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HARMONIZATION OF LAWS ON ELECTRONIC CONTRACTS BASED ON MODEL LAWS FOR THE ASEAN ECONOMIC COMMUNITY

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Abstract

Technological advancement has created new business practices such as utilizing electronic contracts. Utilization of electronic contracts, especially in international transactions, has pushed countries around the world to impose new regulations defining the legalities of electronic instruments. Challenges arise considering the global and borderless nature of electronic transactions faced with regulations of different countries that are not in sync with each other. This is especially apparent in Member States of the ASEAN Economic Community. This paper attempts to discover the ideal legal framework for electronic contracts in the ASEAN Economic Community. Based on the research and analysis, it has been found that there is a need for a harmonized legal framework regarding electronic commerce that can be adopted unaltered by Member States of the ASEAN Economic Community, which could be drafted by the ASEAN as an inter-governmental organization.

Keywords: *legal harmonization, ASEAN Economic Community, electronic contracts*

1. INTRODUCTION

The revolution of communication and information technology starting in the 20th century has resulted in a number of new regulations in various countries around the world, including Indonesia. The development of information technology created the internet and consequently a digital era that transformed people's life patterns. The various aspects of the human life that was previously conducted offline, now can be done online through the internet. In business, there are now electronic business practices such as the application of communication and information technology to support the business activities of a person, group of people, or a business entity. Electronic commerce creates the exchange of products and services between traders, individuals, groups of people, and business entities[1]. Thus, the way in which people contract and their attitude towards contracts made through electronic media also differs from ordinary contracts made through traditional channels.

Short for interconnection networking, the internet is a collection of open global communication networks that connects computer networks of different systems and of all sorts, using the communication types such as the telephone, satellite, and so on[2]. The internet is classified as one of the parameters of technological progress that has carried the world economy into a new era, knows as the "digital age", in which information and communication technology has occupied a very strategic role and position as it presents a new world order of no limits,

[1] Louis V. Gerstner, *Who Says Elephants Can't Dance: Inside IBM's Historic Turnaround* (Thorndike Press, 2003), 172; Paul Beynon-Davies, *EBusiness* (London: Macmillan Education UK, 2013), http://link.springer.com/10.1007/978-1-137-29266-7.

[2] Alfian Hidayat Kamal, "Sistem Pendukung Keputusan Penentuan Harga Pemasangan Internet Di CV. Lontas Smart Media Dengan Pendekatan Logika Fuzzi Inference System Madani" (Universitas Muria Kudus, 2018).

distance, space, and time. It has an impact on increasing productivity and efficiency in trades of goods and services[3].

The internet has created opportunities and challenges of the 21st century with its cultivation. Opportunities sprout in the form of democratization of culture, business, equality and electronic commerce. Trade is no longer limited to face-to-face interactions between sellers and buyers. With the development of technology, trade can be done through the cyberspace where humans perform various activities without the need to directly face each other and be obstructed by the boundaries of space, time and geographical areas. Users conduct trading activities or business transactions without having to know one another, nor buyer, seller, and the product being traded ever being in the presence of one another. With the internet, society has a wider range of space in choosing products in the form of goods and services desired[4].

Along with the abovementioned opportunities, challenges also arise for the international legal system and the legal system of each country. Electronic transactions are "global, borderless, virtual, and anonymous", which affects tax law, contract law, and the application of cross-border intellectual property laws. The contract between the buyer and seller is done by electronic media; the parties are not physically present. Given the unlimited nature of the internet, transactions in electronic commerce are independent of regional and national boundaries[5]. The internet forms a "global village" which according to Mark Federman is the culture of a place, where the place is defined as "nowhere" and "everywhere". Federman states that presence of the internet is a matter of debate caused by its nature of not being easily seen, felt, or touched[6]. The internet's borderless nature presents itself a challenge as the legal system that we have known for the better part of the century is based on the state, territorial boundaries, and physical presence (legal jurisdiction)[7]. Thus the emergence of electronic transactions, which easily break down national boundaries, is a call for lawmakers in each country of the world to come up with a solution to regulate the cyberspace and its citizens' dealings on the internet.

As a response to the changing dynamics, opportunities, and challenges cropping up due to advances in technology, a number of countries in Southeast Asia, such Singapore, Malaysia, and the Philippines, have made changes to their legislation, regulations, and have made specific policies regarding the internet and electronic transactions. A couple of examples namely are Singapore issuing the Electronic Transactions Act 1998 and the Electronic Commerce Act of the Philippines.

The need to regulate not only the offline world, but also the cyberspace as a guideline for the legal subjects involved. Its aim is to provide certainty for said legal subjects that exchange information across national boundaries, which can no longer be determined by the

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[3] Siswanto Sunarso, *Hukum Informasi Dan Transaksi Elektronik (Studi Kasus: Prita Mulyasari)* (Jakarta: Rineka Cipta, 2009), 39.

[4] Arsyad Sanusi, "Efektivitas UU ITE Dalam Pengaturan Perdagangan Elektronik (e-Commerce)," *Jurnal Hukum Bisnis* 29, no. 1 (2010): 6.

[5] Sukarini, *Cyber Law: Kontrak Elektronik Dalam Bayang-Bayang Pelaku Usaha* (Bandung: Pustaka Sutra, 2008), 10.

[6] Mark Federman, "The Cultural Paradox of the Global Village" (Toronto: University of Toronto, n.d.), 1, http://individual.utoronto.ca/markfederman/CulturalParadoxOfTheGlobalVillage.pdf.

[7] Richard Doernberg, *Electronic Commerce and Multijurisdictional Taxation* (The Hague: Springer Netherlands, 2001); Dale Pinto, "E-Commerce and Source-Based Income Taxation" (University of Melbourne, 2002); Bjorn Westerberg, *Cross Border Taxation of E-Commerce* (International Bureau of Fiscal Documentation, 2002); Richard Westin, *International Taxation of Electronic Commerce* (Kluwer Law International, 2002).

legal rules of a country, and instead leads to international regulations. As transactions are done between legal subjects of different nationalities and geographical areas, there need to be legal certainty provided by a legal framework that accommodates the unique nature of these online transactions. This is especially needed for countries that are part of a particular regional organization such as the ASEAN economic community established in 2015 which has the goal of constructing a highly integrated and cohesive economic society by the year 2025[8]. It is also to be noted that ASEAN as a region consists of a mixture of civil law and common law systems. Considering that and the fast-paced development of technology, it is imperative to work on harmonizing the laws between the ASEAN nations. Based on the matters discussed above, the main problem statement of this study is as follows: What is the ideal legal framework for electronic contracts in the ASEAN Economic Community?

