the purpose of establishing the BUMD has not been achieved because BUMD is required to have a social function in society, which makes it less focused on its main mission. Using a normative juridical research method and statutory approach as well as conceptual approach, this paper comprehensively examines Regional Liability Company ("Perseroda") regulations and offers an ideal concept for the existence of profit-oriented Perseroda in Indonesia. The legal theories used are the Theory of Three Fundamental Legal Values (Gustav Radbruch) and the Legal Entity Theory. The results of the research show that the most appropriate solution is to have the management of BUMD separate from the Regional Government Law and that the issuance of Government Regulations regarding BUMD is proven yet to be able in addressing the problem of BUMD management. Therefore, it is recommended that the DPR and the Government immediately organize and harmonize regulations regarding BUMD management so as to realize good BUMD governance and performance, especially to support the strength of the regional economy.

Keywords: *Regional Liability Company; Regional-Owned Enterprise; Governance*

1. INTRODUCTION

The term Regional-Owned Enterprise ("BUMD") emerged when the Minister of Home Affairs Regulation ("Permendagri") No. 3 of 1998 on Regional-Owned Enterprises was issued. This regulation stipulates that the legal form of BUMD can be in a form of regional-owned company or a limited liability company. BUMD is a business entity whose capital is wholly or mostly owned by the Region.[1]

BUMD can take the form of a regional-owned liability company ("Perseroda"). Perseroda is a legal entity that plays a significant role in generating profits for the region. It is not surprising that business entities in the form of Perseroda have a significant contribution to the national economy.

[1] Article 1 point 40 Law Number 23 of 2014 concerning Regional Government jo. Article 1 point 1 Government Regulation Number 54 of 2017 concerning Regional-Owned Enterprises.

BUMD is expected to operate effectively, efficiently and accountably, in order to provide quality and affordable vital products for the people. In addition, it is expected to be relied on as the main source of funding for regional governments.[2]

In order to encourage regional development, the role of BUMD is felt to be increasingly important as a pioneer in business sectors which has not yet attracted private enterprises. BUMD can act as executors of public services, counterbalances of market power, and help the development of small and medium-sized enterprises.

BUMD functions as one of the contributors to regional revenues, both in the form of taxes, dividends and proceeds from privatization. BUMDs were established with the aim of providing benefits for regional economic development in general, providing public benefits in the form of providing quality goods and/or services to fulfill the community's needs according to the conditions, characteristics and potential of the region concerned based on good corporate governance.[3]

There are 2 (two) fundamental problems that hinder the development of BUMD, namely management problems and capital problems:

1. Regarding management, BUMD State-owned enterprises are considered to still lack work ethic, too bureaucratic, inefficient, lack market orientation, do not have a good reputation, and have low professionalism.[4] Other issues include local governments being deemed to intervene too much in the management of state-owned enterprises, as well as a lack of clarity between generating profits. On the other hand, state-owned enterprises are required to have a social function towards the community.[5]
2. Regarding capital, regional companies are heavily dependent on regional government policies, as the majority of their capital comes from the regional budget and revenue. This means that the size of their capital is determined by the financial ability of the region.

The establishment of BUMD has a long history in Indonesia. Prior to the enactment of the Regional Government Law ("UU Pemda"), there was already a provision in the Minister of Home Affairs Regulation (Permendagri) No. 3 of 1998 concerning the Legal Form of Regional-Owned Enterprises. Article 2 of this regulation stipulated that the legal form of state-owned enterprises could be in the form of a regional company (PD) or a limited liability company (PT).

With changes in legislation, Permendagri No. 3 of 1998 was revoked through Minister of Home Affairs Regulation No. 11 of 2016 concerning the Revocation of Minister of Home Affairs Regulations in the Field of Regional Finance and Regional Development Phase II, as it contradicted the UU Pemda. Based on Article 402 paragraph (2) of Law No. 23 of 2014

2 BPS - Statistics Indonesia, *Statistik Keuangan Badan Usaha Milik Daerah* (Jakarta: Badan Pusat Statistik, 2019), 1.

[3] Supplement of State Gazette No. 6173, Elucidation of Government Regulation Number 54 of 2017 concerning Regional-Owned Enterprises, Part I General, paragraphs 2 and 3.

[4] General Elucidation on Government Regulation Number 54 of 2017 concerning Regional-Owned Enterprises.

[5] *Ibid.*

concerning Regional Government and Government Regulation (PP) No. 54 of 2017 concerning BUMD ("PP BUMD"), the regional head has a significant authority in determining policies, especially policies related to the establishment of regional regulations on changes in the legal form of BUMD. The changes in legal form referred to in Government Regulation No. 54 of 2017 concerning BUMD are:

a. Changes in the legal form of regional public enterprises to Perseroda.[6]
b. Regional companies that have been established before the enactment of Government Regulation Number 54 of 2017 can be changed to BUMD.[7]

Article 402 paragraph (2) of Law No. 23 of 2014 concerning Regional Government ("UU Pemda") stipulates that BUMDs that existed before this law came into force must adjust to the provisions of this law within a maximum period of 3 (three) years since the promulgation of this law. Furthermore, BUMDs are formed to carry out business activities to support Regional Original Revenue (PAD) and in managing BUMD, local governments must have a business concept.[8] In the Perseroda regulation, the focus is more on profit, so the regional government as the majority shareholder of Perseroda is expected to have a roadmap for its management. In connection with the above issues, this research aims to examine the existence of regional liability company (Perseroda) as a profit-oriented regional-owned enterprise.

2. RESEARCH METHODS

This research uses a qualitative normative method supported by empirical juridical. Normative juridical research that is qualitative in nature is research that refers to legal norms contained in statutory regulations.

Based on the type of research, the researcher will use three approaches, namely:

1. Statute approach, normative research must use statute approach because it is the central theme of the research. The statute approach that will be studied is various legal rules that are the focus of the research by examining all laws and regulations related to the legal issues being addressed.
2. Conceptual approach, conducted by examining views and doctrines that have developed in legal science, especially related to legal entities in general, and specifically for companies.
3. Case approach, conducted by examining cases related to the issue being faced, which have become court decisions with permanent legal force.

[6] Article 114 paragraph (3) letter (b) Government Regulation Number 54 of 2017 concerning Regional-Owned Enterprises.
[7] *Ibid*., Article 139 paragraph (1).
[8] Business activity is defined as a business operations carried out by a person or business entity on a regular and continuous basis, namely in the form of activities involving the provision of goods or services, as well as facilities for sale or rent, with the aim of making a profit. Zaeni Asyhadie, *Hukum Bisnis Prinsip dan Pelaksanaan di Indonesia,* 11th ed. (Depok: Raja Grafindo, 2018), 154.

3. ANALYSIS AND DISCUSSION

According to the Great Indonesian Dictionary (Kamus Besar Bahasa Indonesia or KBBI), a business entity is a juridical (legal) and economic entity that uses capital and labor, with the aim of obtaining profit.[9] Business entities can take the form of limited liability companies, partnerships, associations, firms, and limited partnerships.[10] The forms of business entities in Indonesia include State-Owned Enterprises (BUMN), Regional-Owned Enterprises (BUMD), and Private-Owned Enterprises (BUMS).[11]

Not all business entities are legal entities, so not all business entities can become legal subjects. This is implicitly regulated in Article 1 point 9 of Law Number 11 of 2020 concerning Job Creation (UU Cipta Kerja), which stipulates that "a Business Entity is a legal or non-legal entity established in the territory of the Unitary State of the Republic of Indonesia and engaged in certain fields of business and/or activities."

The definition and purpose of establishing Regional-Owned Enterprises, based on Article 1 number 40 of Law Number 23 of 2014 concerning Regional Governments, as reiterated in Article 1 number 1 of Government Regulation Number 54 of 2017 concerning Regional-Owned Enterprises, stipulates that "Regional-Owned Enterprises, hereinafter referred to as BUMD, are business entities of which the majority or all of its capital is owned by the Region." Based on Article 334 of Law Number 23 of 2014 concerning Regional Governments (UU Pemda), Regional Public Enterprises are BUMD that take the form of a limited liability company with their capital divided into shares, of which at least 51% are owned by one region. The establishment of a legal entity in the form of a regional liability company is carried out based on statutory provisions regarding limited liability companies. In the event that the shareholders of a Regional liability company consist of several regions and non-regional entities, one region is the majority shareholder.

With regard to the existence of BUMD, based on Article 331 paragraph (4) of the UU Pemda, the objectives of establishing BUMD are as follows:

1. To provide benefits for the development of the local economy in general. The main purpose of establishing BUMD is to provide benefits or advantages for the relevant region. The primary benefit of establishing BUMD, according to researchers, is economic benefits. Economic benefits for the region can be broadly defined as providing financial benefits for increasing the region's Regional Original Revenue (PAD) and improving the economy for the community where the BUMD is located.
2. To provide public benefits in the form of the provision of quality goods and/or services to fulfill the basic needs of the community in accordance with the conditions, characteristics, and potential of the relevant region based on good corporate governance. Article 331 of the UU Pemda states that the main purpose of BUMD is to provide public benefits in the form of the provision of quality goods and/or services to fulfill the basic needs of the wider community in accordance with the conditions, characteristics, and potential of the relevant region based on good

[9] "Badan Usaha," KBBI VI Daring, accessed August 3, 2021, https://kbbi.kemdikbud.go.id/entri/Badan%20usaha.
[10] M. Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2013), 1–32.
[11] "Badan Usaha: Pengertian, Jenis, Dan Bentuk Badan Usaha," Maxmonroe, accessed August 3, 2021, https://www.maxmanroe.com/vid/bisnis/pengertian-badan-usaha.html.

corporate governance. This condition reflects the function of BUMD as a public function.

3. To obtain profits and/or benefits.
   In the regional economic system, BUMD is expected to play a role not only as a market force balancer but also to contribute to increasing regional income through the payment of dividends as part of BUMD's profits.

Based on Article 9 of Government Regulation Number 54 of 2017 concerning BUMD, the establishment of BUMD is based on the needs of the region and the feasibility of the business sector that will be established by BUMD.[12] The needs of the region as referred to are assessed through a study that covers aspects of public services and community needs.[13] The feasibility of the BUMD business sector is assessed through an analysis of economic feasibility, market and marketing analysis, financial feasibility analysis, and other aspects containing laws and regulations, technology availability, and human resources availability.[14]

Regional needs based on the results of the needs assessment and feasibility study of the BUMD business sector are part of the regional medium-term development plan (RPJMD) policy.[15] Funding for regional needs assessments and the feasibility study of the BUMD business sector comes from the Regional Budget (APBD).[16]

The establishment of a Regional-Owned Enterprise (BUMD) must meet the following requirements: [17]

a. There is a study of the needs of the region and a feasibility study of the business sector that will be established by BUMD;
b. The plan for the establishment of BUMD must obtain the approval of the Minister of Home Affairs;
c. The establishment of BUMD is carried out based on a specific regional regulation ("Perda") concerning BUMD
d. There must be Articles of Association

The Perda on the establishment of BUMD contains the name and location, purpose and objectives, business activities, period of establishment, and the amount of authorized capital.[18] Regional liability company has its domicile in the region of the founder determined in the Perda on the establishment of the regional liability company. The domicile is also the headquarters of the reginoal liability company.[19]

Article 17 PP BUMD stipulates that the articles of association of regional liability company is stated in a notarial deed in accordance with statutory provisions. The Articles of Association of a regional liability company contain:

[12] Article 9 paragraph (2) Government Regulation No. 54 of 2017 concerning BUMD.
[13] Article 9 paragraph (3) Government Regulation No. 54 of 2017 concerning BUMD.
[14] Article 9 paragraph (5) Government Regulation No. 54 of 2017 concerning BUMD.
[15] Article 9 paragraph (6) Government Regulation No. 54 of 2017 concerning BUMD.
[16] Article 10 paragraph (1) Government Regulation No. 54 of 2017 concerning BUMD.
[17] Article 9 to Article 17 of Government Regulation No. 54 of 2017 concerning BUMD.
[18] Article 11 paragraph (1) Government Regulation No. 54 of 2017 concerning BUMD.
[19] Article 13 Government Regulation No. 54 of 2017 concerning BUMD.

a. Name and location/domicile.
b. Purpose and objectives.
c. Business activities.
d. Duration of establishment.
e. Amount of authorized and paid-up capital.
f. Number of shares.
g. Classification of shares and number of shares for each classification, as well as the rights attached to each share.
h. Nominal value of each share.
i. Name of position and number of members of the Board of Commissioners and Board of Directors.
j. Determination of the place and procedures for holding the General Meeting of Shareholders (RUPS).
k. Procedures for appointment, replacement, and dismissal of members of the Board of Commissioners and Board of Directors.
l. Duties and authorities of the Board of Commissioners and Board of Directors.
m. Use of profits and distribution of dividends.
n. Other provisions in accordance with statutory provisions.

Based on Article 109 point 2 of Article 7 paragraph (4) of the Job Creation Law, the legal requirement for establishing a regional liability company is to obtain legal entity status. A legally established company as a legal entity *(rechtspersoon, legal entity or legal person)*, must obtain "approval" from the Minister. Ratification is issued in the form of a ministerial decree called as the decision to ratify a company as legal entity.

To obtain legal entity status, a company must be founded by 2 (two) or more individuals. However, specifically for BUMDs, especially after the issuance of the Job Creation Law, BUMDs in the form of Perseroda are allowed to be owned solely by Regional Government, based on Article 109 number 2 and Article 7 paragraph (7) of the Job Creation Law.

The position and relationship of BUMD with regional governments, according to Article 331 paragraphs (1) and (2) of UU Pemda, is that regional governments do not have to have BUMD, but BUMD can be considered for regions to become a means of providing services to the community. BUMD can be established by the regional government and its establishment is stipulated in a regional regulations ("Perda"). BUMD is an organizational unit within the local government body that was established to generate income for the regional government. The performance of BUMD is measured by comparing the profit generated with the investment made by the regional government as an investor.[20] BUMD is formed based on Perda, having two aspects related to BUMD in the form of Perseroda as a business entity established according to the statutory provisions:

1. Relating to the legality aspect (*legal entity*);

[20] Ambar Budhisulistyawati, Yudho Taruno Muryanto and Anjar Sri CN, "Strategi Pengelolaan BUMD Persero Untuk Mewujudkan Prinsip Tata Kelola Perusahaan Yang Baik," *Private Law* 3, no. 2 (July-December 2015): 59, http://jurnal.hukum.uns.ac.id/index.php/PRIVATLAWII/article/view/882.

2. As a business entity.[21]

Perseroda takes the form of limited liability company *(perseroan)* according to the classification of the type of company, because Perseroda is a collection of capital, people (legal subjects), established based on an agreement and subject to the provisions of Law Number 40 of 2007 concerning Limited Liability Companies ("UU PT"). Perseroda is a regional-owned enterprise in the form of a limited liability company whose capital is divided into shares that are wholly or partially owned by the regional government, with at least 51%. The latest regulation related to BUMD is the UU Pemda and Government Regulation No. 54 of 2017 concerning Regional-Owned Enterprise (PP No. 54/2017). The UU Pemda also explains that BUMD in a form of Perseroda has characteristics as stipulated in articles 339 to 342, which are as follows:[22]

1. Capital
   The capital of Perseroda consists of shares. In the case of shareholders of a regional-owned corporation consisting of several regions and non-regions, one of the regions is the majority shareholder.[23] Perseroda can establish subsidiaries and/or own shares in other companies.[24]
2. Organs
   Perseroda consists of 27 General Meeting of Shareholders (RUPS), Board of Directors and Board of Commissioners.
3. Dissolution
   Perseroda can be dissolved.[25] In the event of dissolution, the assets of Perseroda that are dissolved become the property of the region and are returned to the region.[26]

Capital Sources of Regional-Owned Enterprises (BUMD) consist of:

a. Regional capital participation, sourced from Regional Budget (APBD) and/or conversion from loans.
b. Loans, sourced from the Region, other BUMD, and/or other sources in accordance with statutory provisions.
c. Grants, sourced from the Central Government, Region, other BUMD in accordance with statutory provisions.
d. Other capital sources, including reserve capital, revaluation profit of assets, and share premiums.

[21] Sugiarto, *Pengantar Akuntansi I* (Jakarta: Universitas Terbuka Jakarta, 1999), 54.
[22] Article 339 paragraph (1) Law Number 23 of 2014 concerning Regional Government as amended by Law Number 9 of 2015 concerning the Second Amendment to the Law Number 23 of 2014 concerning Regional Government, as last amended by Law Number 11 of 2020 concerning Job Creation (hereinafter referred to as UU Pemda).
[23] *Ibid.*
[24] Article 341 paragraph (1) UU Pemda.
[25] Article 340 paragraph (1) UU Pemda.
[26] Article 342 paragraph (1) UU Pemda.

The characteristics of Perseroda can be explained as follows:

1. BUMD in the form of Perseroda is a Limited Liability Company (Article 339 paragraph (1) of UU Pemda).
2. The capital is divided into shares, most of which (more than 51%) are owned by only one region (Article 339 paragraph (1) of UU Pemda).
3. Apart from the Regional Government, the ownership of Perseroda is open to external parties (Article 339 paragraph (1) of the UU Pemda).
4. Perseroda is a pure business entity established to obtain profits in order to increase Regional Original Revenue (Article 339 paragraph (1)).
5. The shareholders of Perseroda can consist of several regions and non-regions (Article 339 paragraph (3)).
6. Perseroda can establish subsidiaries or hold shares in other companies (Article 341 paragraph (1)).
7. The Head of the Region is the shareholder with the authority to make decisions (Article 3 paragraph (1) and Article 3 paragraph (2) of the PP BUMD).

The problem with changing the legal form of Regional Company (Perusda) into Regional Lialibility Company (Perseroda) has an impact on the governance of a BUMD, as regulated in Government Regulation No. 54 of 2017 concerning BUMD, stating that:

a. Whereas BUMD in the form of Perseroda are subject to Law Number 40 of 2007 concerning Limited Liability Companies.
b. If the legal form is not changed, the company will be stagnant and less developed.

According to the author, the consequences of changing the legal form of a regional company *(Perusahaan Daerah/Perusda)* to become a Perseroda lead to:

1. Changes in ownership of assets that were originally in the name of a regional company were transferred to be in the name of a Perseroda.
2. Name changes in the event of restructuring of the organizational structure.
3. Changes in corporate governance.

The background behind the change from Regional-Owned Enterprise to Regional-Owned Limited Liability Company is:

1. To obtain an optimal and reasonable profit (profit-oriented) in order to increase Regional Original Revenue (PAD).
2. To enhance the function and a greater role in developing their business professionally as well as increasing the potential Regional Original Revenue.
3. To optimize the company's performance in accordance with the principles of prudence and good corporate governance.
4. To achieve equal distribution of banking services in order to improve the businesses and living standards of the people, especially micro, small and medium enterprises (MSMEs).
5. To assist and promote economic growth and development in all fields.

BUMD Business Summit organizer data shows that 80% (eighty percent) of a total of 1,700 BUMD are still unhealthy.[27] Most BUMD throughout Indonesia still rely on the Regional Expenditure Budget (APBD) for company operations. [28] Only 340 BUMD (20% BUMD) are already independent and do not burden the regional budgets of each region.[29] BUMD production quality is still far from expectations so that it is still unable to compete with other companies in ASEAN.[30] There are 1,097 BUMD with total assets of Rp340,11 trillion is still unsatisfactory, because the profit achieved has only reached Rp10,372 trillion, so the ratio of profit to new assets is around 3.05 percents.[31] BUMD so far have not been able to make a significant contribution to the Regional Original Revenue (PAD), even more often requiring "injections" of government funding from the regions rather than generating profits, thus burdening the APBD. The construction of Perseroda is expected to be representative in accommodating the interests of investors or partners in collaboration with BUMD. If the region does not open up its investment opportunities, it will be difficult for the relevant regions to develop from a business approach perspective. Regional development financing should be explored through the success of BUMD as one of the "earning centers" of regional income by attracting investment, especially foreign investment.[32]

Based on the understanding of Perseroda as explained, it appears that regions can have all or 100% (one hundred percent) of Perseroda's shares. Owning 100% (one hundred percent) of the shares by the region does not violate the UU PT which requires the establishment of a company by two or more individuals. This does not violate the UU PT due to the exception as regulated in Article 7 paragraph (7) of the UU PT which stipulates that the provisions requiring a company to be established by two or more individuals do not apply to Persero where all of its shares are owned by the State.

With 100% (one hundred percent) share ownership, the only owner of Perseroda is automatically the relevant region. From the understanding of Perseroda, it is also possible for the region to own at least 51% (fifty-one percent) of the shares. This means that it is very open to the possibility for other parties to have shares in Perseroda, as long as at least 51% (fifty-one percent) of Perseroda's shares are owned by one region.

Based on the explanation above, Perseroda can be owned by:

1. One regional government which owns all of Perseroda's shares.
2. More than one local government, where one local government owns at least 51% of the shares.
3. One local government with non-local government actor(s), where the local government concerned owns at least 51% shares.

[27] "BUMD Se-Indonesia Tidak Sehat," Enciety, accessed August 8, 2021, https://www.enciety.co/1360-bumd-se-indonesia-tidak-sehat/.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*.
[31] Rahmatul Fajri, "Kemendagri Kritik Perolehan Laba BUMD Sepanjang 2019," *Media Indonesia*, August 28, 2019, https://mediaindonesia.com/politik-dan-hukum/255928/kemendagri-kritik-perolehan-laba-bumd-sepanjang-2019.
[32] Nindyo Pramono, *Legal Due Diligence BUMD Sebagai Implementasi GCG*, in *Pengelolaan BUMD Sesuai Prinsip Tata Kelola Perusahaan Yang Baik (Good Corporate Governance)* (Tim Penelitian Hukum BPHN: 2012).

4. More than one local government with non-local government actor(s), where one local government owns at least 51% shares

Considering that one region must own at least 51% of shares, in the event that Perseroda is owned by more than one regional government, one of the regional governments must own more than 51% of Perseroda's shares.

Regarding the majority share ownership, Rudyanti Dorotea Tobing stated that whoever owns the most shares in a Limited Liability Company is the one who determines the policies of the of the Limited Liability Company.[33] The role of the Regional Head represents the local government as the sole shareholder and acts as the General Meeting of Shareholders (RUPS), having a 100% majority vote in decision making. This condition causes the Perseroda to have difficulty in facing business competition with agility and relying on the Regional Budget (APBD), so that the goal of changing the form of the regional company (perusahaan daerah) into a regional liability company (Perseroda), which is expected to be one of the sources of regional government revenue, cannot be achieved.[34]

There are two strategies that can be carried out by Perseroda in order to achieve the desired goals in the future, namely:[35]

1. Carrying out business expansion.
2. Restructuring the company.

In order to improve performance and optimize the role of Perseroda, restructuring is needed in its management. Perseroda restructuring can be carried out by conducting an inventory related to the grouping of forms, types, and profit-oriented characteristics in the framework of achieving Good Corporate Governance (GCG), so several adjustments are needed to the construction of legal structure.

Legal status from regional-owned company (Perusda) to regional-owned limited liability company (Perseroda), ideal arrangement as a profit-oriented BUMD, that Perseroda is in the form of a limited liability company. In the elucidation of Law Number 40 of 2007 concerning Limited Liability Companies, the development of the national economy is carried out based on economic democracy with the principles of togetherness, efficient justice, sustainability, environmental awareness, independence, and maintaining the balance of national economic progress and unity, as well as and maintaining a balance of progress and national economic unity aims to realize public welfare. The improvement of national economic development needs to be supported by a comprehensive law that regulates limited liability companies that can guarantee a conducive business climate. With a comprehensive regulation that covers various aspects of the company, the Limited Liability Company Law

[33] Rudyanto Dorotea Tobing, *Aspek-Aspek Hukum Bisnis: Pengertian, Asas, Teori, dan Praktik* (Surabaya: LaksBang Justitia, 2015), 268.
[34] P2 LIPI, *Revitalisasi BUMD Dalam Perekonomian Daerah* (Jakarta: Lembaga Ilmu Pengetahuan Indonesia, 2010).
[35] "Penjelasan Bentuk dan Alasan Melakukan Restrukturisasi Perusahaan," Mekari Jurnal, accessed August 9, 2021, https://www.jurnal.id/id/blog/penjelasan-bentuk-dan-alasan-melakukan-restrukturiasi-perusahaan/.

can meet the legal needs of the community and provide more legal certainty, especially for the business world.[36]

In the management of a Regional Liability Company (Perseroda) which aims to increase profits, it is mandatory to apply the Good Corporate Governance (GCG) Principles. OECD provides guidelines regarding matters that need to be considered in order to create Good Corporate Governance in a company, namely:[37]

1. Protection of rights in Good Corporate Governance must be able to protect the rights of shareholders, including minority shareholders.
2. Equal treatment of all shareholders (the equitable treatment of shareholders).
3. The role of stakeholders is related to the company (the rule of stakeholders).
4. Disclosure and transparency (disclosure transference).
5. The responsibilities of the board of commissioners or directors (the responsibilities of the board).