This study employs the legal system theory by Lawrence M. Friedman. It is a theory, which divides the legal system into three components, namely the legal structure, legal substance, and legal culture.

System is mostly seen as a conception of all aspects and elements arranged as an integrated whole. In saying that, it means that the legal system is evidently an overall aspect and element that is arranged as an integrated whole pertaining to the law. Lawrence M. Friedman explained in his book several type groups of definitions of law as a preface to understanding the legal system. According to Friedman, the definition of law can be divided into a group that defines law in an institutional way, a group which equates the law with regulations, a group which defines the law based on its function, and a group which sees the law as a special type of process or sequence[9].

Despite the above groups of definitions of law, there is yet a definitive understanding of law reduced to a sentence or a paragraph that all legal scholars can agree on. There is no legal definition that is the most "correct", as definitions flow from the purpose or function of the person giving such definition[10]. However for the purpose of defining the legal system, in this case, we can take the definition of law as a set of rules in the form of regulations governing human behavior in a social, national and state setting which is naturally coercive and binding, containing prohibitions and/or orders that must be obeyed with strict sanctions for violators as to ensure security, order, and justice[11]. The law itself is a system[12].

Thus it may be concluded that the legal system is a legal order consisting of several legal subsystems possessing different functions but are interrelated with one another, in order to achieve a common goal, namely creating security, order, and justice in society.[13]

As previously mentioned, the subsystems of the legal system according to Friedman are the legal structure, legal substance, and legal culture. Friedman believes that the heart of the legal system is how the system converts inputs into outputs. How legal events turn into

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[8] Association of South East Asia Nations, "ASEAN Economic Community," accessed July 13, 2020, https://asean.org/asean-economic-community.

[9] Lawrence M. Friedman, *The Legal System, A Social Science Perspective* (New York: Russel Sage Foundation, 1975).

[10] Philip Selznick, *Law, Society and Industrial Justice* (Michigan: Russel Sage Foundation, 1969), 7; Muhammad Sadi Is, *Pengantar Ilmu Hukum*, ed. Winarno (Jakarta: Kencana, 2017), 125–126.

[11] Handri Raharjo, *Sistem Hukum Indonesia: Ketentuan-Ketentuan Hukum Indonesia Dan Hubungannya Dengan Hukum Internasional* (Yogyakarta: Media Pressindo, 2018), 25.

[12] Is, *Pengantar Ilmu Hukum*, 129.

[13] Handri Raharjo. *Loc. Cit.*

court rulings. He believes that those three elements are what determine how input is changed into output in the legal system[14].

The legal structure is the program that runs the legal system, such as organizational rules, jurisdiction, and court procedures. It means structure likened to the number of judges in court, the jurisdiction of the court, how there are courts that are higher or lower in competency, and the roles of the people bound by courts[15].

The legal substance is the output that functions to shape future outputs. Legal substance in the rules and provisions, including substantive rules and rules on how an institution should behave. H. L. A. Hart asserts that the characteristic of the legal system is this set of double rules, where there are primary and secondary rules. Primary rules being the norms of behavior itself, whereas secondary rules are norms about norms of behavior itself. Meaning secondary rules include how to decide whether the norms of behavior imposed on society are valid, and also how to enforce them. Both sets of rules are the output of the legal system that describes its behavior[16].

Lastly, the legal culture. It is a complement to the legal system. Friedman believes that what makes the legal system come alive is the social life. The legal system depends on external input. Thus, social impulses, namely human needs and demands, are things that influence the course of the legal process[17].

2. RESEARCH METHODS

The type of legal research method used in this study is the normative legal research method. It examines the law from an internal perspective. The research object is legal norms, and it uses materials obtained in literature such as the opinions of legal scholars in law books. Normative legal research functions to provide juridical argumentation where there is a vacuum, obscurity, and conflict of norms. Therefore, the theoretical basis used here is one found at the level of normative/contemplative legal theory[18]. This study uses the normative legal research method in order to find legal certainty by linking the problems occurring in practice with the existing legal norms, both documented and declared.

This research employs a Statute Approach, which is normally used in normative legal research, as it analyzes the rule of law in normal and general circumstances. One such way of employing the Statute Approach in this research is by examining the consistency of the provisions of the Constitution of 1945 with the Law and the laws and regulations under it. Another way is to examine the consistency of the provisions of some of the electronic contract laws in Southeast Asian nations to the provisions of an international instrument, namely a Model Law.

This research makes use of secondary data obtained from library research. This study is a research using available data. The legal materials consist of primary, secondary, and tertiary legal materials. Primary legal materials are authoritative and generally include statutory regulations and official courts decisions. Secondary legal materials consist of law books or journals containing research material in the form of legal principles and doctrines of legal

[14] Friedman, *The Legal System, A Social Science Perspective*, 12.
[15] *Ibid*.
[16] *Ibid*., 14.
[17] *Ibid*., 15.
[18] Mestika Zed, *Metode Penelitian Kepustakaan* (Jakarta: Yayasan Obor Indonesia, 2004), 1.

scholars relating to the research object. Lastly, tertiary legal materials and non-legal materials include legal dictionaries such as the Black's Law Dictionary and census data, as well as general encyclopedias.

3. ANALYSIS AND DISCUSSION

3.1. Overview of the ASEAN Economic Community's Goals and Impacts

Established on 8 August 1967, The Association of Southeast Asian Nations (ASEAN) is a concert of Southeast Asian nations originally consisting of the Founding Fathers, Indonesia, Malaysia, Philippines, Singapore and Thailand. Over the years since its establishment, other countries have joined including Brunei Darussalam in 1984, Vietnam in 1995, Lao PDR and Myanmar in 1997, and Cambodia in 1999. It sets out to promote peace and collaboration between member states and accelerate economic growth through close and beneficial cooperation[19].

Furthering such cooperation between member states, the ASEAN Economic Community (AEC) established in 2015 is a step towards regional economic integration. The AEC was established in order to reduce obstacles in regional trade of goods and services between Southeast Asian countries. It also helps to promote foreign investment. Essentially, the AEC aims to create a free market in Southeast Asia, which translates to improved competitiveness among ASEAN member states[20].

The AEC Blueprint 2025 consists of a number of characteristics and elements, one of them being a highly integrated and cohesive economy. This is achieved through seamless movement of goods, services, investment, capital and skilled labor throughout ASEAN, which in turn enhances trade and production network[21]. Another characteristic is the increased competitiveness and productivity of the ASEAN region as a whole through a number of different key elements, such as[22]:

a. Effective competition policy to ensure a level playing for all firms
b. Fostering the creation and protection of knowledge
c. Deepening ASEAN participation in Global Value Chains
d. Strengthening related regulatory frameworks and overall regulatory practice and coherence and the regional level

Seamless trade and increased productivity is a near impossible task without enhanced connectivity and sectoral cooperation, which is another characteristic of the AEC Blueprint 2025. It involves various sectors, including transport; information and communications technology; e-commerce; energy; food, agriculture and forestry; tourism; healthcare; minerals; and science and technology[23]. The AEC Blueprint 2025 also includes the characteristic of a resilient, inclusive, people-oriented and people-centered ASEAN[24]. And lastly, the AEC points to a global ASEAN integrating into the global economy through Free Trade Agreements and

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[19] Association of South East Asia Nations, "About ASEAN," accessed July 14, 2020, https://asean.org/asean/about-asean/.
[20] Ariawan Gunadi, "ASEAN Economic Community Impact for Indonesia," *Jurnal Opinio Juris* 19 (2016): 9, http://repository.untar.ac.id/id/eprint/1401.
[21] ASEAN Secretariat, *ASEAN Ecomomic Community Blueprint 2015* (Jakarta: ASEAN, 2015), 3, https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf.
[22] *Ibid*., 12.
[23] *Ibid*., 21.
[24] *Ibid*., 30.

Comprehensive Economic Partnership Agreements with other nations outside of Southeast Asia[25].

As a key driver in the economic and social transformation of ASEAN, Information and Communications Technology (ICT) promotes trade, investment, and entrepreneurship in the region[26]. A strong ICT infrastructure facilitates the growth of electronic commerce (e-commerce) that plays a significant role in cross-border trade. E-commerce lowers barriers to entry and operating costs for businesses and in turn highly benefits small and medium enterprises[27]. The AEC involves reducing tariffs, which then eases the flow of goods, which along with improved ICT infrastructure, accelerates the growth of e-commerce and digital economy. Southeast Asia is bound to see an exponential growth of up to an estimated $200 billion internet economy by 2025[28]. That is one potential impact of the establishment of the AEC.

Along with the beneficial impacts, the AEC also carries the consequence of member states having to cooperate with each other concerning matters that affect other countries in the region. One of which is enacting national laws and having legal frameworks that support the regional and economic integration in ASEAN. The AEC member states must enact laws that align with the AEC goals and Blueprint.

3.2. The Various Legal Systems in the ASEAN Economic Community

ASEAN consists of a diverse bunch of Member States with different economies, cultures, and political and legal systems. Some ASEAN nations adopt the civil law system[29], some adopt the common law system[30], while some others adopt a mixture of both[31]. Each country has their own set of rules relating to the use of electronic contracts. The law has to cater to and be accepted by the people in order to truly work, thus why each ASEAN Economic Community member with their own unique qualities and legal system has their own way of regulating electronic contracts.

Legal behavior is not to be understood without context, including cultural context. A legal system in actuality is a complex organism in which the structure, substance, and culture interact with each other[32]. Thus the workings of and any changes to a certain component affect the other two components and vice versa. For example, the different views on contracts where some countries rigorously negotiate the terms of a contract and strictly adhere to it, while some countries work out the contract in a collaborative fashion after the contract has been signed. The difference between those two policies and philosophies, as part of the overall national legal culture, may be reflected in the country's laws, that is the legal substance[33]. Lawmakers that are sensitive to the legal culture of its people would form and enact its laws according to the

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[25] *Ibid*., 35.
[26] *Ibid*., 23.
[27] *Ibid*., 24.
[28] Rajan Anandan et al., "E-Conomy SEA: Unlocking the $200B Digital Opportunity," *Think with Google*, last modified 2016, accessed July 14, 2020, https://www.thinkwithgoogle.com/intl/en-apac/future-of-marketing/digital-transformation/e-conomy-sea-unlocking-200b-digital-opportunity/.
[29] Namely Indonesia and Vietnam.
[30] Namely Singapore, Malaysia, Myanmar, and Brunei Darussalam.
[31] Namely the Philippines.
[32] Friedman, *The Legal System, A Social Science Perspective*, 16.
[33] Low Kee Yang and Phillip Zerrillo, "Negotiating the Legal Systems in ASEAN," *A Walk Through Asia* 5, no. 1 (2018), https://cmp.smu.edu.sg/ami/article/20180530/negotiating-legal-systems-asean.

mold of the legal culture, thus serving national interests while adhering to local customs. Such enacted laws are the legal substance component in a legal system, according to Friedman's theory. The legal substance component in this case is the enacted e-commerce laws in ASEAN. There exist some differences in regard to the content of such e-commerce laws, considering the various legal cultures of each Member State, which in turn affects the legal substance.

While there are differences, there are also some common features in the legal culture of ASEAN Member States. ASEAN countries value consensus and social harmony. In Asia in general, there is a larger social or religious order which contains law as a subordinate part of it. most of the culture is mainly concerned with laws that have to do with such social or religious order, thus laws that have little to do with them (in this case such as electronic contract laws) attracts a mere handful of people of the general population. Many ASEAN Member States also operate with more than one legal system coexisting. Legal pluralism is rampant due to the continuation of colonial legal order, modern state law, traditional law, and religious law[34].

The difference in legal cultures affect how each ASEAN Member State govern electronic contracts and e-commerce laws. One such difference is in the implementing bodies of the rules and regulations. Some countries have dedicated e-commerce offices and agencies that issue trustmarks ensuring the security of a website, while some others don't. Some countries have difficulties in enforcing existing regulations while some others have adopted forward-looking regulations addressing e-commerce [35]. These differences have led to difficulties in cross-border e-commerce in that some ASEAN countries are more ready than others to take on cross-border e-commerce and encourage its people to make cross-border e-commerce transactions and facilitating the electronic contracts resulting from those transactions.