Good Corporate Governance arrangements in Indonesia based on Article 1 point 1 of the Regulation of the State Minister for State-Owned Enterprises Number: PER-01/MBU/2011 concerning the Implementation of Good Corporate Governance in State-Owned Enterprises, provides the definition of GCG as follows:

> "Good Corporate Governance, hereinafter referred to as GCG, are the principles that underlie a process and mechanism for managing a company based on laws and regulations and business ethics."

GCG implementation in Indonesia has been institutionalized through laws and regulations. Several regulations governing the implementation of GCG are as follows:

a. Law of the Republic of Indonesia Number 19 of 2003 concerning State-Owned Enterprises;
b. Law of the Republic of Indonesia Number 40 of 2007 concerning Limited Liability Companies;
c. Regulation of the Minister of State-Owned Enterprises No. PER 01/MBU/2011 dated 1 August 2011 concerning Implementation of Good Corporate Governance in State-Owned Enterprises;
d. Decree of the Minister of State-Owned Enterprises (BUMN) Number KEP-117/M-MBU/2002 concerning the Implementation of Good Corporate Governance Practices in State-Owned Enterprises;
e. PM-PBUMN Ministerial Circular Letter No. S-106/MPM.PBUMN/2000 dated April 17, 2000 concerning the Policy of Implementing Good Corporate Governance in all BUMN.

The implementation of GCG principles in Indonesia is mandatory, especially for BUMN/BUMD. Article 2 paragraph (1) of the Regulation of the Minister of State-Owned

[36] General Elucidation of Law No. 40 of 2007 concerning Limited Liability Companies.
[37] Komite Nasional Kebijakan Governance, *Pedoman Umum Good Corporate Governance Indonesia* (Jakarta: Komite Nasional Kebijakan Governance, 2006), i.

Enterprises (BUMN) No. PER01/MBU/2011 dated 1 August 2011 concerning the Implementation of Good Corporate Governance in State-Owned Enterprises stipulates that BUMN must implement GCG consistently and continuously while taking into account the provisions and norms that apply and the articles of association of BUMN.[38]

There are 5 (five) GCG principles that must be used as guidelines in managing State-Owned Enterprise (BUMN):[39]

1. Transparency;
2. Accountability;
3. Responsibility;
4. Independency;
5. Fairness.

Policy and Efforts of Perseroda in Realizing Good Corporate Governance (GCG), as a business organization, BUMD requires a governance mechanism in order to realize the principles of good corporate governance (GCG). The local government policies related to Perseroda should ideally synergize with the central government's policies, especially in the implementation of GCG. Local governments can apply GCG through legal products such as Regional Regulations (Perda) (Perda on the Establishment of Perseroda).

The implementation of GCG in Perseroda certainly needs to go through policies from the regional government which are coercive in nature, given that the authority of BUMD lies with the regional government. National policies related to good corporate governance (GCG) so far have not been imperative, but only optional, so there is no obligation for each Perseroda to implement it, except as required in statutory provisions.[40] Based on the principle of GCG, the important reason for implementing GCG in Perseroda is to provide protection for the rights of shareholders, including minority shareholders. The framework built in GCG ensures equal treatment for all shareholders, including minority and foreign shareholders.

Local governments always hold the largest shares in Perseroda, namely 51% (fifty one percent), or even 100% (one hundred percent). On the guarantees for BUMD that are legally incorporated Limited Liability Companies (PT), Law Number 40 of 2007 concerning Limited Liability Companies (UU PT) is fully applicable, so that all GCG principles contained in the UU PT must be implemented. Apart from that, there are also General Guidelines for Good Corporate Governance in Indonesia which were issued by the National Committee on Governance Policy in 2006, which is the minimum standard for implementing GCG in BUMD. For BUMD in the form of PT with its core business being in banking, in addition to the provisions of GCG in the UU PT and the General Guidelines for Good Corporate Governance in Indonesia, all regulations regarding the implementation of GCG issued by Bank Indonesia through Bank Indonesia Regulations (PBI) also apply. Meanwhile, for BUMD in the form of Regional Companies (PD), the implementation of GCG must be in

[38] Article 2 paragraph (2) of Regulation of Minister of State-Owned Enterprises No. PER 01/MBU/2011 concerning Implementation of Good Corporate Governance in State-Owned Enterprises.
[39] *Ibid.*
[40] Mas Achmad Daniri, *The Guidelines for Good Corporate Governance (Speech by the Chairman of the National Committee on Good Corporate Governance Policy)* (2006).

accordance with Law Number 5 of 1962 concerning Regional Companies, the General Guidelines for Good Corporate Governance in Indonesia, as well as GCG provisions regulated in the Regional Regulations that serve as the basis for the establishment of BUMD.

Strengthening the Joint Commitment of Regional-Owned Limited Liability Company (Perseroda) Organs to Increase Performance and Profit

A strong and sustainable corporate organization must be supported by good management concepts. Careful planning and strategy development will have an impact on successful management, resulting in the effective and efficient achievement of organizational goals. In order to realize a strong organization, there needs to be a mutually agreed commitment between the main corporate organs, including the Board of Directors, Board of Commissioners/Supervisory Board, and Shareholders/General Meeting of Shareholders (GMS).[41]

According to Nindyo Pramono, the mutually agreed commitment between the main corporate organs, namely the Directors, Commissioners/Supervisory Board, Shareholders/GMS should include vision, mission, objectives, strategy selection, and performance evaluation. The commitment is then implemented by the Board of Directors in the form of company management through policy determination and the creation of a corporate culture and ethics that support the achievement of objectives. Nindyo Pramono explains that the joint commitment, in relation to Good Corporate Governance (GCG), is implemented by the Board of Directors as managers through company policies, which ideally should be codified in company regulations.[42]

The realization of the "Commitment" of stakeholders within the company or between the Company's organs is as follows:

1. Capital Owners/General Meeting of Capital Owners/General Meeting of Shareholders

   With regard to the commitment of the parties, especially the shareholders of Perseroda, ideally the regional government as the majority shareholder should be able to synergize the vision and mission of the regional government in order to prosper its people, as stipulated in Article 331 paragraph (4) of UU Pemda. The commitment of the local government can be embodied in the Regional Regulation on the Establishment of Perseroda, which can support Perseroda in realizing the principles of good corporate governance.
2. Commissioners

   The commitment in the field of corporate supervision is directed through the compliance of corporate supervision commissioners towards regulations related to corporate activities. In the context of business activities, supervision is embodied in

[41] Darwin Nasution, "Analisis Hukum Penerapan Tata Kelola Perusahaan yang Baik (Good Corporate Governance) Pada Badan Usaha Milik Daerah (Studi pada PT. Perkebunan Sumatera Utara)" (Thesis, Universitas Sumatera Utara, 2012), 78–79, Repositori Institusi Universitas Sumatera Utara. http://repositori.usu.ac.id/handle/123456789/39069.
[42] Nindyo Pramono, *Loc. cit.*

the "code of conduct/code of corporate governance" and is one aspect of the commissioners' accountability in carrying out their duties.[43]

3. Directors

   In connection with the commitment of the directors in realizing the principles of good corporate governance, this can be realized in a written “code of conduct” which is used as a guideline for good management in carrying out corporate/company activities as a form of accountability of the directors. In the elucidation of Article 92 paragraph (4) of Government Regulation Number 54 of 2017 concerning BUMD, the code of conduct is one of the good corporate governance manuals.

4. CONCLUSION

BUMD is a business entity in which all or most of the capital is owned by the regional government through the separation of regional wealth to be used as capital participation in BUMD. Therefore, it is necessary to reform the decision-making bureaucracy in submitting share capital in the context of business development in order to increase profits. In terms of corporate governance, Perseroda in business fields other than banking has not fully implemented Good Corporate Governance (GCG).

Based on the findings of this research, the author recommends a profitable option for the regional government to determine the utilization of BUMD capital is in the banking sector, particularly in Rural Banks (BPR). In terms of legal certainty, Perseroda in the banking sector has more specific regulations, which are regulated in the Banking Law and supervised by the Financial Services Authority Law, so that the organ of Perseroda will work professionally with maximum results, and its benefits will be directly felt by the community as Micro business actors.

The role of BUMD must begin to be considered by improving good governance arrangements for Perseroda, thus an integrated legal framework is needed. The legal aspect regulating BUMD needs to be strengthened with Governance Structure in BUMD, which is expected to create a balance in the distribution of roles and authority among organs in BUMD so that Good Corporate Governance can be achieved. The need for a legal umbrella for BUMD management separated from the UU Pemda is the most appropriate solution to obtain legal certainty. It is suggested that the DPR and the government immediately finalize the management arrangements of BUMD to form a special law regulating BUMD.

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EFFECTIVENESS OF LAW ENFORCEMENT ON CORPORATE BANKRUPTCY STATUS

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Abstract

This study aims to evaluate the effectiveness of law enforcement on the status of bankruptcy in Indonesia. Lawrence M. Friedman's legal system theory is used because it has a comprehensive scope to evaluate the effectiveness of enforcing legislation. This study uses juridical-normative research with statutory and case approach. The laws and regulations studied are Law no. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (KPKPU), while the case study takes the case of the bankruptcy of Telkomsel in 2012. This study finds that bankruptcy law enforcement in Indonesia has not been effective. This is because Indonesian bankruptcy law still has weaknesses in terms of substance, structure, and legal culture. In addition, this study finds that the fundamental weakness of Law no. 37 of 2004 is the application of simple proof as a mechanism for imposing bankruptcy statements to debtors. The application of this simple evidence makes law enforcers (judges) tend to ignore facts other than the two conditions stipulated in Law no. 37 of 2004 to impose bankruptcy status, namely the existence of two or more creditors and the existence of one debt that is due and collectible. In the end, the simple evidence mechanism does not open up opportunities for law enforcement officials to assess the debtor's ability to pay off their debts.

Keywords: *Law Enforcement; Bankruptcy; Simple Proof*

1. INTRODUCTION

Bankruptcy of PT Telekomunikasi Selular (Telkomsel) in 2012 attracted public attention. The state-owned company was declared bankrupt through the Central Jakarta Commercial Court Decision Number 48/Pailit/2012/PN.Niaga.Jkt.Pst because it was deemed to not have paid its debt obligations in the form of Purchase Order No. PO/PJI-AK/VI/2012/00000027 dated June 20, 2012 and No. PO/PJI-AK/VI/2012/00000028 dated June 21, 2012, totaling Rp5,260,000,000.00 (five billion two hundred and sixty million rupiah) to PT Prima Jaya Informatika. Telkomsel's bankruptcy is a concern because the company actually has assets that are much larger than the amount owed to PT Prima Jaya Informatika. In other words, Telkomsel is actually a company that has the ability to pay their debts. Thus, the commercial court decided to go bankrupt because of the request submitted by PT Prima Jaya Informatika is considered to have met the requirements for imposing bankruptcy as regulated in Article 2 Paragraph (1) of Law no. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (*Kepailitan dan Penundaan Kewajiban Pembayaran Utang*). The article states that a debtor can be declared bankrupt if 1) it has two or more creditors; 2) not paying at least one debt that is due and collectible.

Prior to Telkomsel, bankruptcy cases involving companies with large assets had also arisen. In 2000, PT Asuransi Jiwa Manulife Indonesia was declared bankrupt through the

Central Jakarta Commercial Court Decision Number 10/Pailit/2002/PN.Niaga.Jkt.Pst. The bankruptcy petition was filed by curator Paul Sukran from PT Dharmala Sakti Sejahtera. In 2004, the commercial court also ruled against PT Prudential Life Assurance at the request of Lee Boon Siong, a Malaysian who has business activities in Indonesia as a consultant for insurance and agency services (Central Jakarta Commercial Court Decision Number 13/Pailit/2004/PN.Niaga.Jkt.Pst).

Regarding corporate bankruptcy applications, according to data from *Sistem Informasi Penelusuran Perkara* (SIPP) at the district courts with commercial court rooms in Jakarta, Semarang, Surabaya, Makassar and Medan, it was found that the number of case applications that were entered and handled during 2017–2021 was 570 cases. This number shows the trend of petitions for bankruptcy cases which tend to increase in every city. The commercial courts in Jakarta and Semarang are the ones who handle the most cases of bankruptcy petitions.

Table 1.1. *Number of Cases of Bankruptcy Applications*

Commercial Court	**Number of Cases of Bankruptcy Applications**					**Total**
	2017	**2018**	**2019**	**2020**	**2021**	
Central Jakarta	47	41	61	56	51	260
Semarang	18	32	23	32	27	139
Surabaya	30	10	29	21	24	114
Medan	1	7	8	11	11	39
Makassar	0	11	3	4	2	20
Total						572

Source: processed by the author from SIPP at the District Courts of Central Jakarta, Surabaya, Medan, Makassar, and Semarang.

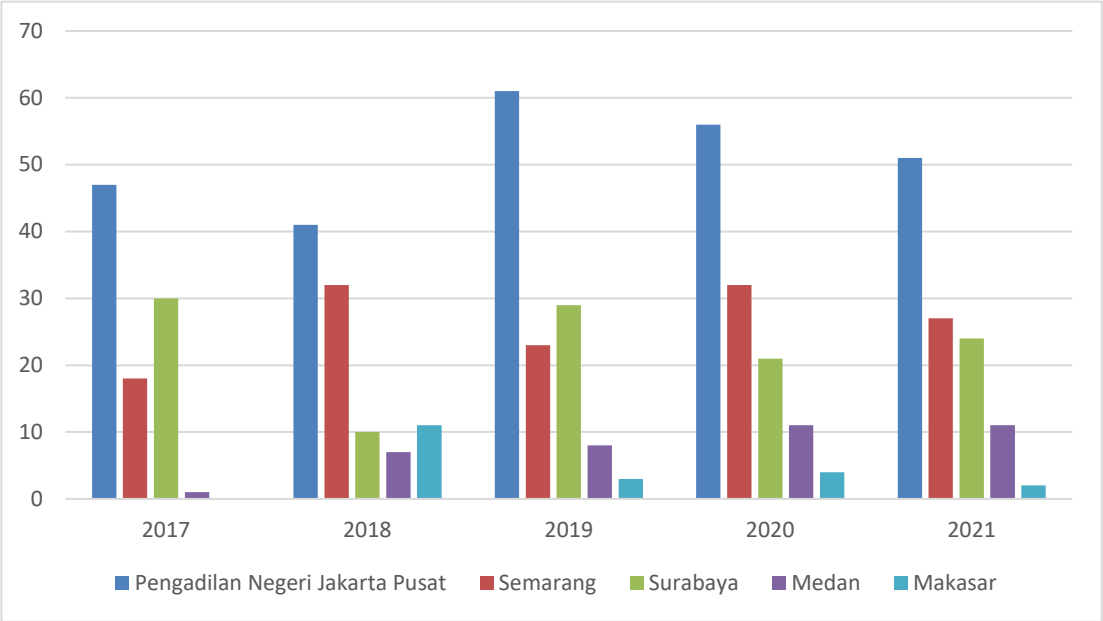

Figure 1.1. *Trends in Application for Bankruptcy in Several Courts in Cities in Indonesia*
Source: processed by the author, 2021.

The increasing trend of bankruptcy petitions actually indicates the ineffectiveness of bankruptcy law enforcement in Indonesia. This is because the imposition of bankruptcy on a solvent company is not in line with one of the principles of bankruptcy law, namely business continuity (going concern). Bankruptcy law should guarantee the realization of a healthy business climate and support economic growth, not be used as a tool that actually facilitates the imposition of bankruptcy on corporations. It is too easy for corporations to enter bankruptcy, which will have implications for the confidence of investors and business actors in Indonesia.

The fundamental problem that needs to be considered regarding the ineffectiveness of bankruptcy law enforcement is the application of simple proof as a mechanism for imposing bankruptcy on debtors. This is in accordance with Article 8 Paragraph (4) of Law no. 37 of 2004 which reads, "Application for declaration of bankruptcy must be granted if there are facts or circumstances that are simply proven that the requirements to be declared bankrupt as referred to in Article 2 Paragraph (1) have been fulfilled." Proving the facts or circumstances in this bankruptcy petition is said to be simple because it only requires the fulfillment of two elements, namely 1) the existence of two or more creditorsand 2) debts that have fallen due and are not paid. In the Elucidation section of Article 8 Paragraph (4) it is also stated that "the difference in the amount of debt argued by the bankruptcy applicant and the bankruptcy respondent does not prevent the issuance of a bankruptcy declaration decision." Thus, regardless of the amount of the debt, as long as there are two or more creditors and the debt is due and unpaid, the bankruptcy application must be granted.

Ricardo Simanjuntak stated that simple proof reflects the application of fast and effective principles for the interests of the business world in solving debt problems. He also considered that simple evidence aims as an absolute requirement to limit the authority of the commercial court in granting a petition for a declaration of bankruptcy to each debtor.[1] In addition, simple proof also offers a firm period of time regarding the decision on the petition for a declaration of bankruptcy. Previously, Article 6 Paragraph (4) of Law no. 4 of 1998 stipulates that the period of decision on the application for a declaration of bankruptcy is set no later than 30 (thirty) days from the date the application for a declaration of bankruptcy is registered. This time period setting was then amended in Law no. 37 of 2004 which states that the court's decision on the petition for a declaration of bankruptcy must be pronounced no later than 60 (sixty) days after the date the petition for a declaration of bankruptcy is registered (Article 8 Paragraph (5)).

Regarding this simple proof, Kartini Muljadi and Gunawan Widjaja also added that the debtor's existence which was simply proven by the creditor must not be denied by the debtor. Furthermore, the fulfillment of the element of "debt due and unpaid" can be proven simply by way of the creditor sending a warning to the debtor regarding the overdue payment deadline, but the debtor does not pay.[2]

[1] Ricardo Simanjuntak, "Esensi Pembuktian Sederhana Dalam Kepailitan," In *Undang-Undang Kepailitan dan Perkembangannya*, ed. Emmy Yuhassarie (Jakarta: Pusat Pengkajian Hukum, 2005) 52.
[2] Kartini Muljadi and Gunawan Widjaja, *Pedoman Menangani Perkara Kepailitan* (Jakarta: Raja Grafindo Persada, 2007), 135.

In addition to not paying attention to the amount of debt, the simple proof mechanism also does not consider aspects of the debtor's ability to pay or solvency. In fact, to declare a company bankrupt, the court should first measure the debtor's ability to pay which is generally done through an insolvency test. Prihatmaka, Sunarmi, and Hendra recommended the need for insolvency conditions as a requirement for bankruptcy applications.[3] The same thing was also stated by Nurmawati that the insolvency test needs to be applied in bankruptcy law in Indonesia when the court wants to determine the bankruptcy status of the debtor (corporate). He proposed this idea after doing a comparison of the United States and the Netherlands bankruptcy laws which apply the insolvency test as a condition of bankruptcy petition.[4] Hamdani more specifically proves the relationship between financial ratios and corporate bankruptcy.[5] Hamdani's research reinforces the need for a financial ratio analysis-based assessment (insolvency test) to determine whether a company is in a solvent or insolvent state.

The absence of this insolvency test can be understood to be the root cause of the ineffectiveness of law enforcement in the bankruptcy cases of Telkomsel, Manulife, and Prudential Life Assurance. The three companies were declared bankrupt without ever being considered by the commercial court on the overall financial condition and assets. In fact, when an appeal was filed, the Supreme Court judge overturned the bankruptcy decision by the commercial court. In general, the cancellation of the decision is based on the main consideration, namely the existence of other facts that have not been considered by the judges of the commercial court in these cases. For example, in the case of Telkomsel and PT Prima Jaya Informatika, it was found that the debtor (Telkomsel) did not pay its debt obligations because the creditor (PT Prima Jaya Informatika) was deemed to have defaulted on the cooperation agreement. The default in question is PT Prima Jaya Informatika is considered to have failed to build the Prima community with 10 million members in a year of agreement or until June 2012. PT Prima Jaya Informatika failed to sell the Telkomsel product to the Prima community because it turned out to only sell outside the Prima community. PT Prima Jaya Informatika also failed to pay purchase order No. PO/PJI-AK/V/2012/00000026 dated May 9, 2012 which resulted in losses for Telkomsel. The basis for further consideration of the Supreme Court judges is that the petition for bankruptcy must be rejected because the existence of debt which is the subject of the case is very complicated, so it must be proven first in the district court.

The author considers that the judges of the Central Jakarta Commercial Court should not have imposed bankruptcy on Telkomsel if an insolvency test was required in the

[3] Hervana Wahyu Prihatmaka, Sunarmi, and Rahmad Hendra, "Insolvensi Dalam Hukum Kepailitan Di Indonesia (Studi Putusan No. 48/Pailit/2012/Pn.Niaga.Jkt.Pst Antara PT.Telekomunikasi Selular vs PT. Primajaya Informatika)," *Fiat Justisia* 8, no. 2 (2014): 4, https://doi.org/10.25041/fiatjustisia.v8no2.295.

[4] Luh ayu Maheswari Prabaningsih and Made Nurmawati, "Pengaturan Insolvency Test Dalam Penjatuhan Putusan Pailit Terhadap Perusahaan," *Kertha Semaya: Journal Ilmu Hukum* 7, no. 9 (July 2019): 1, https://doi.org/10.24843/KM.2019.v07.i08.p14.

[5] Deni Hamdani, "Analisis Likuiditas, Solvabilitas, dan Profitabilitas untuk Memprediksi Tingkat Kepailitan Media di Indonesia (Studi Pada Emiten Subsektor Advertising, Printing dan Media di Bursa Efek Indonesia Periode 2006-2009)," *Jurnal Indonesia Membangun* 14, no. 3 (September-December 2015), https://jurnal.inaba.ac.id/index.php/JIM/article/view/50.

bankruptcy petition. From the insolvency test, it will be proven that Telkomsel has the ability to pay. The judge can then conclude that if the reason for Telkomsel's payment is not due to the inability aspect, it means that there are other facts that cause the BUMN to not pay. At this stage the judge will find the reasons as mentioned above, namely that Telkomsel did not pay the debt because he believed that PT Prima Jaya Informatika as a creditor is considered a default. So, with the insolvency test, the judge can find 1) the fact that the debtor is able or unable to pay (able or not able to pay) or 2) the fact that the debtor is willing or not willing to pay. From these two dimensions the judge can explore the facts or other underlying causes.

Although a number of studies have stated that insolvency tests are important to be included in the bankruptcy legislation in Indonesia, in order to realize the effectiveness of law enforcement, it is believed that this is not enough. Because, to realize the effectiveness of law enforcement, it is necessary to optimize the three components mentioned by Lawrence M. Friedman as substance, structure, and legal culture.

Legal substance is the core of the legislation itself. The substance also contains the meaning of the product or the decision of the legislator.[6] According to Friedman, legal substance can include everything that plays a role in determining whether or not the law can be implemented properly. So, the substance of the law contains rules, norms, and patterns of behavior that bind the community and serve as guidelines for law enforcers.[7]

Structure implies a framework that provides comprehensive protection for a legal system. This structure consists of elements of the number and capacity of the judiciary, how the laws and regulations are and what procedures must be carried out by law enforcers. The structure is a limitation of movement.[8] Thus, structure is the framework, the part that persists, the part that gives some form and limitation to the whole.

Objects from the legal structure, including law enforcement. Law enforcement is an important factor in the proper functioning of the law. If the regulations that have been initiated are good, but the quality of law enforcement is low, a problem will arise. And vice versa, if the regulations that are initiated are bad, while the quality of law enforcers is good, there are opportunities for law enforcement problems to arise.

Legal culture implies the attitude of people's behavior towards the law and the legal system. This includes their beliefs, values, ideas, and expectations for life. This idea of thinking makes the law work as it should.[9] Legal culture is a social thought that is used to determine how the law is applied in people's lives.

The three legal elements presented above (structure, substance, and culture) are interrelated with one another. In its implementation, the three must create mutually supportive relationships in order to create the expected lifestyle.[10] The continuity between the three elements is likened to mechanical work. The legal structure is illustrated as a

[6] *Ibid.,* 6.
[7] Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial* (Bandung: Nusa Media, 2017), 57.
[8] Lawrence M. Friedman, *American Law* (United States of America: W.W. Norton & Company, 1984), 5.
[9] *Ibid.*, 90.
[10] Soekanto, Soerjono. *Faktor-Faktor yang Mempengaruhi Penegakan Hukum* (Jakarta: PT. Raja Grafindo Persada, 2002): 59–60.

machine, the legal substance is what the machine does, while the legal culture is the subject or person who operates the machine, and wants the machine to be used.

A number of previous studies that proposed setting an insolvency test or a minimum amount of debt basically only touched on the substance aspect in efforts to enforce bankruptcy law in Indonesia. Therefore, through this study, the author aims to evaluate the effectiveness of bankruptcy law enforcement in a more comprehensive manner through the three components of Friedman's legal system consisting of structure, substance, and legal culture.