Most e-commerce laws in ASEAN essentially acknowledge the validity of electronic contracts, however some of them phrase their acknowledgments of differently. In most Member States, in general the acknowledgment of electronic contracts is stated along the lines of "contracts made through electronic means should not be denied legality and validity solely on the grounds that it was made through electronic means.".[36] Such statement is in the same vein as the postulate: "what is valid in the real world, is also valid in cyberspace". This means there is no one certain definition of what constitutes an electronic contract, only that contracts not made through traditional means are subject to the same legality requirements as their traditional counterparts and cannot be denied validity just because of its electronic nature. Indonesia takes a different approach to this, as its e-commerce law specifically lists the requirements to be fulfilled in order for an electronic contract to be considered legal and binding.[37] Therefore, there is a narrower definition of a legal and binding electronic contract in Indonesia, as opposed to the broader understanding of what constitutes an electronic contract in the other ASEAN countries.

Another difference is related to when an electronic contract is formed. Electronic contracts consist of an offer and acceptance, all done through electronic media, with different

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[34] Christopher Heath, ed., *Intellectual Property Law in Asia*, 1st ed. (Kluwer Law International, 2003), 13–35.
[35] Singapore Economic Development Board, "E-Commerce in ASEAN: Seizing Opportunities and Navigating Challenges," last modified 2018, accessed July 22, 2020, https://www.edb.gov.sg/en/news-and-events/insights/innovation/e-commerce-in-asean-seizing-opportunities-and-navigating-challenges.html.
[36] See Article 6 of Singapore's Electronic Transactions Act and Article 6 of Brunei Darussalam's Electronic Transactions Order among others.
[37] Indonesia Government Regulation Number 80 of 2019 concerning Trade via Electronic System, Article 52.

electronic systems between the contracting parties, and different time zones. It comes into question of when exactly the moment is when the contract is officially formed. For example, in Indonesia it is stated that an agreement is formed and legally binding when an electronic acceptance is in line with the technical mechanism and substantial terms and conditions in the electronic offer[38], but then requires another electronic confirmation to be sent afterwards by the business.[39] On the other hand, in Singapore the moment of contract formation conclusion is not specifically determined, only the time and place of dispatch and receipt of electronic communications are regulated.[40] Therefore when it comes to international electronic contracts, it may cause disputes, regarding when a contract is concluded and whether or not one has been concluded. In such case, it must be decided upon which country's law prevails, that will then dictate the when and where of the contract formation.

3.3. Regional Electronic Contract Laws in the ASEAN Economic Community

The upsurge of online transactions in the ASEAN region translates to more electronic contracts being drawn up. An electronic contract can be defined as the online simulation of the traditional contracts[41]. This means that an electronic contract is essentially the same as a paper based commercial contract, except made through an electronic medium. The legislation of electronic contracts should be in the scope of traditional laws seeing as it is derived from the traditional contracts system. Putting electronic contracts legislation in a different scope of law would expose the whole business to prosecution by traditional laws[42]. However applying traditional contract laws on electronic contract practices is not a viable course of action, as it would not accommodate the different nature and quirks of electronic contracts. The online marketplace needs a set of rules and regulations that govern a number of factors contributing to protecting the market dynamics and ensuring fair competition[43]. Online stores face a number of challenges in cross-border e-commerce including legal and tax conditions[44]. It is imperative to eliminate such issues to maintain dynamic growth of online shopping abroad and cross-border e-commerce more competitive[45].

Recognizing the role of electronic commerce in driving economic growth and social development in the ASEAN region, the ASEAN members entered into the ASEAN Agreement on Electronic Commerce signed on 12 November 2018. As a platform for Southeast Asian countries to integrate efforts and efficiency in terms of economic cooperation, ASEAN is the

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[38] *Ibid.,* Article 44.
[39] *Ibid.,* Article 46.
[40] Singapore Electronic Transactions Act, Article 13.
[41] Ohanes Baljian, *E-Contracts: Legal Challenges* (Shiremyth, 2012), 2.
[42] *Ibid*.
[43] Lurong Chen, "Improving Digital Connectivity for E-Commerce: A Policy Framework and Empirical Note," in *E-Commerce Connectivity in ASEAN* (Jakarta: Economic Resaerch Institute for ASEAN and East Asia, 2020), 26.
[44] Arkadiusz Kawa, "Network Cooperation in Cross-Border e-Commerce: A Conceptual Model of a Logistics Platform," in *E-Commerce Connectivity in ASEAN* (Jakarta: Economic Resaerch Institute for ASEAN and East Asia, 2020), 199; Arkadiusz Kawa and Wojciech Zdrenka, "Conception of Integrator in Cross-Border e-Commerce," *Logforum* 12, no. 1 (March 30, 2016), http://www.logforum.net/volume12/issue1/abstract-6.html.
[45] Kawa, "Network Cooperation in Cross-Border e-Commerce: A Conceptual Model of a Logistics Platform," 201.

first region in the world to have an e-commerce agreement[46]. The objectives of the e-commerce agreement are to[47]:

a. Facilitate cross-border e-commerce transactions in the ASEAN region;
b. Contribute to creating an environment of trust and confidence in the use of-ecommerce in the ASEAN region; and
c. Deepen cooperation among Member States to further develop and intensify the use of e-commerce to drive inclusive growth and narrow development gaps.

The agreement contains a few key provisions regarding[48]:

1. **Paperless trade:** The agreement encourages Member States to use paperless trading administration by facilitating electronic documents through the use of information and communications technology (ICT)
2. **Electronic authentication and electronic signatures:** The agreement encourages Member States to acknowledge electronic signatures and encourage the use of interoperable electronic authentication
3. **Cross-border transfer of information by electronic means:** The agreement encourages Member States to facilitate cross-border e-commerce by allowing information to flow across borders through electronic means

The agreement comes as a part of the 2017-2025 ASEAN Work Programme on Electronic Commerce. Another part of the program includes updating the e-commerce legal framework and transparent national laws and regulations on e-commerce. In 2001, the ASEAN Secretariat published the e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure, which serves as a guide for Member States to enact national e-commerce laws in their respective jurisdictions with common basic concepts and general principles shared by the region. As of 2020, all of the ASEAN Member States have enacted their own national e-commerce laws, with the latest being Cambodia's Law on Electronic Commerce in November 2019.