2. RESEARCH METHODS

2.1. Type of Research

This study uses a type of juridical-normative legal research. Juridical-normative legal research seeks to find the rule of law, legal principles, and legal doctrines to answer legal issues faced.[11] Based on this definition, in this research the author aims to understand the (normative) norms and principles in the bankruptcy laws and regulations to answer the issue of law enforcement in the Telkomsel bankruptcy case.

This research uses a statutory approach. The statutory approach is a condition *sine qua non* for normative legal research. According to Marzuki, this approach is useful in finding the *ratio legis* and the ontological basis for the birth of laws and regulations. By studying the *ratio legis* and the ontological basis of a law, we will be able to understand the philosophical content behind the law. With his philosophical understanding, we will understand whether there is a philosophical conflict between the law and the content at hand.

Another approach is the case approach. According to Cohen and Olson, research into court decisions is one of the two main sources of legal authority.[12] Although legislation appears to be a direct and imperative source, it is not complete unless it is interpreted by judges and applied to specific situations. Campbell et al. state that the benefit of researching judicial cases is to be able to find the *ratio decidendi* or reasoning, namely the court's considerations to arrive at a rule.[13] The case study in this research is Telkomsel's bankruptcy case based on the Central Jakarta Commercial Court Decision Number 48/Pailit/2012/PN.Niaga.Jkt.Pst.

2.2. Data Collection Techniques

The data collection technique is done through document study. The author first conducts an inventory related to a number of regulations (primary materials) for bankruptcy in Indonesia. From these regulations, researchers identify aspects of law enforcement. The author also looks at other regulations that are referenced and become derivative regulations of the existing and still valid bankruptcy regulations in Indonesia.

[11] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media, 2005): 35.
[12] Morris L. Cohen dan Kent C. Olson, L*egal Research in A Nutshell* (Minnesotta: West Publishing Company, 1992): 5.
[13] Enid Campbell, and E.J. Glasson, Lee Poh York, and Jennifer M. Sharpe, *Legal Research: Materials and Methods*, 4th ed (Sydney: The Law Book Company Ltd., 1996), 64.

From there, the authors obtain information related to regulations and other sources of material collected, then take an inventory and study according to the research objectives.

Documentation studies are also carried out on secondary materials that discuss bankruptcy problems and law enforcement. The author also explores other bankruptcy cases, either through books, articles, reports, or media coverage. These materials are classified, then verified by triangulation techniques with other sources so that it is expected to achieve data accuracy.

2.3. Types of Data

As previously mentioned, this research is a type of juridical-normative legal research. According to Soerjono Soekanto, normative legal research is legal research conducted by examining library materials or secondary data.[14] In this study, the types of data or sources of legal research that researchers use are library materials or secondary data, namely those from library studies. Secondary data in normative legal research includes primary legal materials, secondary legal materials, and tertiary legal materials.

2.4. Data Analysis Techniques

After the literature is collected, the authors process and analyze based on normative qualitative methods. This analysis prioritizes the depth of data, not the amount of data. Data is presented in the form of tables and charts and then compared. Furthermore, the author interprets the data according to the theoretical framework of Lawrence M. Friedman's legal system. Finally, the authors draw conclusions to answer the research questions.

2.5. Delimitation and Limitation

In terms of the object of study, this research is limited by the topic of corporate bankruptcy. This study does not discuss the object of bankruptcy studies at securities companies, stock exchanges, clearing and guarantee institutions, depository and settlement institutions, insurance companies, reinsurance companies, or pension funds. This study limits the study of the current bankruptcy laws and regulations, namely Law no. 37 of 2004. Finally, this research focuses on one case, namely the case between Telkomsel and PT Prima Jaya Informatics in 2012.

3. ANALYSIS AND DISCUSSION

3.1. Evaluation of the Effectiveness of Bankruptcy Law Enforcement in Indonesia

3.1.1. Evaluation of Legal Substance

In the context of bankruptcy law in Indonesia, the legal substance currently applicable as the basis for bankruptcy regulation is Law no. 37 of 2004. This section focuses on evaluating aspects of the legal substance related to bankruptcy

[14] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: PT RajaGrafindo Persada, 2001), 13–14.

as regulated in Law no. 37 of 2004. There are a number of weaknesses in terms of the substance of the Bankruptcy Law no. 37 of 2004. First, it concerns the minimum requirements for creditors as applicants for bankruptcy. Article 2 Paragraph (1) confirms that bankruptcy can be filed if it meets two conditions: 1) the debtor has two or more creditors; and 2) the debtor does not pay at least one debt that has matured and is collectible.[15] This article contradicts the nature of the need for bankruptcy legal remedies which should be for the benefit of all creditors, namely the principle of creditorium parity (creditor equality). Creditors are people who have receivables due to agreements or laws that can be collected before the court. In practice, the substance of Article 2 which requires the existence of two or more creditors can basically cause problems, namely when another creditor who is not a bankrupt applicant and the claim is due or not yet due does not intend to take legal action to bankrupt the debtor. However, because the substance of the Bankruptcy Law only requires a minimum of two creditors, the interests of other creditors who are not applicants for bankruptcy are not facilitated. This regulation actually results in a creditor being forced to register to file for bankruptcy.

Second, Article 2 Paragraph (1) which stipulates the minimum requirement for the number of creditors applying for bankruptcy does not distinguish between concurrent, separatist and preferred creditors. Concurrent creditors are creditors who do not hold material security rights, preferred creditors are creditors who are prioritized because of the nature of their receivables (privileged), and separatist creditors are creditors who hold material security rights. In the Elucidation of Article 2 Paragraph (1), special mention is made of separatist creditors and preferred creditors. Both of them can file for bankruptcy without losing their collateral rights to the property they have against the debtor's assets and their right to take precedence. So, based on the Elucidation of Article 2 Paragraph (1), separatist creditors have the right to go bankrupt and participate in voting without losing their collateral rights. In this case there is an injustice, where the creditor's rights have been protected by collateral on the debtor's wealth, but the debtor is still bankrupt through voting from the separatist creditor.

Third, it relates to debts that have matured and can be collected. The law does not explicitly regulate whether the debt is based on the principle of tendency to the interests of the debtor or creditor. In handling bankruptcy cases, the principle of tendency can lead to various decisions from the Panel of Judges. If at maturity a debt is interpreted based on the principle of inclination to the debtor, the bankruptcy application will be rejected. On the other hand, if the maturity date of a debt is determined based on the interests of the creditor, the bankruptcy petition, especially in the involuntary petition, tends to be granted.

[15] Fitri N. Heriani, "Enam Kesalahan UU Kepailitan," Hukum Online, October 9, 2015, https://www.hukumonline.com/berita/a/enam-kesalahan-uu-kepailitan-lt561737ed1a1cb/.

Fourth, the Bankruptcy Law does not adhere to the principle of limiting the nominal value of money or debt. Debt as referred to in Article 1 Number (6) is debt in a broad sense, namely "a liability that is stated or can be stated in the amount of money, both in Indonesian currency and foreign currency, either directly or which will arise in the future or contingent, which arises because of an agreement or law and which must be fulfilled by the debtor and if it is not fulfilled, it gives the creditor the right to obtain fulfillment from the assets of the debtor." This broad definition of debt can influence the decisions of the Panel of Judges. In this case, the Panel of Judges tends to only focus on the existence of debt. In fact, the Panel of Judges can emphasize another dimension in interpreting debt. For example, instead of just looking at the existence of debt, the Panel of Judges can compare the amount of the debt with the assets, cash flow, or business performance of the debtor. Comparison with these variables can provide an understanding to the Panel of Judges regarding the ability to pay debtors.

Unlike the Bankruptcy Law in Indonesia, several other countries, such as Singapore and Hong Kong, adhere to the principle of limiting the nominal value of money or debt. The implication of not limiting the minimum amount of debt as the basis for filing a bankruptcy application can in turn make the bankruptcy law a mere debt collection tool. This is actually a deviation from the nature of bankruptcy which aims as an institution for the rapid liquidation of the financial condition of debtors who are unable to pay their debts to creditors to prevent unlawful executions. In addition, the absence of a limit on the minimum amount of debt can also harm creditors who have much larger debts or harm debtors who have greater wealth than their debts.

Fifth, in bankruptcy law in Indonesia, there is no known insolvency test in bankruptcy applications to debtors. This results in the size of the debtor's assets not being considered for rejecting or accepting the bankruptcy application. The consequence of not applying the insolvency test is that there is no legal protection for companies that are still solvent from bankruptcy.

Table 3.1. *Weaknesses of Legal Substance in Law no. 37 Year 2004*

Weaknesses in Legal Substance	Descriptions
Minimum requirements for creditors as bankruptcy applicants	Contrary to the nature of bankruptcy law which should be made for the benefit of all creditors.
Separatist creditors and preferred creditors can apply for a declaration of bankruptcy without losing their collateral rights to the property they have on the debtor's assets. They also have the right to prioritize repayment.	There is injustice in this arrangement. This is because the rights of the separatist and preferred creditors have actually been protected by the collateral submitted by the debtor. Even though they have submitted the collateral, the debtor can still be

	bankrupted by voting from the separatist creditors.
Definition of debt	The definition is too broad, does not adhere to the principle of limiting the nominal value of money or debt.
The meaning of debt that has matured and can be collected	It is not explicitly regulated whether the debt that is due and collectible is based on the interests of the creditor or debtor so that there is a difference of interpretation.
Unknown and applied insolvency test	There is no legal protection for companies that are still solvent from bankruptcy. Bankruptcy law in Indonesia is only used as a debt collection tool and a tool to bankrupt a corporation.

3.1.2. Evaluation of Legal Structure

The legal structure is a legal institution that supports the legal system itself, which consists of legal forms, legal institutions, legal instruments, and the process and performance of law enforcement. The first thing that is of concern in evaluating the legal structure of bankruptcy in Indonesia is the availability of a commercial court that has the authority to examine and decide on bankruptcy cases.

In terms of legal institutions, before the enactment of Law no. 4 of 1998 concerning Bankruptcy, the settlement of bankruptcy cases is resolved by the District Court which is part of the General Court. However, since the enactment of Law no. 4 of 1998, bankruptcy cases are examined and decided by the Commercial Court which is within the General Court. The current law (Law No. 37 of 2004) also confirms that the court that has the authority to examine and decide cases in bankruptcy is the Commercial Court.

The establishment of this commercial court is inseparable from the situation of the monetary crisis that has occurred since mid-1997. The settlement of commercial cases (bankruptcy) which was previously the authority of the district court is considered ineffective. In addition, the absence of bankruptcy cases registered and examined in district courts is also due to the lack of public trust (including foreign investors) in the Indonesian judicial system. The results of research conducted by the National Development Planning Agency (Bappenas) in 1996 showed a lot of corruption and a lack of knowledge of the law among court judges who examined commercial cases. This weakness is compounded by the court's incompetence in making decisions. The District Court that examined bankruptcy cases at that time was considered less effective in resolving

bankruptcy cases when the economic crisis hit Indonesia. Therefore, at the suggestion and urging of the IMF, a commercial court was formed.[16]

The establishment of a Commercial Court to examine bankruptcy cases, as well as other commercial cases based on government regulations, is based on considerations of speed and effectiveness. Bankruptcy cases according to the Bankruptcy Law are determined for the period of examination at the Commercial Court level, at the Cassation level, and at the Judicial Review level. Legal remedies that can be taken by parties who are dissatisfied with the decision of the Commercial Court in the case of Bankruptcy are directly cassation to the Supreme Court without an appeal through the High Court. Thus, bankruptcy cases will proceed faster when compared to ordinary case examinations in the District Court. This short process reflects the application of the principles of speedy and appropriateness in Indonesia's bankruptcy law. In addition, the fast deadline is also considered to be able to achieve legal certainty in resolving disputes between debtors and creditors.[17]

Although commercial courts are formed within the district court, not every district court has a commercial court. Currently, in every district and city throughout Indonesia there have been district courts, but there are only five commercial courts, namely in Medan, Jakarta, Semarang, Surabaya and Makassar. With only five commercial courts, this will certainly make it difficult for justice seekers who will resolve their cases. This difficulty occurs because of the wide jurisdiction of the commercial court area. Therefore, the five commercial courts are felt to be insufficient for access to justice seekers.[18]

The second concern that needs to be emphasized in evaluating the legal structure of bankruptcy is the procedural law related to simple evidence. Simple proof is a requirement regulated in the provisions of Article 8 Paragraph (4) of Law no. 37 of 2004 as part of the bankruptcy procedural law. Simple evidence states that "the application for declaration of bankruptcy must be granted if there are facts or circumstances that are simply proven that the requirements to be declared bankrupt as referred to in the provisions of Article 2 Paragraph (1) have been fulfilled." The purpose of proven facts or circumstances is simply the existence of two or more creditors and debts that are due and unpaid. The large difference in the amount of debt argued by the petitioner and the defendant to be bankrupt does not prevent the issuance of a bankruptcy declaration decision.

Based on the explanation of Article 8 Paragraph (4) of Law no. 37 of 2004, simple proof is proof of the existence of a debtor's debt that is filed for bankruptcy

[16] Tata Wijayanta, "Urgensi Pembentukan Pengadilan Niaga Baru." *Mimbar Hukum* 22, no. 2 (2010): 3–4, http://dx.doi.org/10.22146/jmh.16230.

[17] Sandy Marsel Watuseke, "Peranan Lembaga Peradilan Niaga dalam Menyelesaikan Sengketa Pailit Menurut Undang-Undang No. 37 Tahun 2004," *Lex et Societatis* 3, no. 4 (May 2015): 3, https://ejournal.unsrat.ac.id/index.php/lexetsocietatis/article/view/8050.

[18] Tata Wijayanta, "Penyelesaian Kes Kebankrutan di Pengadilan Niaga Indonesia dan Mahkamah Tinggi Malaysia: Suatu Kajian Perbandingan" (Thesis Doktor Falsafah, Universiti Kebangsaan Malaysia, 2008), 287–288, Perpustakaan Tun Seri Lanang, http://ptsldigitalv2.ukm.my:8080/jspui/handle/123456789/389119.

that has matured; and the existence of two or more creditors of the debtor who is petitioned for bankruptcy.[19] This means that the debtor can be bankrupted if it has been simply proven that the debtor has more than one creditor and one of the debts has matured and can be collected, but the debtor or has not paid the debt. So, there is no need to be billed in advance as is usually the case in the stop-paying situation, in which the creditor must first collect the receivables that are past due and it turns out that the debtor even though it has been billed still does not pay his debt. The Bankruptcy Law cannot provide a detailed explanation of how the simple evidence is carried out in examining the bankruptcy petition so that it is indicated that there has been an abuse of circumstances in the evidence in the commercial court. In addition, the absence of clear definitions and boundaries as a guide for what is meant by simple evidence in completing a bankruptcy application.[20]

Table 3.2. *Weaknesses in the Legal Structure Aspects of Law no. 37 Year 2004*

Weaknesses in Legal Structure	Descriptions
Not every district court has a commercial court	With only five commercial courts, this will certainly make it difficult for justice seekers who will settle their cases in this commercial court.
Procedural Law related to Simple Evidence	It is open to abuse of circumstances in evidence in a commercial court.

3.1.3. Evaluation of Legal Culture

Legal culture is a person's attitude towards the law and the legal system, namely beliefs, values, thoughts and expectations. Legal culture can refer to law enforcement and society. The first concern in evaluating the legal culture of bankruptcy in Indonesia is about making the Bankruptcy Law a debt collection tool. This deviates from the nature of bankruptcy which aims as an institution for the rapid liquidation of the financial condition of debtors who are unable to pay their debts to creditors to prevent unlawful execution.

The second concern is related to the legal culture of law enforcers, especially judges. In this case, the legal culture that still stands out from the judges is juridical-dogmatic legal reasoning. That is, the decision mechanism is based on what is in accordance with the sound of the law without paying attention to other facts surrounding the case.

In Law no. 37 of 2004, there are only two requirements for a bankruptcy application, namely a debtor who has two or more creditors and the debtor does not pay off at least one debt that has matured and can be collected. These

[19] Kartini Muljadi and Gunawan Widjaja, *Pedoman Menangani Perkara Kepailitan* (Jakarta: Raja Grafindo Persada, 2004), 141.
[20] Aria Suyudi, Eryanto Nugroho, and Herni Sri Nurbayanti, *Kepailitan di Negeri Pailit* (Jakarta: Pusat Studi Hukum dan Kebijakan Indonesia, 2004), 148.

conditions are very loose because there is no minimum debt limit. That is, whether the debt is large or small, as long as it does not pay, the creditor can file for bankruptcy against the debtor.

With regard to the broad meaning of maturing debt, it is hoped that judges who handle bankruptcy disputes will be able to provide constructive and concrete legal construction on the meaning of maturing debt which is in line with the objectives of bankruptcy law enforcement. However, in certain decisions, judges impose bankruptcy verdicts on debtors regardless of the health condition of the company that was declared bankrupt. This is because the Bankruptcy Law does not adhere to the principle of limiting the nominal value of money or debt. Ideally, judges who handle bankruptcy cases are able to understand the extent to which the substance of bankruptcy dispute resolution is by making decisions based on ideal legal considerations. This can be done, for example, by deciding on a bankruptcy declaration based on the approval of the majority creditors.

Table 3.3. *Weaknesses in Legal Culture Aspects in Law no. 37 Year 2004*

Weaknesses in Legal Culture	**Descriptions**
Legal Culture in the community	Bankruptcy applications can eventually become bankruptcy as a mere collection tool (debt collection tool). This is actually a deviation from the nature of bankruptcy which aims as an institution for the rapid liquidation of the financial condition of debtors who are unable to pay their debts.
Legal Culture Law Enforcement (Judge)	Not being able to understand the extent to which the substance of bankruptcy dispute resolution is by making decisions based on ideal legal considerations, for example related to the element of an element of debt that is due and collectible which is one of the requirements for a bankruptcy application.

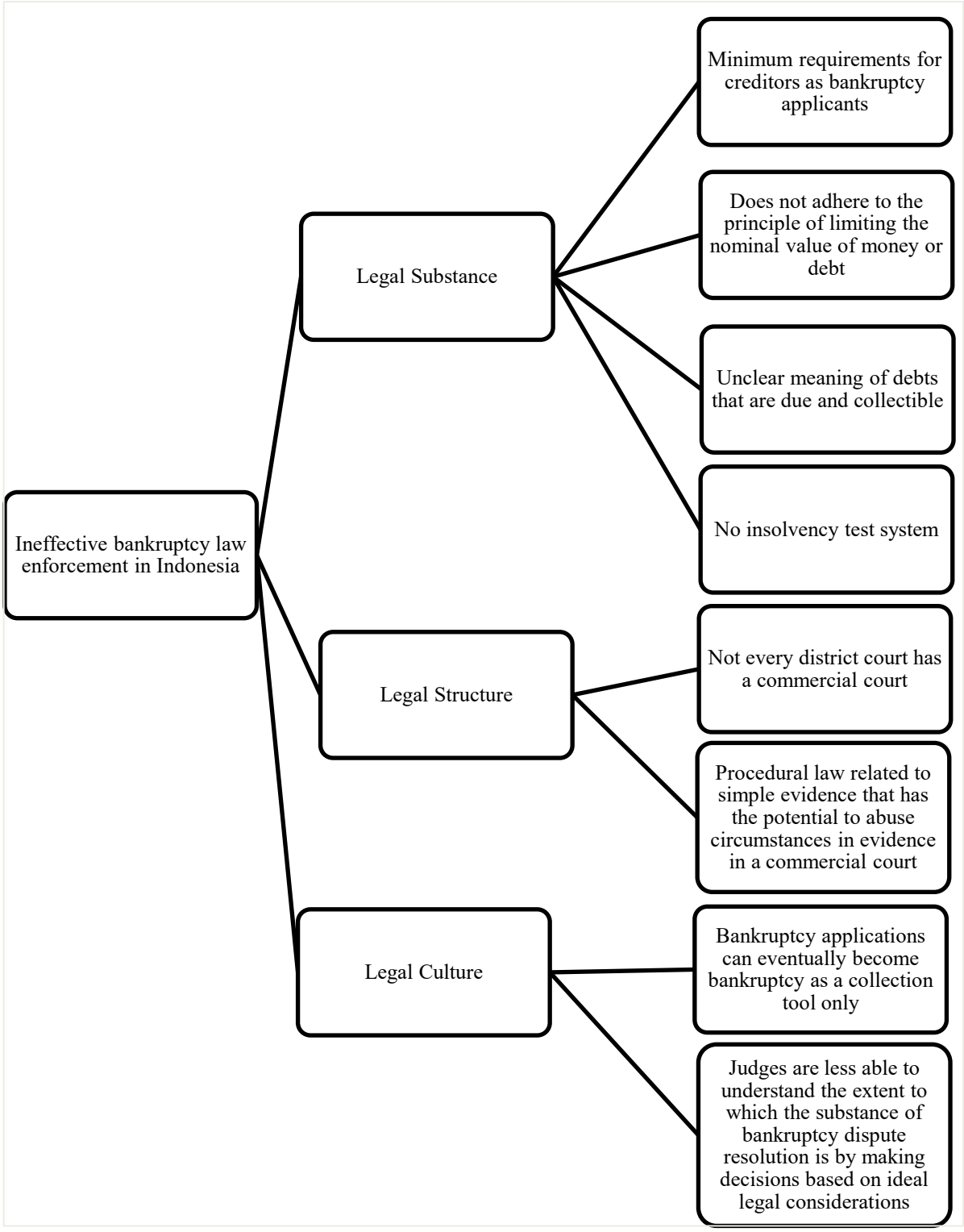

Figure 3.1. *Ineffective Bankcruptcy Law Enforcement in Indonesia*

3.2. Case Study: PT Telekomunikasi Selular

3.2.1. Chronology

PT Prima Jaya Informatika (PT PJI/applicant) filed a bankruptcy petition against PT Telekomunikasi Selular (Telkomsel/the respondent). The reason, PT PJI claims that Telkomsel has 1) at least one outstanding and collectible debt; and 2) two or more creditors. The debt that has matured and is collectible arises from the cooperation agreement between PT PJI and Telkomsel. In the cooperation agreement, it is stated that Telkomsel has an obligation to provide a sports-themed refill voucher in the amount of at least Rp120,000,000 (one hundred and twenty million rupiah) consisting of a top up voucher of Rp25,000 (twenty five thousand rupiah), Rp50,000 (fifty thousand rupiah) top-up vouchers, and sports-themed prepaid cards in the amount of at least Rp10,000,000 (ten million) every year. The vouchers will be sold by PT ISP. On the basis of providing these vouchers, PT PJI issued the purchase order PO/PJI-AK/VI/2012/00000027 dated June 20, 2012 and No. PO/PJI-AK/VI/2012/00000028 dated June 21, 2012 with a total invoice value of Rp5,260,000,000 (five billion two hundred and sixty million rupiah). However, regarding the two purchase orders, Telkomsel decided to temporarily stop the allocation of Prima products.

Apart from PT PJI, Telkomsel also have debts to PT Extent Media Indonesia (PT EMI) for the implementation of cooperation in mobile data content services with a total bill of Rp40,326,213,794 (forty billion three hundred twenty-six million two hundred thirteen thousand seven hundred ninety-four rupiah).

In the exception, Telkomsel stated that PT PJI does not have the right to apply for a declaration of bankruptcy. The reason is, Telkomsel assesses that there are no maturing debts. Telkomsel believes that there has been a default by PT PJI on the cooperation agreement. The default in question is PT PJI is considered to have failed to build a Prima community with 10 million members in a year of agreement or until June 2012. PT PJI failed to sell the Telkomsel product to the Prima community, because it turned out to only sell outside the Prima community. PT PJI also failed to pay purchase order No. PO/PJI-AK/V/2012/00000026 dated May 9, 2012 which resulted in losses for Telkomsel. Thus, Telkomsel concludes that the petition for a declaration of bankruptcy is still unclear (*exceptio obscurum libelum*).

3.2.2. Commercial Court Judge Considerations

1) Regarding the existence of a debt that has matured and can be collected.

In their consideration, the panel of judges used Article 1458 of the Civil Code to declare the purchase order PO/PJI-AK/VI/2012/00000027 dated June 20, 2012 and No. PO/PJI-AK/VI/2012/00000028 dated June 21, 2012 is a debt due and can be collected. Article 1458 of the Civil Code reads "a sale and purchase is deemed to have taken place between the two parties, as soon as the persons reach an agreement on the goods and their prices, even though the

goods have not been delivered and the price has not been paid." Thus, the panel of judges stated that there had been a sale and purchase by way of debt between Telkomsel and PT ISP.

2) Regarding the existence of two or more creditors.

Telkomsel cannot prove that it has paid the bill of PT EMI in the period August to October 2011 and therefore it is legally and convincingly proven that Telkomsel has obligations to other creditors, other than PT ISP.

Based on the above considerations, the judge considered that PT PJI can simply prove the existence of facts or circumstances that make the requirements to be declared bankrupt as referred to in Article 2 Paragraph (1) of Law no. 37 of 2004 has been fulfilled. Thus, the petition for a declaration of bankruptcy filed by PT PJI is considered to have legal reasons and must be granted.

In the exception on September 14, 2012, the judges of the Central Jakarta Commercial Court decided to reject the exception of the bankruptcy respondent (Telkomsel) in its entirety. In the main case, the judge grants the petition for a declaration of bankruptcy from the applicant against the respondent in its entirety and declares that the respondent has been bankrupt with all the legal consequences.

3.2.3. Considerations of Supreme Court Judges

On November 21, 2012, the Panel of Judges of the Supreme Court ruled on the cassation filed by Telkomsel. This decision granted the cassation request from the cassation applicant, namely canceling the decision of the Central Jakarta Commercial Court Number: 48/Pailit/2012/Pn.Niaga.Jkt.Pst. The basis for consideration in this decision is that the judge considers that the petition for bankruptcy must be rejected because the existence of the debt which is the subject of this case is very complicated, so it must first be proven through the District Court.

3.2.4. Analysis of the Effectiveness of Bankruptcy Law Enforcement in Telkomsel Bankruptcy Cases

In this case, the Panel of Judges of the Commercial Court refers to Law no. 37 of 2004 to assess the validity of the petition for a declaration of bankruptcy filed by PT ISP. The elements taken into consideration by the judge are simple evidence, namely the existence of debts that have matured and can be collected and the existence of two or more creditors (Article 2 Paragraph (1)). However, this consideration is inherently flawed.

3.2.4.1 Analysis of Legal Substance

(1) Absence of insolvency test

In this case, the determination of Telkomsel's insolvency condition was not carried out through an insolvency test. Determination of the

conditions of insolvency according to the regulations stipulated in Law no. 37 of 2004 which explains that insolvency is a state of being unable to pay. This is contained in the Elucidation of Article 57 Paragraph (1) which reads, "What is meant by 'insolvency' is the state of being unable to pay." Regarding the method of determining the insolvency, Article 178 Paragraph (1) states, "If at the meeting of the verification of receivables a reconciliation plan is not offered, the proposed reconciliation plan is not accepted, or the ratification of the reconciliation is rejected based on a decision that has obtained permanent legal force, by law the bankruptcy estate is in a state of insolvency."

In this case, Telkomsel's bankruptcy assets are declared not in an insolvent condition. This is because Telkomsel submitted a peace proposal before the Receivable Matching Meeting. Chronologically, this case can be summarized as follows.

Table 3.4. *The Chronology of Telkomsel Bankruptcy Cases in 2012*

July 16, 2012	PT PJI filed for bankruptcy.
September 14, 2012	The judge of the Commercial Court decided that Telkomsel was bankrupt.
October 22, 2012	Telkomsel officially submitted a peace proposal to settle its debts to creditors. In the peace proposal, Telkomsel claimed to be ready to complete all of its obligations. The verification of receivables is carried out at the creditors' meeting, after the bankruptcy decision has been read out in accordance with Article 113 Paragraph (1) of Law no. 37 Year 2004.
October 31, 2012	As of the Accounts Receivable Matching Meeting which was held on October 31, 2012, there were 176 parties who submitted claims to the Telkomsel curator team, with a total invoice value of Rp14 trillion. However, only 46 parties were recognized by Telkomsel as creditors with a total bill of Rp3,15 trillion (or US$81,9 million). The verification or verification meeting of Telkomsel's debt was postponed for three weeks from October 31, 2012 because the debtor felt that he was not ready. There are still many things that need to be resolved by debtors related to creditor bills at creditor meetings.
November 21, 2012	The Supreme Court overturned the decision of the Commercial Court, which meant that Telkomsel was declared bankrupt.

January 29, 2013	PT PJI filed a review.

Based on the chronology above, it can be concluded that the bankruptcy estate has not yet reached the insolvency phase because Telkomsel has submitted a reconciliation proposal on October 22, 2012 (before the Accounts Receivable Matching Meeting on October 31, 2012). Thus, the consideration of the Panel of Judges of the Commercial Court regarding the status of bankruptcy is not fulfilled based on the condition of insolvency as regulated in Article 178 Paragraph (1).

At the appeal level, Telkomsel also proved its financial capability (solvent) through an insolvency test with a balance sheet test. In the memorandum of cassation, Telkomsel confirmed that the total assets they had in 2011 were still far greater than the amount of debt that was collected by PT PJI amounting to Rp5,260,000,000. In addition, Telkomsel stated that they still generate tens of trillions of Rupiah in profit every year.

As previously explained, the absence of an insolvency test makes the Bankruptcy Law unable to provide legal protection for companies that are still solvent from bankruptcy. In fact, when Telkomsel took the initiative to conduct an insolvency test, it was found evidence that their finances were in a solvent condition, and even the amount of debt collected was not proportional to the assets owned by the company. At the same time, the absence of this insolvency test has also made the Law used as a collection tool only.

(2) Definition of debt that has matured and can be collected

The author argues that the existence of debt in this bankruptcy case cannot be proven simply. Telkomsel denied the existence of debt on the grounds of *exceptio non adipleti contractus*, namely because it was preceded by a default by PT ISP. So, there is no debt that can be used as a condition for an application for a declaration of bankruptcy or at least the application for bankruptcy must be rejected because the existence of debt which is the subject of this case is very complicated, so it must first be proven through the District Court. Regarding the terms of maturity and collectability, the researcher is of the opinion that the maturity of the debt referred to in this case cannot be determined because the debt in question cannot be proven simply and must be proven first through the District Court.

3.2.4.2 Analysis of Legal Structure

(1) Misuse of circumstances in simple proof

Previously it was explained that the Bankruptcy Law did not provide a detailed explanation of how simple evidence was carried out in examining a bankruptcy petition so as to allow abuse of circumstances in evidence in a commercial court. This abuse occurred in the bankruptcy case of Telkomsel, especially when the Majleis Judge of the Commercial Court determined the conditions for the existence of two or more creditors.

The author is of the opinion that the consideration of the Panel of Judges of the Commercial Court which states that PT. EMI is another lender is not appropriate and tends to be inconsistent. This is because evidence regarding other creditors is only submitted in the form of photocopies, but is instead approved by the commercial court, while evidence regarding debt repayments against other creditors is simply rejected because the documents are in the form of photocopies. In fact, the panel of judges should have referred to Article 1888 of the Civil Code which reads, "The strength of proof of written evidence is in the original deed. If the original deed exists, then the copies and summaries can only be trusted, only the copies and summaries are in accordance with the original, which can always be ordered to show it." Therefore, PT. EMI should not be valid considered as another creditor so that the existence of two or more creditors as stipulated in Article 2 Paragraph (1) of Law No. 37 of 2004 is not fulfilled.

3.2.4.3 Analysis of Legal Culture

(1) Legal culture in society

The legal culture that develops in the community can be seen from the behavior of creditors who tend to use the Bankruptcy Law as a debt collection tool. This behavior arises because of lax bankruptcy filing requirements. Consequently, the Indonesian Bankruptcy Law is unable to fulfill the nature of bankruptcy, which basically aims to be a quick liquidation institution for the financial condition of debtors who are unable to pay their debts.

(2) Legal culture in law enforcement

The legal culture that appears from the Telkomsel bankruptcy case is that the Commercial Court Judges are not able to understand the extent to which the substance of bankruptcy dispute resolution is by making decisions based on ideal legal considerations. For example, regarding the determination of the condition of insolvency regarding the bankruptcy status of this corporation, the Panel of Judges of the Commercial Court can be understood not to have carefully considered other facts to decide the case. This also indicates that the consideration of the Commercial Court Judges which only refers to simple evidence actually results in the ineffectiveness of bankruptcy law enforcement

in the cases of Telkomsel and PT Prima Jaya Informatics. The decision of the Panel of Judges of the Commercial Court is also considered to cause huge losses in the development of security and certainty of investing in Indonesia, especially 35 percent of Telkomsel's share ownership is a foreign investor, namely Singapore Telecom Pte. Ltd.

4. CONCLUSION

Based on the evaluation of the aspects of substance, structure, and culture, it can be concluded that bankruptcy law enforcement in Indonesia has not been effective. This is because the bankruptcy law in Indonesia still has a number of weaknesses in these three components. In terms of substance, bankruptcy law in Indonesia has a number of weaknesses, namely not applying the minimum requirements for creditors as bankruptcy applicants; does not adhere to the principle of limiting the nominal value of money or debt; unclear purpose of debts that are due and collectible; and no known insolvency test.

In terms of structure, bankruptcy law enforcement is still constrained in several aspects. First, not every district court has a commercial court. Second, the procedural law is related to simple evidence that has the potential to experience abuse of circumstances in evidence in a commercial court. From a cultural perspective, there are weaknesses in the legal culture in the community and law enforcers (judges). In society, the embedded legal culture is the behavior of using the Bankruptcy Law as a debt collection tool, while in law enforcement, the legal culture can be seen from the behavior of judges who tend to be less able to understand the substance of bankruptcy dispute resolution and make decisions based on ideal legal considerations.

The ineffectiveness of bankruptcy law enforcement in Indonesia is also reflected in an example case, namely the Telkomsel's bankruptcy case in 2012. This case proved that the absence of an insolvency test requirement was a fundamental weakness of the Bankruptcy Law in Indonesia. Telkomsel, which is in a financially sound (solvent) condition, turns out to be bankrupt by the application submitted by PT Prima Jaya Informatics. Telkomsel also took the initiative to conduct an insolvency test and prove that its financial condition is healthy. Moreover, the results of the insolvency test prove that Telkomsel's assets are far greater than the debts collected by its creditors. In the end, it was discovered that Telkomsel was not able to pay (not able to pay), but not willing to pay (not willing to pay). Telkomsel does not want to pay because it considers PT Prima Jaya Informatika has defaulted on the cooperation agreement. Thus, at the decision at the cassation level, the Panel of Judges decided that the case must be resolved first in the District Court, not the Commercial Court.

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REGULATIONS ON ACCESS TO FINANCIAL INFORMATION TO IMPROVE TAXPAYER COMPLIANCE WITH LAW NO. 9/2017 AND ITS IMPLEMENTATION RULES

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Abstract

The purpose of this research is to explore and analyze regulations for access to financial information for tax purposes to increase taxpayer compliance. The research approach in this study is qualitative normative based on literature and field studies in the form of collecting access data and following up on inbound and domestic AEOI based on access to information by tax administration. This study finds that for easy access to financial information for tax purposes both in the context of AEOI and the implementation of the tax laws, Law No. 9/2017 authorizes access to financial information to the Director General of Taxes (DGT) by setting aside the confidentiality of financial information in the Law of Tax Procedures and the Banking Law, access to banking financial information has positively increased tax compliance, but compulsory reporting of accounts with minimum balance of Rp1 billion have the potential to trigger rush of bank funds. On the other hand, it had reduced the effectiveness of Law No. 9/2017 to increase tax compliances for individuals who have accounts' balance less than Rp1 billion at the end of the reporting calendar year. It can be suggested to amend the formulation of the provisions of Article 2 paragraph (3) of Law 9/2017 refers to the Common Reporting Standard (CRS) which must contain financial information, including NPWP with NIK (Resident Identification Number) for certainty and to eliminate doubts.

Keywords: *Access to financial information; Automatic Exchange of Information; Common Reporting Standard; Tax Identification Number*

1. INTRODUCTION

The global financial crisis in 2008 had a huge impact on almost all countries in the world, including the United States and European Union, in the form of a slowdown and uncertainty in the world economy. This situation has affected the amount of tax revenue that can be collected by each country, bearing in mind that most portion of tax revenue comes from economic activities whose income is highly dependent on world economic conditions. To be able to recover from the crisis, each country needs funding sources to finance the restructuring of the financial sector and economic stimulus, among others by mobilizing the domestic resources of each country, especially from taxes.[1]

Mobilization of domestic resources away from taxes has been hampered by the widespread practice of tax avoidance and tax evasion by taxpayers who are taking advantage of limited access to financial information for tax purposes. One mode of tax avoidance or tax evasion is by shifting profits and saving money from the results of these activities in tax

[1] "Nota Keuangan Beserta Anggaran Pendapatan Dan Belanja Negara Tahun Anggaran 2018," Direktorat Jenderal Perimbangan Keuangan Kementerian Keuangan Republik Indonesia, last modified September 6, 2017, 78, https://djpk.kemenkeu.go.id/?p=5125.

havens or Offshore Financial Centers. These countries are known for their tax-friendly policies and very strict banking secrecy regulations.[2]

The problem of bank secrecy is considered as one of the factors that exacerbated the global financial crisis because the tax havens that hide global assets. There is a strong allegation that these tax haven countries provide a comfortable haven for officials to hide illegal funds resulting from corruption, or illegal businessmen who the funds away from the pursuit of the law enforcement agencies in their country.[3] For the automatic financial information exchange system to work effectively, the tax authorities need access to financial information from banks.

Someone complies with the tax rules for fear of detection and punishment. This theory is used by Allingham and Sandmo in explaining the phenomenon of income tax evasion.[4] The opportunity to commit tax evasion and/or evasion is one of the important factors affecting taxpayer non-compliance. This opportunity can be related to third party reporting and/or withholding of the activity/revenue of the taxpayer. To counteract the practice of concealing financial assets, the tax authorities have worked together in the field of exchanging information (especially financial information) between tax authorities, which is called Automatic Exchange of Information (AEOI). In the Common Reporting Standard (CRS) compiled by the Organization for Economic Cooperation and Development (OECD) and the countries that are members of the G20, Indonesia is one of 100 other countries that has stated its commitment to implement automatic exchange of information in the field of taxation.[5]

Automatic exchange of financial information for tax purposes is not possible because bank secrecy is guaranteed by Law number 7 of 1992 concerning Banking as last amended by Law Number 10 of 1998, specifically article 40, which states that banks are required to keep information about customers' deposit and savings confidential. For tax purposes, the Governor of Bank Indonesia, at the request of the Minister of Finance, has the authority to issue written orders to banks to provide information and show written evidence and letters regarding the financial condition of certain depositors to tax officials, as stipulated in Article 41 of Law No. 7 of 1992.

Indonesia has bound itself to international tax treaties which is obliged to fulfill commitments to participate in implementing Automatic Exchange of Financial Account Information and must immediately establish statutory regulations at the level of laws regarding access to financial information for tax purposes before June 30, 2017. For this reason, Government Regulation in Lieu of Law No. 1/2017 concerning Access to Financial Information for Tax Purposes was stipulated on May 8, 2017, due to a very urgent need, which is only 53 days before the deadline for the formation of laws and regulations regarding this AEOI ended on June 31, 2017.

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[2] *Ibid.,* 79.
[3] Chairil Anwar Pohan, *Pedoman Lengkap Pajak Internasional* (Jakarta: Gramedia Pustaka Utama, 2018), 281.
[4] Michael G. Allingham and Agnar Sandmo, "Income Tax Evasion: A Theoretical Analysis," *Journal of Public Economics* 1, no. 3-4 (November 1972): 323–338, https://doi.org/10.1016/0047-2727(72)90010-2.
[5] Direktorat Jenderal Perimbangan Keuangan Kementerian Keuangan Republik Indonesia, *Loc. cit.,* 79.

2. RESEARCH METHODS

This study uses a normative research approach. This research is carried out by examining library materials and secondary materials without having to go into the field.[6] On this basis also normative research is said to be legal research of literature. Normative legal research leads to legal principles and legal principles that serve as a benchmark for behaving and behaving legally.[7]

Furthermore, this study uses a statutory approach. The legal approach is taken by examining all laws and regulations related to legal issues related to regulation of access to financial information.[8]

3. ANALYSIS AND DISCUSSION

The three legal foundations: justice, expediency, and certainty, can conflict with each other. Radbruch calls it the antonym of legal ideas. Justice requires equality between members of society. On the other hand, expediency will be specific and cause inequality because they will favor one benefit for one group over other benefits for another group. As a result, justice can come into conflict with expediency. Likewise, legal certainty demands stability which is problematic if it conflicts with benefit or justice. Legal positivism comes out from only the inviolability of the law, the existence of legal order is more important than its justice and expediency.[9]

But if he does have to choose, Radbruch prioritizes justice above all others because it is justice that creates legal stability and aspirations for justice that benefit society. If after justice is prioritized, legal stability and expediency are still at odds, then the priority is legal stability. The reason for this is that legal stability is a characteristic of all applicable laws. The bottom line is expediency because of its potential to be misused as a false law.[10]

3.1. Law No. 9/2017 on Access to Financial Information for Tax Purposes

Access to financial information for tax purposes includes access to receive and obtain financial information in the framework of implementing provisions of tax laws and regulations and implementing international tax treaties. Article of Law No. 9/2017 provides a legal basis for DGT to obtain financial information in the context of domestic AEOI for implementing tax regulations and AEOI between countries (inbound and outbound information) in the framework of implementing international tax treaties.

Article 2 of Law No. 9/2017 regulates that the Director General of Taxes has the authority to gain access to financial information for tax purposes from financial service institutions carrying out activities in the banking, capital market, insurance, other financial service institutions, and/or other entities categorized as financial institutions according to standard information exchange of financial statements based on

[6] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2001), 14.
[7] Nomensen Sinamo, *Metode Penelitian Hukum* (Jakarta: Bumi Intitama Sejahtera, 2009), 107.
[8] Sritomo Wignjosoebroto, "Ragam-Ragam Penelitian Hukum," in *Metode Penelitian Hukum, Konstelasi dan Refleksi*, ed. Sulistyowati Irianto and Shidarta (Jakarta: Yayasan Pustaka Obor Indonesia, 2013), 131–132.
[9] Irma Shioshvili, "General Antecedents of Philosophy by Gustav Radbruch," *Bulletin of the Georgian National Academy of Sciences* 11, no. 2 (2017): 131–132, http://science.org.ge/bnas/t11-n2/21_Shioshvili.pdf.
[10] *Ibid.*

international agreements in taxation, namely: a) a report containing financial information according to the standard of exchange of financial information based on international agreements in taxation for each financial account that is identified as a financial account that must be reported; and b) reports containing financial information for tax purposes, which are managed by financial service institutions, other financial service institutions, and/or other entities referred to during one calendar year. Reports that contain financial information at least include: a. identity of the financial account holder; b. financial account number; c. identity of financial service institutions; d. financial account balance or value; and e. income related to financial accounts.

Article 2 of Law No. 9/2017 has three important elements: 1) who is required to do the reporting? Financial institutions according to the standard exchange of financial information based on international agreements in taxation, namely a comprehensive reporting regime that does not only cover banks but also other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies; 2) Financial information according to the common reporting standard (CRS) for automatic exchange of financial information between countries (outbound AEOI) and automatic financial information for tax purposes (domestic AEOI); and 3) the content of financial information contains at least five types of information, namely: a. identity of the financial account holder; b. financial account number; c. identity of financial service institutions; d. financial account balance or value; and e. income related to financial accounts.

Article 2 paragraph (2) of Law No. 9/2017 explains that there are two types of financial reports, namely financial information according to CRS for outbound AEOI and financial information for domestic AEOI. However, Article 2 paragraph (3) of Law No. 9/2017 only provides one type of financial information that contains at least the five types of information mentioned above. So it can be interpreted that the content of financial information for outbound AEOI and domestic AEOI is the same and should be in accordance with the CRS.

Article 4 of Law No. 9/2017 regulates that apart from receiving reports, the Director General of Taxes has the authority to request information and/or evidence or statements from financial service institutions, other financial service institutions, and/or other entities. Information and/or evidence or statement must be provided and used as a tax database for the Directorate General of Taxes. The tax database is used in order to comply with the implementation of international agreements in taxation and the implementation of the provisions of tax laws and regulations. Article 5 Law No. 9/2017 states that based on international agreements in taxation, the Minister of Finance has the authority to carry out the exchange of financial information; and/or information and/or evidence or testimony with the competent authorities in other countries or jurisdictions. Article 4 and Article 5 of Law No. 9/2017 in principle regulates that: 1) The Directorate General of Taxes uses financial information based on automatic exchange of information (outbound and domestic AEOI) and based on requests from the DGT as a tax database; 2) in addition to the automatic exchange of information (outbound AEOI),

financial information based on the DGT's request, can also be exchanged with the competent authorities in other countries.

Provisions of Article 8 of Law No. 9/2017 among other things stipulates that when this law comes into effect on May 8, 2017, then: 1) Article 35 paragraph (2) and Article 35A of Law Number 6/1983 concerning General Provisions and Tax Procedures as amended several times, most recently by Law Number 7/2021 (UU KUP); and 2) Article 40 and Article 41 of Law Number 7/1992 concerning Banking as amended by Law Number 10/1998; declared no longer valid insofar as it relates to the implementation of access to financial information for tax purposes based on this Government Regulation in lieu of Law.

The articles declared invalid are: Article 35 UU KUP paragraph: (1) If in carrying out the provisions of the tax laws and regulations a statement or evidence is required from a bank, public accountant, notary, tax consultant, administrative office, and/or other third parties who related to a taxpayer who is subjected to tax audit, tax collection, or investigation of criminal acts in taxation, upon a written request from the Director General of Taxes, these parties are required to provide the requested information or evidence; and (2) the parties as referred to in paragraph (1) are bound by the obligation to secrecy, for the purposes of auditing, tax collection, or investigation of criminal acts in taxation, the obligation to secrecy is waived, except for banks, the obligation to secrecy is abolished at a written request from the Minister of Finance. Article 35A UU KUP paragraph (1) stipulates that every government agency, institution, association and other party is obliged to provide data and information related to taxation to the Directorate General of Taxes, the provisions of which are regulated by Government Regulation with due observance of the provisions referred to in Article 35 paragraph (2). In the event that the data and information referred to in paragraph (1) are insufficient, the Director General of Taxes has the authority to collect data and information for the benefit of state revenues, the provisions of which are regulated by a Government Regulation with due observance of the provisions referred to in Article 35 paragraph (2).

Article 40 of the Banking Law, which states that banks are required to keep information about depositors and their savings confidential, and Article 41 of the Banking Law, which reads: for tax purposes the head of Bank Indonesia at the request of the Minister of Finance has the authority to issue written orders to banks to provide information and show written evidence as well as letters regarding the financial condition of certain depositors to the tax official.

Article 8 Law No. 9/2017 provides two implications: 1) the obligations to keep confidential third parties (including banks) who are related to the taxpayers are abolished; and 2) providing evidence and/or information based on a written request becomes based on request and/or is automatic (outbound and domestic AEOI). Article 9 of Law No. 9/2017 delegates authority to the Minister of Finance to issue a Regulation of the Minister of Finance concerning Technical Instructions Concerning Access to Financial Information for Tax Purposes.

3.2. Minister of Finance Regulation on Implementation of Access to Financial Information for Tax Purposes

The implementing regulations of Law Number 9/2017 are: 1) Minister of Finance Regulation Number 70/PMK.03/2017 concerning Technical Instructions Concerning Access to Financial Information for Tax Purposes dated June 2, 2017; 2) the first amendment by Minister of Finance Regulation Number 73/PMK.03/2017 dated June 12, 2017; and 3) the last amendment by Minister of Finance Regulation Number 19/PMK.03/2018 dated February 19, 2018.

Minister of Finance Regulation Number 73/PMK.03/2017 amends several provisions of Minister of Finance Regulation Number 70/PMK/03/2017, including:

1) Delegation of authority for further regulation to the DGT through the Director General of Taxes Regulation regarding procedures for self-registration for reporting financial institutions and non-reporting financial institutions in article 6 paragraph (9); procedures for electronically requesting information and/or evidence or information for the exchange of information in International Agreement in Article 15 paragraph (5); procedures for self-registration for financial service institutions, other financial service institutions, and/or other entities that are required to submit a report containing financial information to the DGT in Article 18 paragraph (7); and procedures for electronically requesting information and/or evidence or information in the context of implementing tax regulations in Article 29A;
2) In Article 15 paragraph (1), the phrase "by request letter" is deleted. This is explained in paragraph (2) so that the request does not have to be by letter (written) but also electronically (paragraph (2)) and can be signed in writing or electronically (paragraph (2a)); and
3) Article 19 has a drastic change regarding the value that must be reported within the framework of domestic AEOI. Balances or financial account values that are submitted automatically by financial service institution in the banking sector, insurance and other entities, are personal financial accounts with a minimum balance/value of IDR 200 million or equivalent foreign currency, within one calendar year, is increased to a minimum amount of IDR 1 billion or equivalent foreign currency. This means that there is a significant increase in the minimum automatically reporting limit from IDR 200 million to IDR 1 billion.