The e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure provides general principles to have in an e-commerce law, such as[49]:

a. They should conform to international standards such as UNCITRAL's Model Law on Electronic Commerce and Draft Model Law on Electronic Signatures[50] so as to be interoperable with similar laws of other countries;
b. They should be transparent and predictable so that there is no legal ambiguity between transacting parties in an electronic transaction;
c. They should be technology neutral, meaning there should be no discrimination between the different types of technology used in e-commerce practices; and
d. They should be media neutral, meaning both paper-based commerce and electronic commerce are to be treated equally by the law.

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[46] Robbaita Zahra, "ASEAN Agreement on E-Commerce: What It Tries to Tackle," *ASEAN Studies Center*, last modified 2019, accessed July 21, 2020, https://asc.fisipol.ugm.ac.id/2019/09/17/asean-agreement-on-e-commerce-what-it-tries-to-tackle/.
[47] ASEAN Agreement on Electronic Commerce. 2018. Article 2.
[48] *Ibid.*, Article 7.
[49] ASEAN Secretariat, *E-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure* (Jakarta: ASEAN, 2001), 5, https://asean.org/wp-content/uploads/images/2012/Economic/TELMIN/e-Asean_Reference Framework.pdf.
[50] Now published since July 2001.

The above principles are in line with the principles stated in the ASEAN Agreement on Electronic Commerce such as: 1) the legal and regulatory frameworks in each Member State to support e-commerce shall take into account internationally adopted model laws, conventions, principles or guidelines; and 2) Member States shall endeavor to recognize the importance of the principle of technology neutrality and recognize the need for alignment in policy and regulatory approaches among Member States to facilitate cross border e-commerce. Most of the laws abide by the principles set out in the reference framework and the e-commerce agreement. However as a result of the different cultures, circumstances, and needs of each country, disparities are difficult to completely avoid. The regional legal system developed through these measures respects cultural sensitivities and national sovereignty[51]. Thus despite having the agreement and the reference framework, there are still discrepancies between the national e-commerce laws in ASEAN.

Aside from the agreement and the reference framework, the ASEAN likes to use Mutual Recognition Arrangements/Agreements (MRA) to work towards legal harmonization in the region. An MRA could be defined as[52]:

> "Principle of international law whereby states party to mutual recognition agreements recognize and uphold legal decisions taken by competent authorities in another Member State. Mutual recognition is a process which allows conformity assessments (of qualifications, product…) carried out in one country to be recognized in another country."

The use of MRAs is beneficial to the countries involved as they reduce costs in international cooperation by eliminating the costs of double testing and certification[53]. There is also a greater certainty of market access with manufacturer or traders meeting the technical requirement of importing countries without testing[54]. ASEAN employs MRAs to provide ease of cross-border trades, resulting in goods and services moving across borders freely. The only ASEAN MRA related to electronics is the ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, which facilitates cross-border trade of electronics.

3.4. Model Law as a Tool of Legal Harmonization

In an ideal world, having every country in a region to adopt the exact same laws would be a straightforward practice. In the real world, lawmakers must take into measure the varied levels of development and priorities each country has in creating laws that are interoperable and do not hinder any cross-border affairs. Especially with ASEAN as an inter-governmental organization, grouping by sovereign states of the Southeast Asia region, it cannot be a party to an international agreement. ASEAN's legal personality as an inter-governmental organization

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[51] Phet Sengpunya, "ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review," *Lentera Hukum* 6, no. 3 (December 31, 2019): 379, https://jurnal.unej.ac.id/index.php/eJLH/article/view/13709; Joanne Wong, "On Legal Harmonization Within ASEAN," *Juris Illuminae* 5 (2013): 1–2, https://www.singaporelawreview.com/juris-illuminae-entries/2015/on-legal-harmonisation-within-asean.

[52] OECD, "Mutual Recognition Agreements (MRAs)," accessed February 7, 2020, https://www.oecd.org/gov/regulatory-policy/irc6.htm.

[53] Anabela Correiea de Brito, Céline Kauffmann, and Jacques Pelkmans, *The Contribution of Mutual Recognition to International Regulatory Co-Operation*, OECD Regulatory Policy Working Papers (Paris, 2016), 53, https://www.oecd.org/regreform/WP2_Contribution-of-mutual-recognition-to-IRC.pdf.

[54] ASEAN, "How MRAs Help Industry in the Region," 2, last modified 2021, accessed February 7, 2021, https://asean.org/wp-content/uploads/2021/08/What-is-MRAs.pdf.

affects its competence to conclude treaties under international law and its capacity to enter into relations with other States or organizations. Since ASEAN is neither a sovereign organization nor a supranational organization like the European Union, ASEAN does not have a formal structure that can issue legal instruments binding for every Member State. Its legal framework is largely based on a regime of the international legal framework[55]. ASEAN has developed a legal framework that harmonizes the Member States' national laws into a regional legal system in which it provides a legal template in the form of a reference framework that serves as a guide for ASEAN Member States in enacting their domestic laws and regulations in their respective jurisdictions[56].

When talking about legal harmonization, we are referring to the coming together of legal systems. The most important element to be aware of in regard to legal harmonization is that it is created by willing participants[57]. Thus in the case of ASEAN, the efforts of harmonizing its various national e-commerce laws must be done willingly and through the consent of all Member States. Member States that agree to a harmonized norm also agrees to the supremacy of said norm to domestic law, thus setting up a harmonized norm as a superior form of norm. Despite the threats of shortsighted political calculations, ultimately, legal harmonization must present political, economic, as well as legal utility, practicality, and benefits[58].

There are two kinds of law in international law: hard law and soft law. Shaffer and Pollack claims that the two should not be viewed as binary categories, but as two ends of a spectrum[59]. Legal instruments falling more towards the hard law end of the spectrum have more compliance pull with more costly outcomes of incompliance than those falling more towards the soft law end[60]. On the other hand, soft law instruments facilitate compromise better and encourage mutually beneficial cooperation[61]. Soft law instrument are often easier to adopt because one or more of its elements may be loosened or changed to accommodate the interests of a participating country[62].