According to the Minister of Finance, the increase in the minimum limit for reporting accounts was due to complaints from MSMEs that have businesses whose assets flow in personal accounts with balances ranging from IDR 200 million to IDR 1 billion. Large companies have their own accounts in the form of entity accounts, all of which are required to report.[11] This is also emphasized in the consideration of Minister of Finance Regulation Number 73/PMK/03/2017 for the purpose of maintaining macroeconomic stability, encouraging economic growth, providing a greater sense of

[11] Fiki Ariyanti, "Alasan Menkeu Ubah Saldo Rekening Wajib Lapor Jadi Rp1 Milyar," *Liputan6.com*, June 9, 2017, https://www.liputan6.com/bisnis/read/2984902/alasan-menkeu-ubah-saldo-rekening-wajib-lapor-jadi-rp-1-miliar.

justice, showing partiality to micro, small and medium business actors, and to provide ease of administrative to Financial Services Institutions, Other Financial Services Institutions, and Other Entities in submitting financial information reports for tax purposes.[12]

The main regulation for increasing taxpayer compliance are based on Minister of Finance Regulation Number 70/PMK.03/2017 concerning Technical Instructions Concerning Access to Financial Information for Tax Purposes as last amended by Minister of Finance Regulation Number 19/PMK.03/2018, henceforth called PMK AIK, among others:

1) Article 2 of PMK AIK provides a reference that financial information for implementing International Agreements (outbound AEOI) and implementing provisions of laws and regulations in taxation (domestic AEOI) is prepared based on CRS. Although there are other regulatory exceptions for domestic AEOI in PMK, the researcher did not find any exceptions to these regulations.
2) Article 7 PMK AIK regulates AEOI (outbound and domestic) with the following conditions: a) Reporting financial institutions that are LJK, Other LJK and Other Entities are required to submit a report containing financial information for each Financial Account that must be reported to: DGT through OJK for LJK, and DGT for Other LJK or Other Entities; b) The report is submitted for the first time in 2018, which contains financial information recorded up to December 31, 2017; and for after 2018, which contains financial information recorded up to December 31 of the previous year; c) The report referred to contains at least the following five types of information: identity of the financial account holder; Financial Account number; identity of the reporting financial institution; balance or value of Financial Account; and income associated with the Financial Account. If combined with Article 2 PMK AIK provides an interpretation in accordance with the Common Reporting Standard (CRS) is a report that contains at least these five types of information.
3) Article 19 PMK AIK stipulates that financial accounts that must be reported within the framework of domestic AEOI are Financial Accounts held by individuals, the balance or value of one or more Financial Accounts with a minimum amount of IDR 1,000,000,0000 (one billion rupiah) or in a foreign currency of equal value as of December 31 in the reporting calendar year; or a Financial Account held by an entity, there is no limit to the balance or value of the Financial Account.
4) The scope of financial information based on requests in the context of implementing Information Exchange and/or implementing provisions of laws and regulations in taxation is in a list format made as needed, which may include the value or aggregate of Financial Account balances as of a certain date or aggregate of debit/ credit of Financial Account in one year.
5) Article 25 paragraph (3) PMK AIK provides a definition of provisions for the implementation of laws and regulations in taxation, among others for the implementation of activities: a. supervision of Taxpayers, including for

[12] Bagian Menimbang Peraturan Menteri Keuangan Nomor 73/PMK/03/2017.

extensification, intelligence or appraisal activities; b. inspection; c. tax collection; d. preliminary evidence examination; e. tax investigation; or f. settlement of tax legal remedies, for example objections, reduction or cancellation of tax assessments, or reduction or elimination of administrative sanctions.

3.3. Enquiry Letter for Explanation of Data and/or Information

Reporting Financial Institutions in 2018, for the first time provided financial information recorded up to December 31, 2017, to the DGT. The Indonesian government began implementing automatic exchange of financial information (AEOI) in September 2018. DGT during the socialization of Law Number 7/2021 concerning Harmonization of Tax Regulations in October 2021, specifically regarding the Voluntary Disclosure Program (PPS), conveyed the facts regarding the use of AEOI data as follows:

1) AEOI data on the Balance/Value of Accounts received in 2018 of IDR 2,742 trillion (inbound) and IDR 3,574 trillion (domestic), or a total of IDR 6,316 trillion. The results of the comparison between the AEOI data and the Cash Equivalent Assets of the Annual individuals tax return (SPT PPh OP) show that the data that has been clarified in the Annual SPT PPh OP is worth IDR 5,646 trillion (89.4%) with the number of taxpayers (WP) being 795,505 (85.8%). This shows that taxpayers are quite compliance in reporting the balance/value of their accounts, both from abroad (inbound) and domestically (domestic), which is 89.4% in rupiah value, which includes 85.8% WP. The remaining IDR 670 trillion (10.6%) or 131,438 WP (14.2%) is being clarified to taxpayers (WP). Researchers will examine the results of this clarification to taxpayers, by examining several Letters of Request for Explanation of Data and/or Information (SP2DK) from the DGT and how they are compatible with the contents of the Annual Individual Income Tax Return.
2) AEOI data related to Inbound Income received in 2018 of IDR 683 trillion. The comparison between the AEOI Inbound Income Data which consists of data on dividend income, interest, sales and other income with foreign income data on the Annual Individual Income Tax Return (SPT PPh OP) shows that the data has been clarified in SPT PPh OP of Rp7 trillion (1.0%) with the number of WP was 6,055 (10.8%). The remaining IDR 676 trillion (99.0%) or 50,095 WP (89.2%) is being clarified to the Taxpayer (WP). This indicates that taxpayers are likely noncompliance in reporting their income from abroad (inbound). The researcher will further examine the results of this clarification to taxpayers, by examining twelve Letters of Request for Explanation of Data and/or Information (SP2DK) from the DGT and their suitability for reporting foreign income on Annual Income Tax Returns for Individuals between July 2020 to June 2022.

A summary of SP2DK data and responses from taxpayers can be presented in the following table.

Table 3.1. *SP2DK data and responses from taxpayers*

WP No.	Date SP2DK	Data Clarified	Taxpayers' Responds
1	24-Mar-22	Encouragement to participate in PPS with data on Differences in Cash and Cash Equivalents, and Investments.	Most of these are Savings/Investment Accounts in Singapore which have been reported in the SPT Tahunan OP and there is a small portion (less than 1%) which have not been reported and will participate in the PPS.
2	22-Jul-20	There is income that has not been reported and assets that have not been/understated in the Tax Amnesty Program.	That the Taxpayer Participated in the Tax Amnesty Program twice, and all the taxpayer's assets have been reported in the two Tax Amnesty. However, the Taxpayer admits that there is income that has not been reported and will pay taxes in the amount of IDR 351 million, which is 12.8% of the Value of Underpaid Income Tax According to SP2DK of IDR 2,744 million.
3	20-Apr-21	WP received a summons from AR on April 21, 2021, to clarify Domestic Account AEOI Data related to Bank Account Balance as of December 31, 2018.	WP said that the Domestic Account AEOI data was inaccurate, because there were double balances and accounts that had changed forms/moved before December 31, 2018, were recorded twice. The WP clarifies that all bank accounts have been reported in their SPT Tahunan OP.
4	15-Jun-22	Encouragement to participate in PPS with data on Differences in Cash and Cash Equivalents, and Investments.	Investment assets in the form of insurance and mutual funds have been reported by the WP in SPT Tahunan OP, it's just that the WP has combined them in savings.
5	13-Sep-21	There is a difference in income from the sale of land that is potentially payable with Article 29 Income Tax.	WP does not sell land and buildings. WP admits that there was negligence in filling out SPT Tahunan 2018 and there are several WP's assets that are not recorded in the SPT Tahunan. The WP will correct the 2018 Annual SPT.

WP No.	Date SP2DK	Data Clarified	Taxpayers' Responds
6	28-Oct-21	There is data on purchases of Taxable Goods and/or Acquisition of Taxable Services using NPWP 00,000,000.0-000,000, and there is a difference in the increase in net assets compared to income that is potentially payable with Income Tax Article 29 for the 2019 tax year.	The FP is for service and car spare parts. WP said that the difference in the increase in assets came from the company's paid-up capital debt that WP had not yet deposited with the company because the company was not yet operational.
7	28-Oct-21	There is a difference in income from the employer that has not been reported which is potentially payable with Income Tax Article 29 and There is a difference in net assets that are potentially payable with Income Tax Article 29 for the 2020 tax year.	WP said that the difference in the increase in assets came from the company's paid-up capital debt that WP had not yet deposited with the company because the company was not yet operational and there were Third Party Loans that had not been reported in the Annual Tax Return. Taxpayers make corrections to their annual SPT.
8	23-Apr-21	There is Inbound Income that has not been reported in the SPT Tahunan OP 2018.	WP acknowledges that the Inbound income (interest) has indeed not been reported and will correct the Annual SPT and pay taxes on the Inbound Income.
9	26-Apr-21	Clarification of the existence of several purchases with FP 00,000,000.0-000,000 for the 2019 Tax Year.	The WP clarifies that there are FPs for service and car spare parts that have been reported in their annual tax returns, and there are motorcycle purchases that have not been reported. For this reason, the WP will correct the Annual SPT and pay taxes on income from Land and/or Building Rentals that have not been reported.

WP No.	Date SP2DK	Data Clarified	Taxpayers' Responds
10	15-Apr-21	There is a difference between the decrease in shares owned by the Taxpayer confirming Data AHU and the profit from the sale/transfer of assets + sale of shares on the stock exchange + Other Income according to the SPT Tahunan OP 2017.	WP acknowledges that there is an increase in Company Shares that has not been reported and will make corrections to the Annual SPT and make tax payments on income from Land and/or Building Rentals that have not been reported.
11	21-Mar-22	Encourage to participate in PPS with data on Differences in Cash and Cash Equivalents and Investments.	The DGT's data is correct, the WP participates in the PPS on the DGT's data.
12	08-Mar-21	There is proof of withholding against transactions that have not been invoiced and reported on the monthly VAT return and there were additional assets in 2018 which indicated net income during 2018 that had not been reported by the taxpayer amount to IDR 632,533,871.	WP admits that FP has indeed not been issued and the difference comes from 3 rental incomes that have not been reported. The WP will pay VAT and income tax on the rental and correct the related SPT.

The results of clarification on SP2DK show that taxpayers are quite compliant in reporting data on their assets, especially regarding the balance/value of bank accounts. Some of the clarification results show that there are inaccurate AEOI data (WP No. 1, 2 and 3) and/or differences in classification between AEOI data and individual annual income tax returns (WP No. 1 and 4). Only AEOI Data on WP No. 11, which is accurate, so that WP participates in PPS according to AEOI data from DGT. This can be explained that the individual WP is a participant in the Tax Amnesty Program which took place from July 1, 2016 to March 31, 2017 and realizes that there is no place to hide their assets anymore because of the disclosure of financial information for tax purposes and the existence of AEOI between countries. This result is consistent with the theory which states that a person complies with the tax rules for fear of detection and punishment.

Indications that taxpayers are still not compliant in reporting their income from abroad (inbound) can be seen from interest income on deposits/savings in Australia (WP No. 8), which has not been reported in their annual tax return. This finding is consistent with the large amount of AEOI data on Inbound Income that needs to be clarified to Taxpayers, namely IDR 676 trillion (99.0%).

3.4. Normative Juridical Analysis in Regulating Access to Financial Information to Increase Taxpayers' Compliance

The legal benefits of exchanging financial information, which is an activity to convey, receive, and/or obtain financial information related to taxation based on international agreements, are to: a. prevent tax avoidance; b. preventing tax evasion; c. prevent misuse of the tax treaties by unauthorized parties; and/or d. obtain information related to the fulfillment of taxpayers' obligations.[13]

There are four elements related to the meaning of legal certainty. First, that law is positive, meaning that it is legislation (*gesetzlichesRecht*). Second, that law is based on facts (*Tatsachen*), not a formula regarding an assessment that will later be made by a judge, such as "good will" and "decency". Third, that the fact must be formulated in a clear way to avoid misunderstandings in meaning, as well as being easy to implement. Fourth, the positive law should not be changed frequently.[14] Legal certainty guarantees that protection is given to individuals against unclear behavior from other individuals, judges, and administration (government).[15] Legal certainty relates to what individuals can expect governments to do, including confidence in the consistency of judges' and government's decisions.[16]

Law No. 9/2017 and its implementing regulations make no distinction between reports containing financial information in accordance with financial information exchange standards based on international agreements in taxation (outbound AEOI) and reports containing financial information for tax purposes (domestic AEOI). Reports containing financial information referred to contain at least five types of information, namely: identity of the financial account holder; Financial Account number; identity of the reporting financial institution; balance or value of Financial Account; and income associated with the Financial Account. The word "at least contains" can create legal uncertainty for financial institutions and can be detrimental to depositors of financial institutions. Can financial service institutions, other financial service institutions, and/or other entities provide information beyond and/or more than this minimum information?

The Common Reporting Standard (CRS) published by the OECD does not contain "at least contains" provisions, but states that each reporting financial institution "must

[13] Article 1 number 2 Peraturan Menteri Keuangan Nomor 19/PMK/03/2018.
[14] Achmad Ali, *Menguak Teori Hukum, (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-Undang (Legisprudence)* (Jakarta: Kencana, 2010), 292.
[15] Ibnu Multazam, Ismansyah, and Wetria Fauzi, "Legal Certainty of Doctor Profession Insurance Claim in Bumiputera Muda 1967 General Insurance, Pekanbaru City," *International Journal of Multicultural and Multireligious Understanding* 7, no. 10 (October 2020): 336, https://ijmmu.com/index.php/ijmmu/article/view/2099.
[16] *Ibid*.

report" the following information: name, address, country of residence and NPWP of the financial account holder; Financial Account number; identity of the reporting financial institution; balance or value of Financial Account; and income associated with the Financial Account. For legal certainty, financial information reports that must be reported to the Director General of Taxes periodically, in the context of implementing international agreements in taxation and/or implementing the provisions of laws and regulations in taxation, should use the word "must report...", not "at least contains…".

Furthermore, there is no clarity on the limits and/or details on information and/or evidence or statements from financial service institutions, other financial service institutions, and/or other entities, can be requested by the Directorate General of Taxes in relation to the implementation of international agreements in taxation and/or implementation of the provisions of laws and regulations in taxation. Appendix I Letter E PMK No. 19/PMK.03/2018 explains that the information and/or evidence or information requested is made in a list format as needed, among others contains the value or aggregate of Financial Account balances as of a certain date, or the aggregate of debit/credit Financial Account mutations in one year. The word "among others contains" creates uncertainty and can be interpreted as an option, not an obligation, so it should be formulated in accordance with the CRS by using the word "must contain".

Provisions on procedures for electronically requesting information and/or evidence or information (IBK) as intended and procedures for electronically providing information and/or evidence or information are further stipulated in Regulations of the Director General of Taxes, as mandated in Article 15 paragraph (5) and Article 29A PMK AIK. However, the researcher did not find the Director General of Taxes Regulation as referred to, but only found Director General of Taxes Circular Letter No. SE-16/PJ/2017 dated July 14, 2017 concerning requests for information and/or evidence or information regarding access to financial information for tax purposes. The attachment to this Circular Letter contains examples of financial information formats as part of the attachment to the IBK request letter for tax audit activities including information on the initial balance and ending balance along with transactions or savings account mutations. Circular of the Director General of Taxes No. SE-16/PJ/2017 is not a statutory regulation and is an internal administrative instrument for DGT.

A review of Indonesia's legal framework in implementing the AEOI Standard concludes that Indonesia's domestic and international legal framework already exists. A total of 869 financial institutions submitted 389,448 financial information reports in 2021. The successful exchange of information with partner countries continues to increase, from 59 countries in 2018 to 72 countries in 2021. In terms of Financial Account information collected and sent by Indonesia, while where the date of birth appears to be in line with most other jurisdictions, as well as for the level of undocumented accounts, the proportion of taxpayer identification numbers in relation to the link between an individual and their financial accounts is significantly lower when compared to most other jurisdictions. This is key data for exchange partners to utilize information effectively. Feedback was also received from Indonesian exchange partners indicating that, compared to what they generally experience with respect to information

received from all their exchange partners, they had a relatively low success rate when attempting to match information received from Indonesia with taxpayer databases. In addition, some exchange partners experienced problems such as invalid or missing NPWP, invalid or missing date of birth, and invalid or incomplete address.[17]

Furthermore Article 19 PMK AIK stipulates that financial accounts that must be reported within the framework of domestic AEOI are Financial Accounts held by individuals, the balance or value of one or more Financial Accounts with a minimum amount of IDR 1,000,000,0000 (one billion rupiah) or in a foreign currency equivalent as of December 31 in the reporting calendar year. The considerations are to maintain macroeconomic stability, encourage economic growth, provide a greater sense of justice, show partiality to micro, small and medium business actors, and to provide more administrative convenience to Financial Services Institutions, Other Financial Services Institutions, and Other Entities in submit financial information reports for tax purposes. However, Allingham and Sandmo's theory states that a person complies with the tax rules for fear of detection and punishment. Compliance is based on a cost-benefit basis where a person weighs the benefits of non-compliance against the costs of detection and punishment. In line with this theory, the compliance of individuals who have financial accounts worth at least IDR 1 billion or the foreign currency equivalent will increase, because the probability of detection is high. At the same time, it has implications for non-compliance with individuals who have an account of less than Rp1 billion, either because of the fact that the individual has an account balance of less than Rp1 billion or makes a cash withdrawal before December 31 so that the account balance becomes less than Rp1 billion. Determination of the amount of the mandatory reporting account balance of IDR 1 billion can cause injustice to individual taxpayers. On the other hand, determining the amount of the financial account balance of an individual who is required to report too low, for example IDR 200 million, can cause public anxiety, especially MSME players and has the potential to cause a banking rush (large cash withdrawal). Given the importance of determining the value of the financial account balance of an individual who is required to report and the consequences that can arise, it is best if the determination of the amount of the balance and/or the value of this financial account is regulated in a law so that the public interest can be represented by the member of parliament (DPR).

Setting up a mandatory reporting financial account at PMK AIK with a balance or value from one or more Financial Accounts with a minimum amount of IDR 1,000,000,0000 (one billion rupiah) or in a foreign currency equivalent in value as of December 31 in the reporting calendar year, can cause efforts to increase individual compliance have limitations. Individuals can withdraw their savings at financial institutions before December 31 each year, so that the balance or value of their financial accounts becomes less than IDR 1 billion and does not include financial accounts that must be reported to the DGT.

[17] OECD, *Peer Review of the Antomatic Exchange of Financial Account Information 2022* (Paris: OECD Publishing, 2022), 530–535.

4. CONCLUSION

The research results on the regulation of Access to Financial Information to Increase Taxpayer Compliance yield several conclusions. Firstly, Law Number 9/ 2017 concerning the Stipulation of Government Regulation in lieu of Law Number 1 of 2017 concerning Access to Financial Information for Tax Purposes Becomes a Law, authorizing the DGT to disclose information regarding depositors and their savings, excluding the confidentiality of information finance as stipulated in Article 35 paragraph (2) and 35A of UU KUP and Articles 40 and Article 41 of the Banking Law.

Secondly, reports containing financial information as referred to "at least contains" in Article 2 paragraph (3) of Law No. 9/2017, creates legal uncertainty and can be interpreted differently. Thus, Article 2 paragraph (3) of Law No. 9/2017 needs to be amended, so that the principles of justice and legal certainty can be realized. The Common Reporting Standard (CRS) published by the OECD does not contain “at least contains” provisions, but states that each reporting financial institution must report the following information: name, address, country of residence and NPWP of the financial account holder; Financial Account number; identity of the reporting financial institution; balance or value of Financial Account; and income associated with the Financial Account. So that the provisions of Article 2 paragraph (3) of Law No. 9/2017 it is necessary to add information on the NPWP and/or NIK of the financial account holder in accordance with the CRS so that it becomes: a report containing financial information referred to must report: namely: the identity of the financial account holder; Financial Account number; NPWP/NIK of the financial account holder; identity of the reporting financial institution; balance or value of Financial Account; and income associated with the Financial Account.

Thirdly, the provisions of Article 19 PMK AIK can increase the compliance of individuals who have a financial account worth at least IDR 1 billion or equivalent foreign currency, because the probability of detection is high. However, it has weaknesses, namely individuals can withdraw their savings at financial institutions before December 31 each year, so that the balance or value of their financial accounts becomes less than IDR 1 billion and does not include financial accounts that must be reported to the DGT. In addition, the negative excesses of Article 19 PMK AIK can encourage increased economic activity using cash (underground economy). Taxpayers can switch to cash transactions and/or save in cash and/or make cash withdrawals before December 31 each year so that their deposit balance is below Rp1 billion, so that it is not detected by the DGT.

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PARATE EXECUTION AFTER THE INDONESIAN CONSTITUTIONAL COURT'S JUDICIAL REVIEW OF FIDUCIA LAW AND MORTGAGE LAW

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Abstract

According to the Law No. 42 of 1999 on Fiducia Security ("Fiducia Law") as well as the Law No. 4 of 1996 on Mortgage, if there is a breach of fiduciary guarantee and mortgage rights, the secured creditors can undertake a parate execution, as the expedient, simple and cost-efficient method by means of a public auction. However, the Indonesian Constitutional Court's (MKRI) Decision Number 18/PUU-XVII/2019 has interpreted Parate Execution of Fiduciary Guarantee must firstly obtain the debtor's consent that a breach has indeed occurred and the voluntarily surrenders of the guarantee object to the creditor. On the other hand, in the Decision No. 21/PUU-XVIII/2020, MKRI did not define the same process for Parate Execution of Mortgage Rights. From the substance point of view, the two MK verdicts provide a different interpretation of the principle of "*pacta sunt servanda"* and fiducia security. This has caused the execution of Fiduciary Guarantee becomes not easy, expedient and cost efficient any longer. This normative research attempts to analyse the legal and economic impact of the two verdicts and their implementation from a law and justice perspective. The results show the need of consistency in the implementation of Parate Execution for both. This means that an agreement regarding the existence of a breach is not required. In addition, if the debtor does not voluntarily surrender the guarantee object, then the creditor by law reserves the rights to seize the object. Arguably, it is necessary to amend the Fiducia Law in accordance with the MKRI's Decisions, in line with the general principles of security in parallel with the principles of justice, legal certainty and utility.

Keywords: *Fiducia Security; Mortgage Rights; Parate Execution; Indonesian Constitutional Court (MKRI) Decision*

1. INTRODUCTION

Legally, fixed guarantee is one of the guarantee institutions other than personal guarantee. Fixed guarantee is divided into movable objects, namely pledge, fiducia and ship hypothec, while immovable fixed guarantee, namely mortgage rights, covers land and building. Fixed guarantee is aimed to facilitate the settlement of credit disbursed by the creditor if the debtor defaults. Thus, effective and adequate regulation regarding an easy, quick and simple execution is required so that not much time or resources are wasted. Among others, this can be done by providing authority to the creditor holding the guarantee object to conduct parate execution.

The verdict of the Indonesian Constitutional Court (MKRI) No. 18/PUU-XVII/2019 address judicial review of Article 15 paragraph (1), paragraph (2) and paragraph (3) of Law No. 42 of 1999 on Fiduciary Guarantee (Fiduciary Guarantee Law). Such provisions, relates to the fiduciary guarantee with full executorial authority, in the sense that if the debtor is in breach or defaults, then the receiver of the fiducia (financial institutions) has the rights to sell the guarantee objects on its own behalf through an auction. In the verdict that is *erga omnes*

in nature the MK define that the fiduciary guarantee certificate does not immediately have executorial authority. In this context, a breach in the execution of a fiduciary agreement must be based on a mutual agreement between the debtor and the creditor or based on a legal recourse, namely a lawsuit, to a court determine that the breach exists.

In another verdict (No. 21/PUU-XVIII/2020), MK rejects the petition for judicial review of Article 14 paragraph (3) and Article 20 paragraph (1) of Law No. 4 of 1996 on Mortgage Rights for Land and Objects Related with Land (Mortgage Rights Law). The applicants for the judicial review refer their petition to MK Verdict No. 18/PUU-XVII/2019 on the review of Article 15 paragraph (2) of the Fiduciary Guarantee Law. According to the MK, there are fundamental differences between the nature of fiduciary guarantee and mortgage rights.[1]

The significant difference between the MK verdict for parate execution in the Fiduciary Guarantee Law and the Mortgage Rights law is the application of the *pacta sunt servanda* principle, which is a fundamental norm of an agreement. In a fiduciary guarantee agreement, the MK considers that the terms and conditions regarding a breach that is stipulated in a fiduciary agreement does not bind the creditor and debtor that signs it. Moreover, there must be a written confirmation from the debtor regarding the existence of a breach when the creditor views that the debtor has conducted a breach. In mortgage rights, the MK believes that the terms of a breach that are stipulated in a mortgage rights agreements are binding to the creditor and debtor that sign the agreements, therefore a written confirmation from the debtor regarding the existence of a breach is not needed.

It must be noted that the two MK verdicts as mentioned above impact the mode of execution. If there is no agreement in regards to the existence of a breach between the debtor and creditor, and the debtor does not voluntarily hand over the fiduciary guarantee object, then execution of the guarantee object cannot be done through parate execution. In other words, it must be done through fiat execution based on executorial title, which is by permission from the head of the court. If the execution of fiduciary guarantee is conducted through a court process, then it will need longer time, uneasy, and more expensive. Obviously, it is not in line with the general principles of fixed guarantee, where execution may be conducted in a quick, easy and affordable manner. Meanwhile, mortgage right guarantee execution may still be conducted via parate execution. Since such guarantee does not require an agreement regarding whether or not a breach has occurred. Additionally, there is no requirement for voluntary handover of the mortgage right guarantee object.