Soft law instruments come in different forms such as a set of principles for reference, decisions adopted by international organizations, or model laws. A model law is as its name suggests a model instrument. An international organization or a group of countries design a model instrument pertaining a certain issue to be adopted by countries either unaltered or with changes as required[63]. Unlike a convention, a model law allows any number of changes when

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[55] Phet Sengpunya, "ASEAN E-Commerce Legal Framework - Towards the Development and Prospects," *ปีที่ 10 ฉบับที่* 10, no. 2 (2019): 99, https://so01.tci-thaijo.org/index.php/truhusocjo/article/view/236826.

[56] *Ibid*., 106.

[57] Antonios Platsas, *The Harmonisation of National Legal Systems* (Edward Elgar Publishing, 2017), 1, https://www.elgaronline.com/view/9781786433282/9781786433282.xml.

[58] *Ibid*., 2.

[59] Gregory Shaffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance," *Minnesota Law Review* 94 (2010): 716, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426123#.

[60] Andrew T. Guzman and Timothy Meyer, "International Soft Law," *The Journal of Legal Analysis* 2, no. 1 (2010): 177, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353444#.

[61] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (July 9, 2000): 421, https://www.cambridge.org/core/product/identifier/S0020818300441111/type/journal_article.

[62] *Ibid*., 423.

[63] Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 2016), 6.

adopted to suit the adopting country's requirements. Although complete textual uniformity is unlikely to be achieved through adopting a model law, it may accomplish its harmonization objective if we consider successful harmonization as harmonization that enhances economic efficiency and substantiates reasonable expectations of the parties to transactions[64].

An example of a model law in the field of electronic commerce is the UNCITRAL Model Law on Electronic Commerce (1996) with Additional article 5 bis as adopted in 1998. It contains articles and provisions establishing rules for the formation and validity of electronic contracts, attribution of data messages, acknowledgment of receipt and determining the time and place of dispatch and receipt of such data messages[65]. For example, Article 11 of the model law states[66]:

> "In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."

A contract itself is a document, that contains information and consists of data. In the process of making a contract, before the conclusion, it is also often done through the exchange of information and data through electronic means. The UNCITRAL e-commerce model law acknowledges electronic versions of such documents, records, and information. Its provisions have influenced the e-commerce laws of ASEAN countries, including how it governs the use of electronic contracts.

The e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure while useful is not a model law. As opposed to the UNCITRAL Model Law on E-Commerce, the reference framework only contains instructions such as that an e-commerce law should have a certain scope and legal effects as set out in the reference framework. The same goes for the ASEAN Agreement on Electronic Commerce, which is a hard law. While Member States are legally bound to abide by the provisions of the agreement, it contains mostly broad principles regarding paperless trading and electronic authentication. Each Member State still has to adopt further national laws and regulations governing electronic transactions.[67]

One could argue that the cross-border use of electronic contracts could be governed by an MRA, seeing as MRAs have presently been implemented in ASEAN in a few sectors. When implemented to electronic contracts, MRAs could be used to encourage Member States to recognize each other's systems and methods of digital signatures and digital authentication. However, MRAs are only recognizing each other's qualifications, which means the scope of what is determined by MRAs is quite limited. Furthermore, one concern to be had regarding MRAs in the regulatory specificity and a possible lack of flexibility. Deeply entrenched regulations in the countries involved may significantly complicate the implementation of MRAs[68]. Thus even with MRAs, there may still be a need to revise the laws and regulations.

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64 *Ibid*., 7.

65 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 Bis as Adopted in 1998* (Vienna: UNCITRAL Secretariat, 1998), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf.

66 *Ibid.*, Article 11.

67 ASEAN Agreement on Electronic Commerce, Article 12.

68 Brito, Kauffmann, and Pelkmans, *The Contribution of Mutual Recognition to International Regulatory Co-Operation*, 55.

Model laws on the other hand would contain the specific provisions in a formulated article which a country or a Member State could adopt unaltered into its national e-commerce laws should it desire to do so. Apart from the aforementioned point, the reference framework also needs updating as it was first adopted in 2001. The 2017-2025 ASEAN Work Programme on Electronic Commerce does include the agenda of creating an updated e-commerce legal framework as an element. Such update may be done instead through the making of an e-commerce model law.

In creating a model law based on recent updates on the development of electronic contract usage around ASEAN, lawmakers should consider not only the electronic contract itself, but the ICT required to accommodate electronic contracts. As Friedman states, all components of the legal system interact and influence one another. ICT and certain regulatory bodies created for electronic contracts are part of the legal structure, while the laws and regulations are the substance. The model law may not only contain provisions on the electronic contract itself, but also the ICT and special authorities governing the use of electronic contracts, paperless trading, as well as digital signatures and authentications, even a special court tasked with settling disputes relating to or arising from electronic contracts and its paraphernalia. All elements of the legal structure (substance, structure, and culture) must be utilized to maximize legal certainty in electronic contracting. Considering how the legal culture in ASEAN has the general population more concerned with laws related to social and religious orders, the implementation of laws for electronic contracts might not be given particular attention in relation to its legal structure (authorities' efforts in implementation, communication between regulating bodies, and clear control and monitoring procedures). Thus the model law should not only acknowledge the use of electronic contracts, but pay great attention to how it's going to be implemented.

4. CONCLUSION

Based on the above discussion and analysis, it can be concluded that the establishment of the ASEAN Economic Community calls for an integrated economic system within the Southeast Asian region. The AEC'S aim to yield seamless trade and increased productivity in ASEAN demands enhanced connectivity as well as sectoral cooperation. Such cooperation involves all sorts of aspects, not excluding the legal framework. A set of national laws that mesh and coordinate with each other is especially relevant when it comes to electronic commerce, which transcends time and borders. Contracts concluded through electronic mediums as a result of e-commerce transactions need legal norms regulating the making and implementation thus providing legal certainty to those contracting electronically. The assurance of legal certainty in electronic contracting is one way of reducing the obstacles in regional trade of goods and services between Southeast Asian countries and consequently improves the regions' competitiveness against the rest of the globe. One such way of securing legal certainty is by creating a model law on electronic commerce which provides legal harmonization for facilitating cross-border e-commerce in ASEAN. While the e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure instructions such as that an e-commerce law should have a certain scope and legal effects as set out in the reference framework, a model law would generate greater benefits as it presents clear and specific provisions in a formulated article which a country or a Member State could adopt unaltered into its national e-commerce laws should it desire to do so.