Based on the above problem, the research questions encompass problem on how parate execution of fiduciary guarantee and mortgage rights guarantee is regulated, how it is implemented and how parate execution should be regulated in Indonesia so that it can better support legal certainty and justice.

[1] Constitutional Court Verdict No. 21/PUU-XVIII/2020, Petitum, page 20.

2. RESEARCH METHODS

This research uses juridical normative methodology supported by empirical normative one. The focus is the analysis on the provision of parate execution in Fiduciary Guarantee Law and Mortgage Rights Law and their judicial review in the Constitutional Court.

For the data analysis, the research uses qualitative method, namely regulatory and conceptual approach, as well as uses primary, and secondary data, collected based on library research and document review regarding the legal consideration in the two MK verdicts and other relevant court verdicts.

3. ANALYSIS AND DISCUSSION

3.1. Review on The Aspect of Legal Certainty and Justice

Legal certainty is one of the purposes of law as part of the effort to actualize legal protection for the public. The tangible form of legal certainty is the implementation or enforcement of law regarding an action that does not take into consideration who conducts such action. With legal certainty, any person can predict what will happen if a certain legal action is taken. It is required to actualize the principle of equality before the law without discrimination. It is defined in positive law.[2] In this research, the topic is focused on laws that specifically regulate fiduciary guarantee and mortgage rights. The existence of the two regulations is expected to provide legal certainty and justice in the lending and borrowing environment. If there is clear legal basis, then a person can obtain a guarantee of protections afforded by the law. Such certainty is necessary, and crucial to be understood in the context of a legal state. Simplistically, it may be understood that when the business world requires regulatory guidance, and such regulation does not exist, then there will be legal uncertainty as well as uncertainty in business.

The law, as the personification of justice, according to Radbruch, becomes the measure of whether or not a legal system is just. Not only that, justice is also the basis of law as a law. Therefore, justice has both normative and constitutional nature for law. Law is the basis for each dignified positive law.[3] Gustav Radbruch emphasizes that law is the personification of justice and justice is both normative and constitutional law. It is normative since positive law stems from justice values. It is constitutional since justice must become the absolute factor in law. Without justice, a regulation is not proper to become a law. If, in the enforcement of law, the tendency is on the value of legal certainty or from its perspective, then as a value, it has set aside the value of justice and utility. The reason is that in legal certainty, the most important aspect is for the law itself to be in accordance with what was formulated. This also applies if the value of utility is prioritized. In this case, the value of utility will set aside the value of legal certainty and justice since what is most important for the value of utility is the benefit of law for the people. Such is also the case when only the value of justice is observed, then it will set

[2] M. Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," *Legalitas: Jurnal Hukum* 4, no. 1 (2013): 143, http://legalitas.unbari.ac.id/index.php/Legalitas/article/view/117.

[3] Yovita A. Mangesti and Bernard L. Tanya, *Moralitas Hukum* (Yogyakarta: Genta Publishing, 2014), 74.

aside the other values. Therefore, the enforcement of law must have a balance between the three abovementioned values.[4]

The law is all that gives utility for the public. As part of the purpose of law, justice and legal certainty also require a complement in the form of utility. Utility may be understood as happiness. The good or bad in law is determined by whether or not the law can provide utility to all legal subjects. Law is categorized as good if it can provide happiness to the biggest part of society. The public expects utility in the implementation and enforcement of law. The law is for people so that its implementation or enforcement must provide benefit or utility for the people. The implementation and enforcement of law must avoid stirring discord within society. Law that is good is law that provides utility for the people. Here, utility may also be understood as happiness. The public will obey law without having to be coerced by sanctions if it feels that there is utility on it.[5]

Normatively, the Fiduciary Guarantee Law provides legal certainty for the public because it provides a legal basis for the fiduciary guarantee execution process and can resolve problems regarding fiduciary guarantee execution. For business actors, particularly financing companies, the Fiduciary Guarantee Law may provide more guarantee for them in extending credit to the public. Article 15 paragraph (3) of Fiduciary Guarantee Law provides authority for the recipient of fiducia to sell off the guarantee object. The rights to sell the guarantee object is a form of legal certainty for the creditor if the debtor conducts a breach. Article 15 (2) of the Fiduciary Guarantee Law states that the Fiduciary Guarantee Certificate as referred to in paragraph (1) has the same executorial authority as a court verdict that is final and binding. Such provision explains the power of executorial title may be directly implemented without having to undergo a court proceeding and is final and binding for the parties in carrying out the verdict. This means that the creditor is facilitated in conducting execution of fiduciary guarantee object, particularly considering that movable objects are easily damaged, lost or depreciated. In relation to such risk for the creditor, execution of fiduciary guarantee object is crucial instrument.

From a legal aspect, the MK verdict No. No. 18/PUU-XVII/2019 does not reflect legal certainty as it provides different interpretation than the normative provisions as regulated under the Fiduciary Guarantee Law. Furthermore, the MK verdict regarding the interpretation of "existence of a breach is not unilaterally determined by a creditor but through an agreement between the debtor and the creditor or a legal recourse which determines that a breach has occurred" is an issue because on one hand, the terms and condition of a "breach" have been determined by the creditor and debtor upon the signing of the credit agreement and guarantee agreement. One thing that is certain is that this verdict severely impacts relevant institutions. Since the enactment of this MK verdict, the mechanisms for an auction has become more complex and tedious for creditors, since there is an added requirement of needing a Declaration of a Breach from the debtor. In

[4] Bernard L. Tanya, Yoan N. Simanjuntak, and Markus Y. Hage, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi* (Yogyakarta: Genta Publishing, 2013), 117.

[5] Fence M. Wantu, "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, dan Kemanfaatan di Peradilan Perdata," *Mimbar Hukum* 25, no. 2 (2013): 206. https://jurnal.ugm.ac.id/jmh/article/view/16092.

other words, the debtor must admit that it has conducted a breach. Conceptually, this contravenes with the principles of contract law, whereby an occurrence of a breach does not depend on the approval from the creditor, but whether or not the debtor's obligations are fulfilled.

By definition, a "breach" is failure or negligence in conducting obligations as determined in an agreement made between a creditor and debtor.[6] Breach, or failure to perform a commitment occurs either intentionally or unintentionally.[7] In practice, a Breach is "the implementation of an agreement that is not on time or is not as it should be, or not at all."[8] So, a breach does not require approval from the debtor since proving its existence is a simple process. If the proof of a breach must be based on an agreement between the creditor and debtor, then it will be more difficult for the creditor to conduct execution. Normatively provision of breach have already regulated clearly and adequately. It has been used as a reference in the legal practice and established certainty.

In short, the MK verdict does not provide legal certainty for both parties, particularly for the creditor. The elements of parate execution for movable objects which require easy, speed and efficiency in its execution process are disrupted by such MK verdict above, especially for the business sector.

3.2. Parate Execution of Fiduciary Guarantee in Accordance with Fiduciary Guarantee Law

Article 15 Paragraph (3) of the Fiduciary Guarantee Law determines that "If debtors are in default, Fiduciary Recipient has the rights to sell Assets that become Fiduciary Guarantee objects on their own authority". In this case, the creditor's authority to conduct Parate Execution is obtained based on the executorial right attached to the fiduciary guarantee certificate as stipulated in Article 15 Paragraph (2) that "the Fiduciary Guarantee Certificate has the equal executorial authority to a court decision that already has a permanent legal force". As for what is meant by "executorial title" is that it "may be directly executed without having to go through a court and is final and binding for the parties to carry out the verdict". The execution of Parate Execution does not involve a court process or a bailiff. If the requirements under Article 29 Paragraph (1) letter b of the Fiduciary Guarantee Law is fulfilled, the creditor may directly contact the auctioneer and request for the guarantee to be auctioned off as soon as possible. In this case, Parate Execution must be carried out through a public sale or auction. Meanwhile, Article 30 of Fiduciary Guarantee Law governs that "The grantor of Fiducia must hand over the fiduciary object for execution of fiduciary guarantee." In the elucidation of the provision, it is stated "in the event that the grantor of the fiducia does not hand over the object that is the guarantee object at the tme that the execution is conducted, the receiver of the fiducia has the right to seize the fiduciary guarantee object and, if necessary, request aid from authorized parties to do so." Chief of Indonesian Police Force Regulation Number

[6] Salim HS, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2008), 108.
[7] Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak* (Jakarta: Rajawali Pers, 2007), 74.
[8] M. Yahya Harahap, *Segi-Segi Hukum Perjanjian*, 2nd ed. (Bandung: Penerbit Alumni, 2017), 60.

8 of 2011 on the Safeguarding of Fiduciary Guarantee Execution provides the explanation on who the "authorized parties" refer to. In addition, if the debtor does not hand over the fiduciary guarantee object, then the creditor may take legal measures such as coordinating with the police to secure or provide securitization to the execution conducted on the fiduciary guarantee object. The execution is also conducted by external teams of the creditor (legal counsel or debt collector) with the creditor. To ensure that the execution is conducted in a proper and legal manner, if parate execution is conducted, then it is conducted with executorial title. Executorial title is implemented through a petition to the head of the district court which is followed by summons, executorial seizure and sale of the guarantee object through an auction. In practice, creditors often conduct parate execution since the implementation of executorial title requires more time and cost as its procedure is not simple and is quite complex. Even though the debtor is required to hand over the guarantee object, often times, there are actions that disrupt the debtor verbally and physically, at times there can even be use of violence and forced seizure. These factors are the main reason for the submission of the judicial review to the Law Number 42 of 1999.

3.3. Parate Execution of Fiduciary Guarantee After the Indonesian Constitutional Court's Verdict Number 18/PUU-XVII/2019

After the MKRI's verdict Number 18/PUU-XVII/2019, Parate Execution of fiduciary guarantee is conducted in accordance with the interpretation set forth by the MKRI. In short, there must be an agreement between the debtor and the creditor regarding the existence of a breach, and that the debtor must have handed over the fiduciary guarantee object voluntarily to the creditor. If there is no agreement regarding the existence of a breach, or if the debtor does not voluntarily hand over the guarantee object, then the execution is conducted based on the permission of the court. In this case, it will be commanded to the debtor to fulfil its obligation. In case the debtor does not fulfil such command, then the court shall administer a fiat execution and order an attachment of the guarantee object to be subsequently auctioned off. That the process of settlement for the receivables of the creditor.

It must be noted that financing companies have conducted the methods as regulated by the MK verdict. However, in practice, it is not easy to obtain consent regarding the existence of a breach from the debtor. In this regard, the debtor will choose the procedure in which the creditor submits for an execution through the court. There are instances in which the debtor has agreed that a breach occurs, but does not voluntarily submit the guarantee object. So that it become a complex legal problem. What is certain is that execution conducted by financing institutions post MK verdict in regards to fiducia can be summarized, as follows:

1. Parate execution cannot be conducted like it has been before the MK verdict. Currently, financing institutions must enter into an agreement with the debtor regarding the existence of a breach. This may be done by submitting warning letters for several times, and if the debtor does not comply its obligations, the financing

institution will send their representative to negotiate with the debtor. The results of the negotiation may also vary, as follows:

a. The debtor agrees that it is in breach and voluntarily hands over the fiduciary guarantee. In such case, the debtor will sign an agreement which states that he is in breach and has voluntarily handed over the fiduciary guarantee object to the creditor. Based on this, the execution may be conducted using the parate execution prosedur
b. The debtor agrees that it is in breach, but the debtor refuses to handover the fiduciary guarantee object. In such case, the debtor will only sign an agreement stating that he is in breach, parate execution shall be done through executorial title.
c. The debtor disagrees with the creditor that a breach has occurred, and the debtor is not willing to hand over the fiduciary guarantee object. In this case, execution cannot be conducted, and the creditor must submit a breach of contract lawsuit to the court. In general, creditors will not choose these options due to time and cost concerns. Meanwhile, the value of the guarantee object will depreciate over time and it will not be beneficial for the creditor to commence a breach of contract lawsuit. In practice, these kinds of cases have become the *status quo.*

2. Execution using executorial title. So far, courts rarely conduct execution using executorial title. This is because if there is no agreement between the creditor and the debtor regarding the existence of a breach, and the debtor does not hand over the fiduciary guarantee object. Similarly, if there is an agreement regarding the existence of a breach but the fiduciary guarantee object is not voluntarily handed over by the debtor, then the auction cannot be carried out. This is because for movable objects, they may only be auctioned if the object is physically controlled by the applicant for the auction, namely the creditor. In this regard, some courts may conduct executorial title with only an agreement of the breach's existence and without voluntary hand over of the guarantee object of the debtor. The condition is that when the auction is held, the auction petitioner or creditor physically controls the goods to be auctioned.
3. Execution through private sale. This method is often done by financing institutions or creditors. The condition is that there must be an agreement that the debtor is in breach, and the debtor agrees to sell the guarantee object privately. For private sale, generally a time span of between 1–3 months is given. If the private sale is not successful, then the guarantee object will be sold off through an auction.

3.4. Parate Execution of Mortgage Rights in Accordance with the Mortgage Rights Law

Mortgage rights is an institution that provides guarantee over rights of land as governed under Law No. 5 of 1960 on Basic Agrarian Principles. In Mortgage rights, protection is afforded to the creditor since a sum of funds that is loaned to the debtor with a guarantee is prioritized over the rights of the land itself. Executorial right of the object of mortgage rights lies with the creditor and its implementation is easy and certain. Parate Execution is regulated in Article 6 of the Mortgage Rights Law, which gives rights to the first creditor to sell off the object of the security rights through a

public auction and reach the settlement from such sale. This right may be executed without a court decision. Parate Execution may be called as direct execution by the holder of the mortgage rights without assistance or action of other parties. This is the same with the provisions of Parate Execution regulated under the Fiduciary Guarantee Law, since both represent a judicial guarantee with the same principles, one of which being that the procedure of the execution must be easy, quick and affordable.

It should be acknowledged that, implementation of parate execution is the fastest method since it does not require fiat execution from the court and its implementation may be conducted by the creditor as the holder of the mortgage rights directly through a public auction. In this case, the auction is conducted on the State Assets and Auction Service Office (KPKNL).

The provisions regarding the auction process is regulated under Minister of Finance Regulation No. 213/PMK.06/2020 on the Instructions for Auction and Directorate General of State Assets Regulation No. PER03/KN/2010 on Technical Instructions on the Implementation of Auctions and Circular Letter No. 19/PN/2000 on the Implementation of Circular Letter No. SE-21/PN/1998 on Instructions for the Implementation of Article 6 of Mortgage Rights Law.

3.5. Parate Execution of Mortgage Rights After the Indonesian Constitutional Court's Verdict No. 21/PUU-XVIII/2020

Considering the success story of the MKRI's Verdict No. 18/PUU/-XVII/2019 on Parate Execution of Fiduciary Guarantee Law, a debtor as the grantor of mortgage rights submits a judicial review of the provisions of parate execution of Mortgage Rights Law. MK rejects the judicial review as stipulated by MK Verdict No. 21/PUU-XVIII/2020. Parate Execution of Mortgage rights does not require an agreement between the debtor and the creditor regarding a breach nor the voluntary handover of the mortgage rights object.

According to Article 6 of the Mortgage Rights Law, an agreement between the creditor and the debtor regarding the existence of a breach is not needed. Since the guarantee rights object is an immovable good, therefore the "physical control of the guarantee object by the auction applicant" requirement is also not necessary. If the auction object is still possessed by its residents, then it is sufficient to state that description regarding the object. In such case, the execution auction may be carried out and the potential buyer is assumed to be aware that the auction goods are still possessed by a third party.

After the MKRI's verdict, the implementation of parate execution of fiduciary guarantee and mortgage rights could be summarized, as follows:

Table 3.1. *Writer's Conclusion from analysis of Constitutional Court Verdict No. 18/PUU-XVII/2019 and 21/PUU-XVIII/2020 on Parate Execution of Fiduciary Guarantee and Mortgage Rights*

Parate Execution of Fiduciary Guarantee	Parate Execution of Mortgage Rights	Fundamental Difference between the these MKRI's Verdicts
Proof of a written agreement between the creditor and the debtor which states that the debtor is in breach is require; proof of voluntary handover of the fiduciary guarantee object by the debtor to the creditor is also required.	Proof a written agreement between a creditor and debtor which states that the debtor is in breach is not required and proof of a voluntary handover of the Mortgage rights object from the debtor to the creditor is also not required.	The application of *"pacta sunt servanda*" which is a fundamental norm of an agreement. In the Mortgage Rights scheme, the MK acknowledges that the terms and conditions stipulated in an agreement is binding to the parties, whereas in a Fiducia scheme, the MK's approach is different whereby there must be an agreement regarding the existence of a breach between the creditor and debtor.

3.6. The Indonesian District Court Verdicts regarding Parate Execution Disputes after the MKRI'sVerdict

Based on other court decision regarding parate execution of fiduciary guarantee in the era of post MK Verdict No. 18/PUU-XVII/2019, it could be summarized some points as follows:

1. District courts and Supreme Court (MA) acknowledge that the terms and conditions regarding "default/breach" stipulated in a financing agreement or credit agreement that has been signed by the debtor and creditor are legitimate terms and conditions which are binding to its signatories. If the debtor violates on or more of such conditions, then the creditor can determine that the debtor has defaulted or is breach without needing an agreement between the debtor and the creditor.
2. District courts and Supreme Court (MA) believe that the seizure of a fiduciary guarantee object by the creditor after the debtor is declared to be in breach is an action of the creditor to secure the guarantee object to be auctioned. Considering that the fiduciary guarantee object is a movable object that is transferrable, the district courts as well as the MA do not require a voluntary handover by the debtor to the creditor. In several cases submitted to the district court, there are recorded actions of creditors who have forcibly seized the guarantee object from the debtor, and the MA still decides that such action is not an unlawful act.

Considering that the judicial review of parate execution in the Mortgage Rights Law was rejected by the Constitutional Court (MK), then there is no conception which has affected the district court's decision, be it before or after the MK Verdict No. 21/PUU-XVIII/2020. The district court verdicts regarding execution of mortgage rights are in essence as follows:

1. Evidentiary proceedings regarding the breach is simple in nature, whereby if the debtor violates the provisions stipulated in the agreement which has been signed with the creditor, then no further proof regarding the breach is required.
2. Execution of mortgage rights auction may be carried out even though there is a recommendation letter from the Head of the District Court to stop the auction. In this case, if the requirements of an auction are fulfilled, then the auction may go on.
3. Execution of mortgage rights auction may still be conducted even though there is a lawsuit in a court. In this case if the requirements of an auction are fulfilled, then the auction may go on.
4. Execution of mortgage rights may be conducted through parate execution as regulated under Article 6 of Mortgage Rights Law, even though the guarantee object is still possessed and resided by the owner of the guarantee object.

3.7. Authority of the Constitutional Court to Conduct Judicial Review of Laws

MK verdicts are *erga omnes* in nature, meaning that it is final and binding, not only for a certain party, but for anyone. The binding nature is emphasized in the elucidation of Article 10 of Law Number 8 of 2011 regarding the Amendment of Law Number 24 of 2003 regarding the Constitutional Court, stipulates that "the final nature of a Constitutional Court Verdict in this Law also includes a binding legal nature". The provisions of Article 29 paragraph (1) of Law Number 48 of 2009 regarding Judicial Powers define that "The Constitutional Court has the authority to adjudicate, on the first and final level, with a verdict that is final in nature…". Accordingly, the Constitutional Court has a legal consequence that is certain and strict, there can be no further legal remedies since the declaration of the verdict. This principle is also stipulated in Law Number 24 of 2003 regarding the Constitutional Court as amended by Law Number 8 of 2011 regarding the Constitutional Court. Therefore, it can be concluded that there is no other option besides carrying out the verdict of the Constitutional Court.[9]

Legal uncertainty caused by two verdicts that are contradictory to each other must be resolved. This relates to the legal uncertainty arising out of the MA verdict, and the two judicial bodies that do not have any resolution to these verdicts. In the future, there must be clarification regarding the hierarchical structure between MA and MK decisions.

Structurally, MA is not subordinate to the MK, and has a different view regarding the execution of movable guarantees. MA may interpret the meaning of the law. The basis for its considerations is as follows:

1) Positive legal norm "all agreements that are legitimate act as law for those that are party to it (*pacta sunt servanda*). This means that violations to the obligations in an agreement are violations of obligations, or breaches. This principle in positive law is regulated under Article 1338 paragraph (1) of the Indonesian Civil Code. Essentially, all valid agreements apply as law to individuals involved. Such agreements are

[9] Maruarar Siahaan, " Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum IUS QUIA IUSTUM* 16, no. 3 (2009): 359, https://doi.org/10.20885/iustum.vol16.iss3.art3.

irrevocable other than through mutual consent, or pursuant to reasons stipulated by the law. This is a fundamental norm in law and is closely related to the principle of good faith in complying to an agreement.[10] An agreement born as a result of consent is a meeting of the intention of the parties and it cannot be realized unless it is based on the good faith of the parties. Without good faith and the ability to carry out what has been promised, the agreement cannot be carried out as it should. In relation to financing agreements and credit agreements, the creditor's obligation to provide a certain amount of funds to meet the debtor's needs has been implemented. Furthermore, the debtor's obligation is to return the funds to the creditor according to the procedures agreed in the agreement. In this case the good faith of creditors and debtors to comply with the agreement is crucial. Without such good faith the financing and credit business, including banking in Indonesia, will not perform properly.

2) The Fiduciary Guarantee Law and the Mortgage Rights Guarantee Law are adoption from the Dutch legal provisions. The Mortgage Rights Guarantee Law is adapted from the provisions regarding hypothec as regulated under Book II of the Indonesian Civil Code and the regulations regarding Creditverband in Staatsblad 1908-542 as amended by Staatsblad 1937-190.[11] The Fiduciary Guarantee Law is adapted from the *Hoge Raad* Judge Decision: *Bierbrowerij* Arrest dated January 25, 1929.[12] The above laws have been adjusted with the national conditions and life values of the Indonesian society. A good law is law that is in line with the law that is present in society. The definition of "in line" here means that the law reflects the values that live in society. Both the Fiduciary Guarantee Law and the Mortgage Law are judicial guarantees with the same legal principles, and are not new legal principles that were created when Indonesia adapted from the Dutch legal provisions. Historically, the legal principles of judicial guarantees are the basic requirements needed to protect the interests of creditors and debtors. Constitutional Court Verdict Number 18/PUU-XVII/2019 which provides a different understanding of certain provisions in the Fiduciary Guarantee Law, results in the change of the understanding of the general principles of judicial guarantees in general such as mortgages and pledges, especially regarding the execution procedures that easy, quick and affordable, namely parate execution.
3) In accordance with the opinion of the expert Aria Sayudi in the Constitutional Court Verdict No. 18/PUU-XVII/2019 statutory provisions regarding guarantees for movable objects will be an indicator of competitiveness and ease of doing business. Some of the guidelines recommended by UNICITRAL agencies and the World Bank in drafting legislation for movable property guarantees include:[13]
    a. Facilitating execution rights of the holder of the guarantee rights efficiently;

[10] J. Satrio, *Parate Eksekusi sebagai Sarana Mengatasi Kredit Macet* (Bandung: PT. Citra Aditya Bakti, 1993), 36.
[11] Law No. 4 of 1996 regarding Mortgage Rights of Land and Land Related Objects, Considerations letter c.
[12] Salim HS, *Perkembangan Hukum Jaminan di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 2013), 60.
[13] Constitutional Court Verdict No. 18/PUU-XVII,2019, Expert Opinion, page 53.

b. The execution process must uphold the collection rights of the movable object when the debtor is in breach of the obligations which is guaranteed by on object. The enforcement mechanism must allow for execution outside of the courts.

4) Consideration that Indonesia is projected to become a developed country in 2045, one way to make this happen is to have good regulations. One of the marks of good regulations is that it fulfills legal principles that can be accepted internationally, so that it will make it easier for foreign capital to invest in Indonesia, as there is legal certainty. The entry of foreign investment will increase employment opportunities and subsequently improve people's standard of living. MK Decision Number 18/PUU-XVII/2019 which provides a different understanding of certain articles in the Fiduciary Guarantee Law, clearly does not provide ease of execution or is inefficient in the execution process. Parate execution in practice will be difficult to be implemented because the debtor will not easily agree with the creditor regarding the existence of a default. Debtors tend to encourage creditors to conduct execution through a court process. The conditions for a breach or default have been stipulated in the principal debt agreement and fiduciary guarantee agreement, so that when the debtor fulfils these criteria in the agreement in question, the creditor can unilaterally determine that the debtor is in default. The next condition is that there must be voluntary hand over of collateral by the debtor to the creditor. This requirement will also be difficult to fulfil after the debtor defaults or is in breach. The procedure for collecting the guarantee object by creditors when the debtor defaults is regulated in the guarantee agreement. Therefore, the creditor has the right to withdraw collateral when the debtor defaults. If these two requirements are not met, then the execution of the guarantee can only be carried out by fiat execution based on executorial title and based on permission from the head of the district court. In contrast, what is recommended by international institutions is execution without involving the court or wholly outside the court.

3.8. Ideal Regulation of Parate Execution

In practice, creditors' efforts to gather fiduciary guarantee objects from the debtor are usually carried out by using a debt collector. Execution methods carried out by debt collectors is often done using force, by seizing the guarantee objects. Procedures like these are not regulated in the execution provisions in the Fiduciary Guarantee Law. In fact, the procedure for collection and seizing fiduciary guarantee objects using a debt collector has been regulated in the Republic of Indonesia Financial Services Authority Regulation (POJK) Number 35/POJK.05/2018 on the Implementation of Financing Company Business, Chapter XI regarding Collection, which is regulated from Article 47 to Article 52, as well as Chief of Indonesian Police Force Regulation Number 8 of 2011 on Safeguarding the Execution of Fiduciary Guarantees.[14]

[14] Regulation of the Financial Services Authority of the Republic of Indonesia Number 35/POJK.05/208 on the Implementation of a Financing Business, Article 47–52, essentially explains the obligations that must be carried out by a financing institution if it is to execute a fiduciary guarantee. The Indonesian Chief of Police Regulation Number 8 of 2011 on Safeguarding the Execution of Fiduciary Guarantees, essentially explains that the Police will assist

With regard to the above analysis, particularly to enable the law provide legal certainty as well as the balance interests of various parties involved in the execution of fiduciary guarantees, it is necessary to set up ideal parate execution regulation by amending the Fiduciary Guarantee Law to accomodate the POJK provisions and the Indonesian Chief of Police Regulation No. 8 of 2011 concerning Safeguarding the Execution of Fiduciary Guarantees. The main points of the amendments are included in the revision of the Fiduciary Guarantee Law which must be accompanied by criminal sanctions provisions, so that all relevant parties will comply with the regulation. Should there be any violation, the parties in violation of the regulation will be subject to criminal sanctions. The rationale for such a change is due to the fact the POJK only regulates financing companies, while the Fiduciary Guarantee Law regulates all parties related to fiduciary guarantees. Another consideration is that the POJK can only set out the financing business' license revocation as the highest degree of sanction while laws are able to impose criminal sanctions. If legal reform or amendment to the Fiduciary Guarantee Law require a long time to effectuate, then the primary revision may be included in the principal debt agreement and guarantee agreement/Fiduciary Guarantee Deed.

Mortgage Rights Law provides that if a debtor is in breach, then the creditor may conduct mortgage rights execution. In this case, the holder of the first mortgage rights reserves the rights to sell off the mortgage rights guarantee on its own behalf through an auction to collect the settlement of its receivables from the sale of the guarantee object.

Referring to Article 6 and Article 20 paragraph (1) letter (1) of the Mortgage Rights Law, and Number 4 of the General Elucidation of such law, it is clearly stated that every execution of an object of mortgage rights can be carried out through a public auction. Through this method, the highest price can be reached out, and the creditor has the right to collect the settlement of its receivables that is guaranteed by the sales of the mortgage right guarantee object. In the event that the proceeds of the sale exceed the receivables, then the remainder has to be becomes hold by the grantor of the mortgage right. Therefore, it can be concluded that the underlying principle of parate execution as a means of accelerating the settlement of creditors' receivables is the principle of legal protection for the holder of the first guarantee right. The embodiment of the principle of legal protection is reflected in the implementation of parate execution, namely due to its facilitation, fast duration and low cost, compared to executions through executorial titles. This is in line with the procedure for selling the object of guarantee right on its own authority, which is without prior security attachment or execution seizure and without court fiat.

3.9. The Bill on Movable Object Guarantee

The government, represented by the Ministry of Law and Human Rights and particularly the National Legal Guidance (BPHN) has prepared a Draft Law on Movable Object Guarantee (Movable Object Guarantee RUU) which will be finalized by the

financial institutions in executing fiduciary guarantees if necessary, under several conditions that must be fulfilled by the financing institutions.

Directorate General of Legislation. The Bill governs the imposition of guarantee on objects previously governed under Fiduciary Guarantee, Mortgage, Warehouse Receipt, Aircraft Guarantees and Ship Hypothec. Additionally, the regulation will also be directed for financing agreements which imposes a movable object as a guarantee (quasi-guarantee).[15]

One of the considerations in drafting this Bill is the need to accommodate the Constitutional Court's Verdict No. 18/PUU-XVII/2019. The Constitutional Court's Verdict caused the conducting of executions (which had so far been carried out by directly taking over the guarantee object objects using fiduciary certificates as the basis for rights) unable to be carried out immediately. If there is no agreement regarding the breach and the debtor refuses to voluntarily hand over the fiduciary guarantee object, the creditor must file for execution assistance to the court.[16]

In the academic paper for the Bill, it is stated that, in order to provide legal certainty and facilitate the execution process, it is necessary to regulate the terms and mechanism of the execution. Execution of movable guarantee objects is carried out by means of execution of executorial titles. The implementation of the execution must first be announced and the fiduciary certificate can immediately be used as the basis to directly takeover the movable guarantee object. Execution can be carried out immediately because between the grantor and the recipient of the movable object guarantee has entered into an agreement regarding the elements of a breach and also the willingness of the grantor to voluntarily hand over the guarantee object. This agreement has been stipulated in the deed of guarantee for movable objects. The grantor of the movable objects is obligated to hand over the objects in the event of execution. This obligation arises when the object is not under the possession of the recipient. After the execution is carried out, the recipient may sell the object. Sales are made through a public auction.[17] If, upon execution, it turns out that a problem relating to the collection of the

[15] Academic Papers of the Bill on *Movable Object Guarantee*, Ministry of Law and Human Rights of the Republic of Indonesia Year 2021. Foreward, page ii.
[16] *Ibid,* Guarantee Execution, page 157–158.
[17] *Ibid*, Philosophical, Sociological and Juridical Basis, page 235–237, which is presented in the academic paper as follows:
1) The philosophical basis submits that improvements to the rules for the guarantee of movable objects that will be carried out through this Draft Law must pay attention to fulfilling the needs of national development while fulfilling 3 (three) fundamental aspects of legal value, namely justice, legal certainty and utility. From the aspect of legal benefits, the formulation of this new law was carried out to allow everyone the opportunity to obtain guarantee rights in and simple and efficient way. Guarantees for movable objects as an instrument for obtaining access to capital must be able to improve its role so that it is able reach more people. The easier the public's access to capital, the more it will encourage business activity, which is expected to be directly proportional to the increase in people's welfare.
2) Sociological basis submits that fulfillment of the need for business financing is obtained through the provision of credit through debt agreements between creditors and debtors through credit facilities that contain risks, namely not being repaid by debtors to creditors in accordance with what was agreed. One of the ways to anticipate this is for the debtor to provide guarantees to creditors. One type of guarantee that is applicable in Indonesia is judicial guarantees which includes guarantees for movable objects. In general, regulations regarding movable objects in Indonesia have several flaws, namely the legal framework that has not been integrated, non-possessive ownership arrangements which still impose numerous restrictions, the scope of movable objects that can be guaranteed is limited and has not yet accommodated international practice.

guarantee object occurs, then it can be resolved through a mechanism outside the court. Settlement is carried out by an institution that has a dispute resolution function in collection of guarantee objects. Institutions authorize to conduct these functions are those registered with the Ministry of Law and Human Rights.[18] The purpose of this is to avoid execution through a court process.

Several important articles in the Bill of Movable Object Guarantee includes, amongst others: Article 10 paragraph (1) letter h which states that "A Guarantee Deed for a movable object as mentioned in Article 9 paragraph (1) shall contain at least: a clause regarding a breach which includes that execution may be done immediately and the voluntary handover of the Guarantee object must also be stipulated in the guarantee agreement."

4. CONCLUSION

Normatively, provisions regarding the parate execution of Fiduciary Guarantees are stipulated in Article 29 of Law no. 42 of 1999 concerning Fiduciary Guarantees. The law defines that if the debtor or fiduciary grantor is in breach, then the execution of the object of the fiduciary guarantee can be carried out by selling the object which is the object of the fiduciary guarantee on the authority of the fiduciary recipient himself. The procedure is done through a public auction whereby the proceeds are settled with the obligation. This means that execution by way of parate execution does not involve a court or a bailiff. If the requirements as stipulated in Article 29 Paragraph (1) letter b of the Fiduciary Guarantee Law have been met, the creditor can contact the auctioneer and request that the guarantee object be auctioned off immediately. Meanwhile, provisions regarding the execution of mortgage rights are regulated in Article 6 of Law No. 4 of 1996 concerning Mortgage Rights on Land and Land Related Objects. In principle, if the debtor defaults, then the holder of the first mortgage rights reserves the right to sell the mortgage right object through a public auction and collect the settlement of the receivables from the earning of the sale. The provisions in Article 20 of the Mortgage Rights Law provide protection to creditors with priority rights over other creditors.

In practice, the execution of fiduciary guarantees is confronted by several obstacles. An example of such obstacle is that the grantor of the fiducia, who from the start still possesses the object of the guarantee (*constitutum possessorium*) refuses to voluntarily hand over the object of guarantee to the fiduciary recipient. In this case, the provisions of Article 30 of the Fiduciary Guarantee Law states that "Grantors of fiducia are obliged to hand over objects that are objects of fiduciary guarantees in the framework of executing fiduciary guarantees". To provide legal certainty for the execution through parate execution, the elucidation of Article 30 of the Fiduciary Guarantee Law emphasizes the following principles "In the event

3) Juridical Basis conveys that the special arrangement can also be used to amend the regulation of the provisions for movable object guarantees which have been canceled by the Constitutional Court through the Constitutional Court Verdict Number 18/PUU-XVII/2019 by creating provisions that accommodate the contents of such verdict in order to avoid re-annulment in the future. Due to various developments in the legal needs of society, verdicts of the Constitutional Court and developments in the international world, it is necessary to establish a Movable Object Guarantee Law to improve existing regulations.

[18] *Ibid.*, Conclusion, page 265–266.

that the Grantor of Fiducia does not hand over objects that are objects of fiduciary guarantee at the time the execution is carried out, the fiduciary recipient has the right to collect the objects of fiduciary guarantees and if necessary may request assistance from the authorities." Using the above provisions as a basis, creditors often must forcefully collect the collateral object through various ways. The fact, this coercive practice was used as legal grounds for judicial review of the Fiduciary Guarantee Law to the Constitutional Court.

Unlike the case with mortgage rights, parate execution based on Article 6 of the Mortgage Rights Law has relatively no obstacles. This is because the collateral object is an immovable object, and therefore the physical possession of the collateral object by the auctioneer is not required. Furthermore, if the auction object is still controlled by residents or other parties, it is sufficient to provide information of such status. In this case, the execution auction can still be carried out and the prospective buyer is deemed to be aware that the object of the auction is still controlled by a third party. Additionally, based on the Constitutional Court Verdict No. 18/PUU-XVII/2019 and No 21/PUU- XVIII/2020, it can be concluded that there are differences in "norms" and legal implications in the implementation of parate execution of fiduciary guarantees with execution of mortgage rights, particularly in the application of the principle of "*pacta sunt servanda*". In the conception of mortgage rights, the Constitutional Court acknowledges that the terms and conditions of a breach that are stipulated in an agreement are binding on the parties. Meanwhile, in the fiduciary scheme, an agreement regarding the existence of a defaults after the default occurs is required. After the Constitutional Court's verdict, the process of implementing the parate execution of fiduciary guarantee became more complex as it is difficult for the debtor and creditor to reach an agreement regarding the existence of a breach. This is also the same for the conditions of the voluntary handover of the guarantee object from the debtor to the creditor. Subsequently, the creditor must carry out the execution of the fiduciary guarantee through the courts. This causes execution costs to be not simple, quick and affordable. As for parate execution of mortgage rights in a normative manner, it remains to be carried out.

According to the Supreme Court (MA), the terms and conditions regarding "breach/default" stipulated in the financing agreement or credit agreement, are legally valid and binding on the debtor and creditor who have signed the agreement. This means, if the debtor violates one or several provisions, then the debtor is deemed to have committed a breach, without further agreement to ensure that a default has occurred. Furthermore, the Supreme Court is of the opinion that the collection/seizing of the fiduciary guarantee objects by creditors is an action to secure guarantee items, considering that fiduciary collateral objects are transferable. Certainly, the creditor's action to forcibly collect the guarantee object from the debtor is not an unlawful act. Meanwhile, Constitutional Court's Verdict Number 21/PUU-XVIII/2020 the procedure for parate execution remains in accordance with the Mortgage Rights Law. In this case, legal standing of the judiciary is consistent, in the sense that the evidentiary process for the breach is simple. If the debtor violates the agreement signed with the creditor, then there is no need for the proof of the breach. The execution of the mortgage right can still be carried out by parate execution as stipulated in Article 6 of the Mortgage Rights Law, even though the collateral object is still occupied by another party and/or controlled by the owner of the guarantee.

Since there are substantially differences between the decisions of the Constitutional Court and the Supreme Court regarding the basic principles of parate execution of Fiduciary Guarantees, it is necessary to have policy steps to provide legal certainty in the implementation of business transactions based on fiduciary guarantees. In this regard, the Constitutional Court's verdict, which is *erga omnes* in nature, results in the need for the Fiduciary Guarantee Law to be revised. This needs to be done immediately while still paying attention to the general principles of judicial guarantees, especially those relating to easy, quick and affordable execution arrangements. More than that, considering that in practice creditors' efforts to collect guarantee objects from the debtor are often done using debt collectors, who tend to do so by force, there is a need to regulate the proper procedure for parate execution in the Fiduciary Guarantee Law. This amendment to the Fiduciary Guarantee Law can then become an umbrella as well as a basis for improving the Regulation of the Financial Services Authority of the Republic of Indonesia (POJK) Number 35/POJK.05/2018 on the Implementation of Financing Company Business, and the Indonesian Chief of Police Regulation Number 8 of 2011 on the Safeguarding the Execution of Fiduciary Guarantees.

In line with the above conclusions, it is advisable to amend Law No. 42 of 1999 on Fiduciary Guarantee by considering MK Verdict No. 18/PUU-XVII/2019 pursuant to the general principles of easy, quick and affordable execution. This step is in line with government’s plan of currently drafting the Bill on Movable Objects Guarantee whose substance include pledge guarantee, fiducia, warehouse receipt. The problem is that if the RUU is enacted into law, then it will revoke the Fiduciary Guarantee Law which is currently effective. Regardless of the process and status of the Bill, the amendments of the Fiduciary Guarantee Law are recommended to be as follows:

1) The financing or credit agreement must regulate in detail provision or clause regarding what qualifies as “breach”. This includes that if the debtor violates the provisions that are stated in the agreement, then the creditor may consider the debtor to be in breach. Thus, the debtor, within a certain time frame, must submit the fiduciary guarantee object to the creditor. If the debtor does not hand over the guarantee object, then the creditor has the rights to seize the guarantee object from the debtor.
2) In the event that the debtor is in breach, then the creditor must conduct collection. This is done, at the very least, through a warning/demand letter in accordance with the term stipulated in the financing agreement. The demand/warning letter must include information on:
    a. The number of late days in the settlement of obligations;
    b. The outstanding amount of the loan;
    c. The interest of the loan; and
    d. The fines for the loan.
3) The financing company or the creditor may cooperate with other parties in conducting collection against the debtor. Such cooperation must be stipulated in writing, with the following conditions:
    a. The other party must be a legal entity;
    b. The other party must have a license from authorized institutions; and

c. The other party must have human resources that have obtained certification in collection from the Professional Certification Institute in the field of collection.

4) The implementation of Fiduciary Guarantee, be it from the creditor himself, or other parties as its representatives must be done in an orderly, safe and responsible manner and must avoid things that may cause judicial losses or endanger physical/mental safety. In this case, the creditor as the recipient of the fiducia must be responsible for the collection that he conducts.
5) Violations to the above must be met with criminal sanctions, be it imprisonment or a fine.

As a short-term solution, considering that the amendments to the Fiduciary Guarantee Law requires a considerable time and effort, then it is recommended for the main points above to be included as a part of the substance in each principal agreement of a loan and/or the guarantee agreement/Fiduciary Guarantee Deed. Meanwhile, for Mortgage Rights Law, particularly for parate execution, no change is necessary since it is already in line with the legal practice and legal rational of the law.

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THE EFFECTIVENESS OF THE GOVERNMENT REGULATION CONCERNING FRANCHISES IN RESOLVING FRANCHISE BUSINESS DISPUTES IN INDONESIA

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Abstract

Franchising is a business system that is growing with the current in Indonesia and the legal relationship between the franchiser and the franchisee is regulated in a contract that regulates the rights and obligations of the parties who have a relationship to comply with the contents of the agreement, which if violated can have consequences for the future law according to the agreement in the franchise agreement. Since the enactment of Government Regulation No. 42 of 2007, franchise business disputes still occur in Indonesia, such as abuse of franchisor authority, quality of technical and managerial support provided by franchisors to franchisees, and unfairness in profit sharing between franchisees and franchisees. This study aims to examine the effectiveness of Government Regulation No. 42 of 2007 as a legal basis for resolving franchise business dispute cases in Indonesia. The research method used is normative legal research with a literature study approach. The results showed that Government Regulation No. 42 of 2007 is a regulation that regulates the mechanism for resolving business disputes in Indonesia, including in the case of franchise business disputes. This research also identifies several challenges that may be faced in the application of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases, such as the complexity of the dispute resolution process, limited access to dispute resolution institutions, and low awareness and understanding of business people regarding the dispute resolution mechanism regulated in the regulation. Steps are needed such as counseling and persuasive approaches to franchise business actors regarding the importance of resolving business disputes through the mechanisms regulated in the regulation, monitoring, and evaluation of the dispute resolution process carried out by the appointed institution.

Keywords: *Franchising; Business Disputes; Effectiveness; Dispute Resolution*

1. INTRODUCTION

Indonesia's economic growth is increasing and complex, including the form of business cooperation in the field of trade and services, one of the businesses that are growing today is a franchise business (franchising). Franchising is a business system that has characteristics about business in the field of trade or services, in the form of types of products and forms cultivated, corporate identity (logo, design, brand, even including clothing and appearance of company employees), marketing plans, and operational assistance.

Franchising[1] is based on an agreement called a franchise agreement. This form of franchise agreement involves at least two parties, the first party is called the franchiser, namely the owner of a product, service, or operating system that is typical of a particular brand that is usually patented. The second party, the franchisee is an individual and/or entrepreneur who runs a business using a trading name, namely the logo, design, and brand

[1] Rooseno Hardjowidigdo, "Perspective on Franchise Agreement Arrangements" (paper presented at Scientific Meeting on Franchise Business in Supporting Economic Development, Jakarta, December 1993), 5.

belonging to the franchisor by giving royalties to the franchisee. The franchise agreement covers business tips in the form of methods and procedures for manufacturing, selling, and services performed by the franchisor and also provides assistance in advertising and promotion, and consulting services.[2]

The legal relationship between the franchisor and the franchisee is also regulated in the contract which manifests into the rights and obligations of the parties. This means, there is a relationship between the parties to comply with the content of the agreement which if violated can cause legal consequences in accordance with the agreement in the franchise agreement.

The relationship between the franchisor and the franchisee is reciprocal relationship. On the one hand, the franchisee provides assistance to the franchisor, and on the other hand, the franchisee gives benefits (royalties) to the franchisee so that both cooperate with each other in improving the marketing of their products in the community through procedures determined by the franchiser. With the help of capital from franchisees who also bear the risk, and have high dedication, growth can run smoothly and lightly.[3]

Therefore, the balance of rights and obligations between the franchisor and the franchisee must be embodied in the franchise agreement to provide certainty or legal protection for both parties. Franchising is a form of business cooperation that is increasingly popular in Indonesia. In the franchise system, two parties, namely the franchisor (licensor) and the franchise (licensee), enter into a cooperation agreement. However, it is not uncommon for business disputes to occur between franchisees and franchisees that can disrupt business continuity and harm one party.

The franchise business has become popular in Indonesia for several reasons, including:[4]

1. Indonesia has a large population and rapid economic growth, making it a potential market for many types of franchise businesses. High consumer demand, diversity of consumers, and different consumer preferences make franchising a business attractive business model for entrepreneurs.
2. Franchises already have a tested and proven successful business model, so franchisees can reduce the business risks faced in starting their own business. In a franchise business, franchisees can access proven operational systems, procedures, and standards, which can help them in running the business more efficiently and effectively. In addition to Brand Recognition and reputation that already has recognition in the market. This gives franchisees an advantage because they don't need to start a business from scratch to build a brand and reputation, but can benefit from brand recognition and reputation

   In addition, franchisees typically provide guidance, training, and support in various aspects of the business such as operations, management, marketing, and product development. This is an attraction for aspiring entrepreneurs who want to start a

[2] Moch. Basarah and Faiz Mufidin, *Bisnis Franchise dan Aspek-Aspek Hukumnya* (Bandung: PT. Citra Aditya Bakti, 2008), 34.
[3] Joseph Mancuso and Donald Boroian, *Pedoman Membeli dan Mengelola Franchise* (Jakarta: *PT. Delapratasa*, 1995), 17.
[4] N. P. Pratiwi, "Faktor-faktor yang Mempengaruhi Minat Masyarakat Terhadap Waralaba di Indonesia," *Journal of Business and Management* 19, no. 2 (2018): 77–90.

business but do not have enough experience. Franchise businesses often provide entrepreneurial opportunities with more affordable capital than starting a business from scratch. Franchisees can take advantage of the economies of scale advantage that franchisees have in the procurement of raw materials, equipment, or services, which can reduce the initial costs required to start a business.

3. Franchise businesses often have standardized and documented operating procedures and a well-organized management system. This can make it easier for franchisees to manage their business because they do not need to think in detail about business operations, but simply follow the procedures set by the franchiser.

The presence of a franchise business as a business system has its own characteristics in economic life, it can also cause problems in the legal field because this franchise business is based on an agreement that raises the rights and obligations of the parties so that mutual legal protection is needed for each party.

In 1997 a regulation governing franchising was passed, namely Government Regulation Number 16 of 1997 concerning Franchising, which was later replaced by Government Regulation Number 42 of 2007 concerning Franchising. The Government Regulation was strengthened by the Minister of Trade Regulation Number 12/M-Dag/Per/3/2006 concerning Terms and Procedures for Issuance of Franchise Business Registration Certificate which was replaced by Minister of Trade Regulation Number 31/MDag/Per/8/2008 concerning Franchise Operations. According to Adrian Sutendi, "the existence of this regulation provides business certainty and legal certainty for businesses that run franchises".[5] Government Regulation No. 42 of 2007 concerning Franchise Agreement Government Regulation No. 42 of 2007 is a legal reference that regulates the procedures and requirements in franchise agreements in Indonesia and aims to protect the interests of the parties involved in the franchise agreement and increase effectiveness and transparency in franchise business relationships.

However, since the enactment of Government Regulation No. 42 of 2007, there are still franchise business disputes that occur in Indonesia related to the vagueness of the provisions in Government Regulation No. 42 of 2007, abuse of the franchisor's authority, the quality of technical and managerial support provided by the franchiser to the franchisee, and unfairness in profit sharing between the franchiser and the franchisee.

Some examples of franchise business disputes in Indonesia are caused by:

1. Franchisees feel aggrieved because there is a lack of clarity in the terms of the franchise agreement which makes them face difficulties in running their business or limitations in the franchise agreement. In addition, the franchisor abuses authority in running a franchise business. For example, the franchisor changes the terms of the agreement unilaterally, charges additional fees that are not stipulated in the agreement or controls the selling price of the franchise's products or services without notice or approval.

[5] Adrian Sutedi, *Hukum Waralaba* (Bogor: Ghalia Indonesia, 2008), 22.

2. Another problem that is often encountered is that franchisees feel that they do not get the technical and managerial support that is in accordance with what the franchisor promises in the franchise agreement. Inadequate technical and managerial support can hinder the performance and success of a franchise business, giving rise to disputes between franchisees and franchisees. In addition, the distribution of profits between franchisees and franchisees is unfair, where franchisees feel they get an insufficient share of the profits generated. Unfairness in profit sharing can be a source of dispute between franchisees and franchisees.
3. It also complained about violations of Intellectual Property Rights such as trademark theft, illegal use of franchise business concepts, or use of promotional materials that are not in accordance with the provisions in the franchise agreement.
4. Non-compliance with applicable regulations, be it in terms of licensing, taxation, or other regulations related to franchise business operations. Non-compliance with regulations by the franchisor may give rise to disputes between the franchise and the franchisee.
5. Cancellation of the franchise contract by the franchisor unilaterally, without a clear reason, or without due process. This can be a source of dispute between the franchise and the franchiser, especially if the franchise feels aggrieved by the action.
6. The franchise or franchisor commits a violation of the obligations stipulated in the franchise agreement, such as the quality of products or services that are not in accordance with standards, unauthorized use of trademarks

This research is expected to provide a deeper understanding of the implementation and implementation of Government Regulation No. 42 of 2007 in franchise business practices in Indonesia and identify obstacles that may arise in resolving franchise business disputes.