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SECURING AGRICULTURAL LAND INVESTMENT CONTRACT: RESOLVING SALIENT AGRICULTURAL LAND DISPUTE IN INDONESIA

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Abstract

In 2014, Indonesia introduced a more progressive law to ease foreign investment on plantation. This policy seems to resuscitate the legacy of plantation during colonial time as a source of state revenue. This law however has not signified the increases in plantation companies. One of the major couses has been inadequate quality of contract such as lack of transparency, participatory and coherence. In practice the plantation contract still utilizes the outdated uniform contract based on 18th century Civil Code adopted from the Dutch Civil Code. These have challanged the certainty and enforcability. In line with the liberation of plantation in developing nations, the International Institute for Unification of Private law (UNIDORIT) is drafting the universal guideline for responsible agricultural land investment contract. The guideline aims at providing the model of responsible agricultural land investment contract. The model contract considers broad range of social, political, economy and cultural aspects to ensure that stackholder's interests are respected while it also needs to adhere global issues, such as food security, poverty elevation and environmental preservation. The article is part of study attempting to explore the deficiencies of the existing plantation contract and to seek the potential adoption of the UNIDROIT guideline in Indonesia. There are multi-facet challenges to adopt the UNIDROIT guideline as the stakeholders and legal council capacity are still limited. Those result in complexity during agricultural land dispute settlement process in which non-legal factors contribute to its success. This article explores to mapping the potential issues and seeking a strategic intervention to consolidate stakeholders's interest and to propose more effective agricultural land dispute settlement.

Keywords: *land tenure, land reform, land dispute*

1. INTRODUCTION

The transformation of land affairs from colonial to post-colonial system has created major problems related to the security and certainty of land holding. The problems often raise critical issues in promoting a just and fair dispute settlement in which disputes carries not only legal issues but also socio and political aspects. These emerging problems are the causes of the repressive government during the New Order Government (NOG) 1966-1997.[1] The represive government during the NOG made the tenurial system including agricultral land management

[1] During New Order Government (NOG), land issues was considered as a sensitive case because it is often related to the Communist Party Propaganda therefore the discourse on land tenure was banned. This has caused limited knowledge and capacity on land tenure. The NOG period neglected the opportunities to establish the foundation of land tenure. See in general Ben White (2005) *Land and Resource Tenure: Brief Notes*, in *Tanah Masih di Langit: Penyelesaian Masalah Penguasaan Tanah dan Kekayaan Alam di Indonesia yang Tak Kunjung Tuntas di Era Reformasi*. (Yayasan Kemala, 2005)

was severely locked,[2] lacking of independency of court from bureacracy and elite influence,[3] and unreliable land administration.[4] These create multi-dimensional land tenure uncertainty after the NOG collapesed in 1997 which hindered to opening the agricutural land investment.

In line with the Agrarian Law Reform 2001, there are three major pillars to achieve the equitable agricultural land management: firstly, the legal framework to ascertain the land holding, secondly the effective dispute prevention and resolution and third, responsible, responsive and transparent agrarian resource governance.[5] These three pilars of the argrarian reform will lead to continuous economic development in the rural areas as well as poverty eradication. The equitable tenurial system is expected to address the economic, social as well as political issues to achive the sustainable development goals.[6]

Recenty the government initiates a series of deregulation policies to opening the investemnt in agricultural land. The major policies related to local autonomy initiatives and the empowerment of civil society that envision land and agrarian resource management become important factors contributing to current economic, social and political both (in)stability. The agrarian reform needs to address multidimentional issues in related to the values and principles as well as effective governing laws to enhance a more condusive investment climate. The agricultural land investment however has not been significantly increassed as it was during colonial time. The agricultural contract provision would be a major source of deficiensies, but the dispute setlement mechansim has also been a source of uncertainty.

This paper aims at exploring deficiencies of the existing plantation contract and to seek the potential adoption of UNIDROIT contract guideline in Indonesia. There are multi-facet challenges to adopt the UNIDROIT guideline as the stakeholders and legal council capacity are still limited. In addition the land dispute mechanism is unable to uphold the certainty and security due to the complexity and deteriorating process.

2. RESEARCH METHODS

Study on land in developing countries is generally an interdisciplinary research. Research that uses an interdisciplinary approach allows obtaining an integrated understanding of the problems at hand.[7] This is due to the diversed functions of land from legal, social,

[2] A number of laws governing the use of land are conflicting with Basic Agrarian Law 1960, such as Law No. 41 of 1999 on Forestry, Law No. 4 of 2009 on Mining, Law No. 32 of 2009 on Environmental Law and other land related regulations. Sumardjono, M S W, *Kebijakan Pertanahan: Antara Regulasi Dan Implementasi* (2004) <http://www.kompas-online.com> at 14 April 2004

[3] Many Court Decisions are conflicting each others and the legal argument presented in court verdict is weak. See *Yurisprudensi Kasus Pertanahan di Indonesia*. (Mahakamah Agung Republik Indonesia, 2002)

[4] The bureacracy often is bounded with the patriachal culture and imprecision rules causing to the denial of general community interest. See Harsono, B, '*Reformasi Hukum Tanah yang Berpihak Kepada Rakyat*' dalam Adhie, B and Menggala, H B N (eds), Reformasi Pertanahan: Pemberdayaan Hak Hak Atas Tanah Ditinjau Dari Aspek Hukum, Sosial, Politik, Ekonomi, Hankam, Teknis, Agama dan Budaya, (Mandar Maju, 2002).

[5] Flourie, C dan Soewardi, B, *Institutional Framework Reform for Land Administration - Indonesia*, National Development Agency (BAPPENAS) and National Land Agency, 2000.