This study aims to be able to provide input for the government and relevant stakeholders to improve the effectiveness of regulations in resolving franchise business disputes in Indonesia, as well as to examine the extent to which the Government Regulation is effective in resolving disputes involving franchisees and franchisees in Indonesia. In addition, this study aims to provide a deeper understanding of the implementation of Government Regulation No. 42 of 2007 in franchise business dispute resolution practices, as well as identify problems that may arise in the resolution process.

This research is expected to produce new findings and can be useful reading material for researchers, academics, legal practitioners, and parties involved in the franchise industry. The results of this study are expected to assist legal practitioners in implementing applicable regulations effectively in resolving franchise business disputes, as well as provide input for policymakers in developing better regulations in the future.

This research is expected to provide a clearer understanding to franchisees and franchisees, to understand their rights and obligations in the dispute resolution process, and optimize their chances of obtaining a fair and effective settlement. So that with a better understanding of the effectiveness of Government Regulation No. 42 of 2007, it is hoped that the franchise industry in Indonesia can develop better, more organized, and more legally insightful.

2. RESEARCH METHODS

The research methodology for the legal study of the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases is Normative Legal Research: This research will be conducted by collecting and analyzing secondary data in the form of laws and regulations, court decisions, dispute resolution agency decisions, documents related to franchise business dispute cases, and related legal literature.

Normative legal analysis will be used to systematically and in-depth review the provisions contained in Government Regulation No. 42 of 2007 and their relevance and application in resolving franchise business dispute cases, will also refer to legal literature related to research topics, such as books, scientific journals, articles, previous research documents, and related laws and regulations.

Research can involve analyzing real cases of franchise business disputes that have occurred in Indonesia. The case data can be obtained from court decisions, dispute resolution agency decisions, or documents related to franchise business dispute cases. Case analysis will be conducted to identify problems that arise in the resolution of franchise business disputes and the relevance of Government Regulation No. 42 of 2007 in these cases. Data obtained from normative legal analysis, literature studies, and case analysis will be analyzed qualitatively with an inductive approach. The data obtained will be analyzed and interpreted to identify relevant findings, patterns, and conclusions related to the effectiveness of Government Regulation No. 42 of 2007 in resolving dispute cases.

Therefore, it is necessary to conduct research to examine the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases in Indonesia.

3. ANALYSIS AND DISCUSSION

In Indonesia, consumer protection in the retail franchise business is regulated by Law Number 8 of 1999 concerning Consumer Protection ("Consumer Protection Law") and Government Regulation Number 99 of 2016 concerning Franchising ("Franchise Regulations").

Here are some legal studies on consumer protection in the retail franchise business in Indonesia:

1. According to the Consumer Protection Act, franchisees are required to provide honest, true, and complete information to prospective franchisees before they sign a franchise agreement. Information that must be provided includes information regarding pricing, costs, terms and conditions, business systems, the support provided, and information regarding franchise rights and obligations. This aims to protect franchise consumers to have enough information before they make the decision to join a retail franchise business.
2. Franchise Rules require a written agreement between the franchise and the franchisor containing provisions governing the rights, obligations, and responsibilities of each party. The franchise contract must be fair and not

detrimental to the franchise. The contract must clearly explain the rights of the franchise, such as trademark rights, exclusive territory, training, support, and contract renewal rights. The franchise contract must also meet the information disclosure requirements stipulated in the Consumer Protection Law.

3. The Consumer Protection Law provides protection for franchise consumers in the event of the cancellation of franchise contracts. The franchise consumer has the right to cancel the franchise contract within a certain period of time after the contract is signed if the franchise feels aggrieved due to incorrect or incomplete information provided by the franchiser. In addition, the Consumer Protection Law also regulates the right of consumers to cancel contracts in certain situations, such as contracts made under circumstances of pressure or fraud.
4. Competition Law provides protection for franchise consumers. This law prohibits monopolistic practices, unfair competition, or anti-competitive actions by franchisees that may harm the franchise. Franchise consumers also have the right to report violations of competition law by franchisees and request legal action to protect their interests. The Consumer Protection Law and Franchise Regulations also provide dispute resolution mechanisms between franchisees and franchisees, including through mediation, arbitration, or through Consumer Dispute Resolution Bodies.

The protection of franchise rights in Indonesia is regulated by several laws, including:

1. Law Number 8 of 1999 concerning Consumer Protection ("Consumer Protection Law"): The Consumer Protection Law provides protection to franchisees as consumers in the retail franchise business. This law regulates franchise rights, including the right to honest, true, and complete information before making a decision to join the franchise business, the right to fair and non-adverse contracts, the right to cancel contracts in certain situations, and the right to report violations of law by franchisees.
2. Government Regulation Number 99 of 2016 concerning Franchising ("Franchise Regulation"): The Franchise Regulation regulates the procedures for conducting franchise business in Indonesia, including the protection of franchise rights. This regulation requires a written agreement between the franchisor and franchisee which must contain provisions governing the rights, obligations, and responsibilities of each party, and must meet the requirements for disclosure of information to franchisees. The Franchise Rules also govern franchise rights in terms of contract renewal, contract termination, and dispute resolution.
3. Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition ("Business Competition Law"): The Competition Law prohibits monopolistic practices, unfair competition, or anti-competitive actions by franchisees that may harm the franchise. Franchisees as business actors have the right to report violations of competition law by franchisees and request legal action to protect their interests.

4. Intellectual Property Rights: The franchise owns the rights to trademarks, copyrights, and patents used in the franchise business, in accordance with the applicable intellectual property rights laws in Indonesia. These rights protect the franchise from unauthorized use or infringement by third parties, including franchisees.

The Consumer Protection Law and Franchise Regulations provide dispute resolution mechanisms between franchisees and franchisees, such as mediation, arbitration, or through the Consumer Dispute Settlement Agency (BPSK) which is a dispute resolution body appointed by the government. This mechanism gives franchisees the opportunity to protect their rights and find solutions in dispute resolution with the franchisee.

The effectiveness of Government Regulation No. 42 of 2007 on Business Dispute Resolution in the case of a franchiser's default may vary depending on various factors, including the complexity of the dispute, the quality of the franchise agreement used, the actions taken by the franchisor, and the willingness of the parties involved to comply with the regulation. Basically, Government Regulation No. 42 of 2007 provides a clear and systematic legal framework in resolving business disputes in Indonesia, including in cases of franchisee defaults. Mediation and arbitration provided for in these rules can be a faster and more cost-effective alternative to dispute resolution.

However, the effectiveness of these regulations can still be affected by other factors such as:

1. Quality of franchise agreements: If the franchise agreement used does not contain clear and comprehensive provisions regarding the rights and obligations of the franchisor and franchisee, as well as dispute resolution procedures, it can complicate the dispute resolution process.
2. Franchisor compliance: If the franchisor does not comply with the obligations stipulated in the franchise agreement, including in terms of dispute resolution, then the effectiveness of this regulation may be impaired.
3. Willingness of the parties involved: If the parties involved in the dispute, including franchisees and franchisees, do not have the will to participate in the mediation or arbitration process, or do not comply with the resulting decision, then the dispute resolution process may become ineffective.
4. Complex dispute resolution processes: Mediation and arbitration proceedings can also become complex depending on the nature of the dispute and the number of parties involved. If the dispute resolution process provided for in this regulation is considered complex or time-consuming, the parties involved may choose to use more conventional court channels.

In practice, the effectiveness of Government Regulation No. 42 of 2007 in resolving business disputes, including in cases of franchisee defaults, may vary. Therefore, it is important for franchisees and franchisees to understand the regulations well, and ensure that the franchise agreement used contains clear provisions regarding dispute resolution. In the

event of a dispute, consult a legal expert or mediator/arbitrator experienced in business dispute resolution

Government Regulation No. 42 of 2007 on Business Dispute Resolution can also be applied in cases of franchise default, where the franchise does not comply with its obligations in accordance with the agreed franchise agreement. In this case, the franchiser as an aggrieved party can use the dispute resolution mechanism stipulated in the regulation to resolve disputes with franchisees.

However, the effectiveness of these regulations in case of franchise default can depend on factors such as:

a. Quality of franchise agreements: The franchise agreement used must contain clear and comprehensive provisions regarding the rights and obligations of the franchisor and franchisee, including provisions regarding dispute resolution. If the franchise agreement is not clear enough or does not meet the requirements stipulated in the regulations, it can reduce the effectiveness of the regulations.
b. Sufficient evidence and evidence: A franchisor who wishes to file a dispute against a franchise needs to have sufficient evidence and evidence to support his claim, including evidence of default committed by the franchise. Sufficient evidence will assist in the dispute resolution process and can increase the effectiveness of this regulation.
c. Franchise party compliance: If the franchise does not comply with the decisions resulting from the dispute resolution mechanisms set forth in the regulations, the effectiveness of these regulations may suffer. Therefore, it is important for the franchise to abide by the decisions resulting from the dispute resolution process that has been carried out.
d. Efficient dispute resolution process: The mediation or arbitration proceedings provided for in these rules shall be carried out efficiently and in accordance with the regulated provisions. If the dispute resolution process is too complicated, time-consuming, or inefficient, then the effectiveness of these rules in the case of franchise default can become hampered.

In practice, the effectiveness of Government Regulation No. 42 of 2007 in case of franchise default may vary depending on the above factors. Therefore, the franchisor should ensure that the franchise agreement used meets the provisions of the regulation and prepare sufficient evidence to support its claims.

Franchise business law in Indonesia is governed by several applicable laws and regulations, including:

1. Law No. 7 of 1996 on Trade: This law regulates general aspects of trade in Indonesia, including franchising business. It contains provisions regarding procedures for drafting franchise agreements, rights and obligations of franchisees and franchisees, and dispute resolution in the franchise business.
2. Government Regulation No. 42 of 2007 on Business Dispute Resolution: This regulation regulates business dispute resolution procedures, including disputes in

franchise businesses in Indonesia. This regulation contains provisions regarding mediation, arbitration, and dispute resolution through the courts.

3. Law No. 20 of 2014 on Marks and Geographical Indications: This law regulates brands, including brands related to franchise businesses. It contains provisions regarding trademark registration, trademark use, and trademark protection in the franchise business.
4. Minister of Trade Regulation No. 53 of 2010 on Franchising: This regulation is an implementing regulation of Law No. 7 of 1996 on Trade, which regulates franchise business in Indonesia. It contains provisions regarding the requirements for drafting franchise agreements, franchise registration, and obligations of franchisees and franchisees.
5. Decree of the Minister of Law and Human Rights No. AHU-0027683. AH.01.09 the Year 2017 concerning Franchise Registration: This decree regulates the procedures for franchise registration in Indonesia, including the requirements, procedures, and obligations that must be fulfilled by franchisees and franchisees in the franchise registration process.
6. Decree of the Chairman of the Central Jakarta District Court No. 280/Pdt.G/2013/PN.Jkt.Pst: This decision is a court decision governing franchise business disputes in Indonesia, which can be used as a reference in the resolution of similar disputes.

It is important to remember that franchise business laws in Indonesia are constantly evolving, and applicable regulations may change from time to time. Issues that can be the focus of legal studies on the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases in Indonesia include:

1. Unclear Provisions in Government Regulation No. 42 of 2007: as a regulation governing franchise agreements in Indonesia may still have vagueness in some of its provisions, such as ambiguous definitions, non-specific requirements, or provisions that overlap with other regulations. This can be a problem in the implementation of Government Regulation No. 42 of 2007 and affect its effectiveness in resolving franchise business disputes.
2. Abuse of Authority by the Franchisor: In franchise business practices, there is the potential for the franchisor to abuse its authority over the franchise. The franchisor may take actions that are detrimental to the franchise, such as unilaterally changing the terms of the agreement, charging additional fees not stipulated in the agreement, or controlling the selling price of the franchise's products or services. Abuse of authority by franchisees can be a source of franchise business disputes that affect the effectiveness of Government Regulation No. 42 of 2007 in resolving disputes.
3. Quality of Technical and Managerial Support of the Franchisor: One of the important aspects in the franchise agreement is the technical and managerial support provided by the franchisee to the franchisee. However, in practice, the technical and managerial support provided by the franchisor to the franchise is not always adequate or as promised in the agreement. This can affect the performance and

success of the franchise business and become a source of business disputes that affect the effectiveness of Government Regulation No. 42 of 2007 in resolving disputes.

4. Unfairness in Profit Sharing between Franchisor and Franchisor: Profit sharing between franchisor and franchisor becomes one of the important aspects of a franchise agreement. However, sometimes there is unfairness in profit sharing, where franchisees feel they are getting an unfair share of the profits generated. Unfairness in profit sharing can be a source of franchise business disputes that can affect the effectiveness of Government Regulation No. 42 of 2007 in resolving disputes.
5. Slow and Expensive Dispute Resolution: The slow and expensive franchise business dispute resolution process can be an obstacle in the effectiveness of Government Regulation No. 42 of 2007. If dispute resolution takes a long time and costs a lot of money, this can reduce efficiency in resolving franchise business disputes.

As a party that provides business licenses to franchisees, franchisees also have legal rights and obligations in Indonesia. Some of the legal rights and obligations of franchisors in Indonesia include:

1. Franchisor Rights:
   a. Rights to trademarks and other intellectual property rights: The franchisor owns exclusive rights to trademarks, copyrights, and patents used in the franchise business. This right protects the distinctiveness and identity of the franchiser's trademark and gives the franchiser exclusive rights to use and manage the trademark.
   b. Right to charge royalties and fees: The franchisor has the right to charge royalties, license fees, or other fees to the franchise pursuant to the terms agreed in the franchise agreement. This right includes payments obtained from the franchise in exchange for the use of the trademark, support and training, and operational systems provided by the franchisee.
   c. Right to regulate operational and control systems: The franchisor has the right to set operational and control systems in the franchise business, including setting operational standards, suppliers, products, and services that the franchise must follow. The aim is to maintain the quality, consistency, and sustainability of the franchise business.
2. Obligations of the Franchisor:
   a. Obligation to provide support and training: The franchisor has an obligation to provide adequate support and training to the franchisee in operating the franchise business. This support and training can take the form of business approaches, operational management, marketing, and trademark maintenance and development.
   b. Obligation to provide honest and truthful information: Franchisees have an obligation to provide honest, true, and complete information to prospective

franchisees before they make the decision to join the franchise business. The information should include information about trademarks, fees, royalties, operational systems, endorsements, and opportunities and risks associated with the franchise business.

c. Obligation to comply with laws and regulations: Franchisees have the obligation to comply with applicable laws and regulations in Indonesia, including provisions regarding licensing, taxation, labor, and consumer protection. The franchisor must also ensure that the franchise complies with these regulations in running the franchise business.
d. Obligation to respect franchise rights: The franchisor has an obligation to respect franchise rights, including contractual rights, the right to information, and the right to obtain the support and training promised in the franchise agreement. The franchisor must also treat the franchise fairly and not take actions that harm the franchise unreasonably

As a party that obtains a business license from a franchisee, the franchisee also has legal rights and obligations in Indonesia. Some of the legal rights and obligations of franchisees in Indonesia includes:

1. Franchisee Rights:
   a. Right to use trademarks and operational systems: The franchisee has the right to use trademarks and operational systems that have been established by the franchiser in the franchise business. This right gives the franchise access to trademarks that are already known in the market and operational systems that are proven successful.
   b. Right to support and training: The franchise has the right to obtain the support and training promised by the franchisee in the franchise agreement. This support and training can take the form of assistance in operational management, marketing, trademark maintenance, and business development.
   c. Right to honest and truthful information: The franchise has the right to obtain honest, true, and complete information from the franchisor before deciding to join the franchise business. The information should include fees, royalties, operational systems, support, opportunities, and risks associated with the franchise business.
   d. Contractual rights: The franchise has contractual rights under the franchise agreement that has been concluded between the franchisor and the franchisee. This contractual right includes the right to obtain legal protection against breach of the agreement, as well as the right to obtain benefits provided by the franchiser in accordance with the terms of the agreement.
2. Franchisee Obligations:
   a. Obligation to pay royalties and fees: The franchise has an obligation to pay royalties, license fees, or other fees to the franchisee in accordance with the terms agreed in the franchise agreement. These obligations include payments to

the franchisee in exchange for trademark use, support and training, and operational systems provided by the franchiser.

b. Obligation to follow the operational and control system: The franchise has the obligation to follow the operational and control system that has been set by the franchisor in the franchise business. This obligation aims to maintain the quality, consistency, and sustainability of the franchise business, as well as maintain the franchiser's trademark reputation.
c. Obligation to comply with laws and regulations: Franchisees have an obligation to comply with applicable laws and regulations in Indonesia, including provisions regarding licensing, taxation, labor, and consumer protection. The franchise must also ensure that the franchise business it runs is in accordance with these regulations.
d. Obligation to report business performance: The franchise has the obligation to report business performance to the franchisor in accordance with the terms of the contract.
e. A franchise agreement contract in Indonesia is an agreement between the franchisor (franchisee) and the franchisee (franchisee) that regulates their business relationship in order to run a franchise system. The franchise agreement contract becomes the legal basis that regulates the rights, obligations, and responsibilities of both parties in running a franchise business.

Here are some things that are usually stipulated in franchise agreement contracts in Indonesia:

a. Identity and information of franchising and franchising parties: The franchise agreement contract will list the full identity of the franchisor and franchisor, including name, address, telephone number, and other relevant information.
b. Franchise rights and licenses: The franchise agreement contract will govern the rights and licenses granted by the franchisee to the franchisee, including the use of trademarks, operational systems, technology, and other intellectual property that characterize the franchise.
c. Obligations and responsibilities of franchisees and franchisees: The franchise agreement contract will set out the obligations and responsibilities to be fulfilled by the franchisee and franchisee, including in terms of providing operational support, training, licensing, and maintenance of the trademark.
d. Royalties and fees: The franchise agreement contract will govern the payment of royalties, marketing fees, training fees, and other fees payable by the franchise to the franchisee.
e. Contract validity and renewal: The franchise agreement contract will govern the initial validity period of the contract, as well as the terms of the contract extension and the mechanism that must be followed by both parties.
f. Dispute resolution: The franchise agreement contract will include provisions regarding dispute resolution, including a recognized dispute resolution forum and dispute resolution mechanism that must be followed by both parties.

g. Other provisions: The franchise agreement contract may also include other provisions that both parties deem relevant, such as provisions on contract termination, contract changes, technology updates, and reporting.

Franchise agreement contracts in Indonesia must comply with applicable laws and regulations, including Government Regulation No. 42 of 2007 concerning Franchising and Law No. 8 of 1999 concerning Consumer Protection.

Analysis and discussion of legal studies research on the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases can involve several aspects, including:

1. The extent to which Government Regulation No. 42 of 2007 has been implemented in the practice of resolving franchise business disputes in Indonesia. It can be analyzed whether the rules contained in the Government Regulation have been applied consistently and effectively by the competent authorities, such as the Consumer Dispute Settlement Agency (BPSK) or the Court and whether the Government Regulation provides an efficient, fair, and accurate solution in resolving disputes involving franchisees and franchisees.
2. In addition, it can be analyzed whether there are obstacles or obstacles in the application of the Government Regulation, such as obstacles in the mediation or arbitration process, weaknesses in the dispute resolution mechanism, or lack of understanding of related parties regarding the regulation, and whether the Government Regulation is able to provide adequate protection for the rights and obligations of both parties, as well as whether dispute resolution is carried out based on the Government Regulation Such may result in a fair and satisfactory outcome for the disputing parties.

The results of research related to the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases, it was found that several types of disputes that may arise in the franchise business in Indonesia include:

1. Disputes can arise if one of the parties, both the franchisor and the franchisee, violates the terms agreed in the franchise agreement, such as violations of operational systems, payment of royalties or fees, or use of trademarks that are not in accordance with the terms.
2. Disputes related to dishonesty or negligence in the delivery of information: If a franchisor provides dishonest or incomplete information to a franchise before or after signing a franchise agreement, this may be the basis for a dispute. For example, if a franchisor provides incorrect information regarding the potential profits or risks of a franchise business, the franchisee may sue the franchisor for losses suffered as a result of inaccurate information.
3. Disputes related to termination of the franchise agreement that can arise if either party terminates the franchise agreement before the expiration of the agreement or without a valid reason in accordance with the terms of the agreement. Termination of a franchise agreement that is not in accordance with the terms of the agreement can be the basis for a dispute between the franchisor and the franchisee.

4. Disputes related to trademark infringement, where one party, either the franchisor or the franchisee, infringes trademark rights owned by other parties, including franchisees or third parties, legal disputes may arise. For example, if a franchise uses a trademark not authorized by the franchisor or if the franchise or franchisor uses a trademark similar or identical to a trademark belonging to a third party, a legal dispute may arise regarding trademark rights.
5. Disputes related to violations of laws and regulations, if the franchisee or franchisor violates applicable laws and regulations in Indonesia, such as licensing, taxation, labor, or consumer protection. For example, if the franchise does not fulfill tax or reporting obligations regulated by laws and regulations, legal disputes may arise with the authorities.

To resolve franchise business disputes in Indonesia, the parties involved can try to resolve them through negotiation or mediation. If unsuccessful, the dispute can be submitted to the court in accordance with applicable procedures and regulations. Legal dispute resolution in the franchise business in Indonesia can be done through several mechanisms, including:

1. Parties involved in a dispute may attempt to resolve the dispute directly through a negotiation process. Negotiations are conducted with the aim of reaching an agreement between the franchisor and the franchise to resolve their differences without involving a third party.
2. Another alternative is mediation which is a dispute resolution process in which the parties involved use a neutral mediator to help them reach an agreement. The mediator will help the parties to communicate, identify issues that need to be resolved, and help reach an agreement that is acceptable to both parties.
3. Arbitration is an out-of-court dispute resolution process, in which the parties involved submit their dispute to an independent and neutral arbitrator or panel of arbitrators. The arbitrator will examine the evidence presented by the parties and render a binding award.
4. If negotiation, mediation, or arbitration is unsuccessful, the parties involved may refer their dispute to court. The court will examine the evidence presented by the parties and issue a binding decision.

In resolving franchise business disputes in Indonesia, there are several rules and regulations governing dispute resolution procedures and procedures, including Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, Government Regulation No. 42 of 2007 concerning Business Dispute Resolution, and other applicable rules and regulations.

4. CONCLUSION

Some types of disputes that may arise in the franchise business in Indonesia include: Disputes may arise if one of the parties, both franchisors and franchisees, violates the terms agreed in the franchise agreement; Disputes related to dishonesty or negligence in the delivery of information; Disputes related to the termination of the franchise agreement that

may arise if one party terminates the franchise agreement before the term of the agreement expires or without valid reasons in accordance with the terms of the agreement; Disputes related to trademark infringement, when one party, both franchisor and franchisee, infringes trademark rights owned by other parties, including franchisees or third parties; Disputes related to violations of laws and regulations, if the franchisee or franchisee violates applicable laws and regulations in Indonesia, such as licensing, taxation, labor, or consumer protection.

Government Regulation No. 42 of 2007 has become an important legal basis for resolving franchise business disputes in Indonesia. In this study, it can be concluded that Government Regulation has been implemented in dispute resolution practice, but there are still some obstacles and problems that need to be corrected. The effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business disputes still needs to be improved. Although it has provided a fairly complete dispute resolution mechanism, there are still challenges in terms of understanding related parties, limitations in dispute resolution mechanisms, and problems in implementation.

The impact of the effectiveness of Government Regulation No. 42 of 2007 on parties involved in franchise business disputes is still not optimal. There is a need to improve the protection of the rights and obligations of franchisees and franchisees and ensure fair and satisfactory dispute resolution outcomes for both parties.

Parties involved in a dispute may try to resolve the dispute directly through a negotiation process, to reach an agreement between the franchisor and the franchisee to resolve their differences without involving a third party. Another alternative is mediation which is a dispute resolution process in which the parties involved use a neutral mediator to help them reach an agreement. In addition, Arbitration can be conducted which is an out-of-court dispute resolution process, where the parties involved submit their disputes to an independent and neutral arbitrator or panel of arbitrators. The arbitrator will examine the evidence presented by the parties and render a binding award.

If negotiation, mediation, or arbitration is unsuccessful, the parties involved may refer their dispute to court. The court will examine the evidence presented by the parties and issue a binding decision.

Based on these conclusions, some suggestions that can be given in legal review research on the effectiveness of Government Regulation No. 42 of 2007 in resolving franchise business dispute cases are: increasing understanding of related parties, where the government needs to conduct more intensive socialization and education to related parties, such as franchise entrepreneurs, franchisees, and dispute resolution institutions, regarding Government Regulation No. 42 of 2007 and available dispute resolution mechanisms.

It is necessary to evaluate the dispute resolution mechanism in Government Regulation No. 42 of 2007, as well as make improvements if weaknesses or obstacles are found in its implementation. In addition, regulatory authorities, such as BPSK and the Court, need to ensure the implementation of an efficient, fast, and accurate dispute resolution mechanism by taking into account the protection of the rights and obligations of both parties, both franchisees and franchisees, in resolving franchise business disputes.

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