[6] Equitable land tenure would address multiple SDGs including Goals no, 1, 10, 15 and 16. See https://sustainabledevelopment.un.org/?menu=1300

[7] The interdisciplinary approach is intended to improve analytical and synthesis skills from the perspective of various disciplines. See Jufrina Rizal, *Multidisciplinary, Pluridisciplinary, Interdisciplinary and Transdisciplinary Approaches in Understanding the Symptoms of Law and the Diversity of Indonesian Society*, a paper presented at the National Conference of the Association of Legal Philosophy, Semarang: Fakultas Hukum Universitas Soegijopranoto, 2012, hlm. 8.

cultural, political and economic aspects. Or it can be stated that land issues can not only be seen and studied from one side, namely the legal aspects, but require the assistance of various other disciplines such as Sociology, Anthropology, Politics and Economics. As stated by B. Arief Sidharta that in the position as a practical science, law is a field for meeting and interacting with various sciences (converging) whose the final product is scientific and rational problem solving and can be accounted for.[8]

Likewise, because of the effects of social transformation, modern bureaucracy and national law on the land system in Indonesia, it is necessary to involve socio-legal studies. For this reason, socio-legal studies are also used in this research to answer the problems concerned. The basis for this consideration is that since the working of law involves a social space which is influenced by other fators outside the law itself. Law is not something that is autonomous, closing itself off to the world outside it. Therefore, in order to be able to explain legal problems with a more meaningful theoretical and practical work of law in society, the use of a socio-legal methodology was chosen to be used.

The study of law in this socio-legal sense cannot be separated from the context in which the law exists. [9] Here, law is not only defined in a limited way, which is associated with state law (positive norms that are generally accepted at a certain time and in a certain area and are declared as an exclusive product of a legitimate source of political power).[10] However, seen from a broad perspective, it is not only the state law that is intended but also the norm system outside it. Therefore, law can be interpreted in various ways because it is never separated from society or by borrowing Shidarta's statement, law is a multifaceted phenomenon.[11]

3. ANALYSIS AND DISCUSSION

Understanding socio-legal phenomena of plantation encompasses a wider background of legal framework in which the law exists and how the plantation business responses to the

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[8] See B. Arief Sidharta (2005) argues that although each science has autonomy which is built at the level of a closed system (such as law as a normative science), in the scientific context all these scientific groups basically open themselves in an open system so that they provide input to each other. However, jurisprudence has different characteristics from other sciences (sui generis) because of its unique workings and different scientific systems due to different objects of attention. What should not be ruled out is the normative character of legal science, namely that on the one hand, legal science is analytical empirical, but on the other hand, it is normative practical science. Check out the writings of Johny Ibrahim, *Theory and Methodology of Normative Law Research*, Surabaya: Bayumedia Publishing, 2005, p. 153 & 50. As a practical science, law science is required to immediately make decisions on a concrete event that occurs in society. On the one hand, law science must follow normative rules that have been presented (given), while on the other hand there is always the possibility of practical needs arising which are not entirely accommodated according to the prevailing positive norms. Also check the writings of Shidarta, Mapping Schools of Legal Thought and Their Methodological Consequences, *Metode Penelitian Hukum – Konstelasi dan Refleksi*, Jakarta: Yayasan Obor Indonesia, 2009, hlm. 157.

[9] Banakar (2005) viewed the opinion of Wheeler and Thomas which explains the meaning of the word 'socio' in 'socio legal studies' which represents the relationship between the contexts in which the law exists. Furthermore, it was stated by Sulistyowati Irianto that according to the explanation of Banakar & Travers (2005) socio-legal study is an alternative approach that tests doctrinal studies of law. See Sulistyowati Irianto, Introducing Socio-Legal Studies and Its Methodological Implications, *Kajian Sosio-Legal*, Editor: Adriaan W. Bedner dkk, Denpasar: Pustaka Larasan bekerjasama dengan Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012, hlm. 3.

[10] Soetandyo Wignjosoebroto (2009) Legal research is basically a scientific research, *Metode Penelitian Hukum Konstelasi dan Refleksi*, Editor: Sulistyowati Irianto & Shidarta, Jakarta: Yayasan Obor Indonesia, 2009, hlm. 90.

[11] According to Shidarta (2009) there are five major role of law: (1) law as an order of sovereign; (2) law as a principles of universal truth and justice; (3) law as reflection of expected behavior; (4) law as court decision in-concerto; (5) law as a people behavior in real case. See Shidarta, *op.cit.*, 2009, hlm. 150-5.

legal infrastructures. The coexistences of legal and non-legal aspects such as the culture and politics often create complexity to ensure legal certainty. Those may reveal the underlying causes of deficiencies in both agricultural land contract provision and dispute settlement mechanism that hinder the investment climate on agrarian land. The analysis therefore focuses on the three different aspects including the legal framework, the contract provisions, and the dispute settlement mechanism. Those three aspects are important to be discussed to highlight how the socio-legal phenomena affects to the working of law in Indonesia. The analysis and discussion are presented in the following.

3.1. THE LEGAL FRAMEWORK

The investment provisions both domestic and foreign investment were initially regulated in late 60's where the nationalization of the neglected Western properties and plantation was taken place.[12] The investment policy aimed at primarily to restore the Ducth plantation destroyed during the revolution war. The investment policy also targeted to providing immidiate source of income for the new government of Indonesia. The first foreign investment law in 1967 invited foreign investors with attractive fiscal packages including tax holiday and duty free for the imported machinery. The law also provided a safegard for the investment security and protection from the nationalization or local community claim. Furthermore, state guaranteed certainty and security by imposing special security armed forces to the plantation. This law however made a little impact to foreign investment due to the on going internal political conflict and the global uncertainty.

However during 70's to 80's there was an oil and gas booming. As one of the prominant oil and gas producers, Indonesia had relied state income on the oil and gas revenues. The foreign investment police went very slow and the policy even imposed a protection to foreign investors by the obligations of reinvestment and the limit of shared ownership up to 51%. The period of oil and gas booming prevented the foreign investment particularly in agricultural sector.

The late 80's the oil and gas booming ended and the government explored the foreign investment as a suplement of the state income. A series of the policies were enacted to ease the foreign investment by offering various incentives and increasing the limit of share to 95%.[13] The export oriented investments were given priority to be established in eastern part of Indonesia. Majority of the foreign investments are on the mining sectors.

The government further extended the policies for opening foreign investment to various sectors such as plantation, fisheries, forestry, transportation and infrastructures, public health and telecommunication.[14] Considering the increasing foreign investment, the government amended the law on foreign investment with the Law no 25 of 2007 on Capital Investment. This new law was prepared to provide more open policy to investment and gave autonomy to local government to invite investors in various fields.

[12] See the consideration of Law No. 1 of 1967 on Foreign Investment.

[13] See Presidential Decree no 17 of 1986 on The requiremetn of the domestic share ownership for foreign investor.

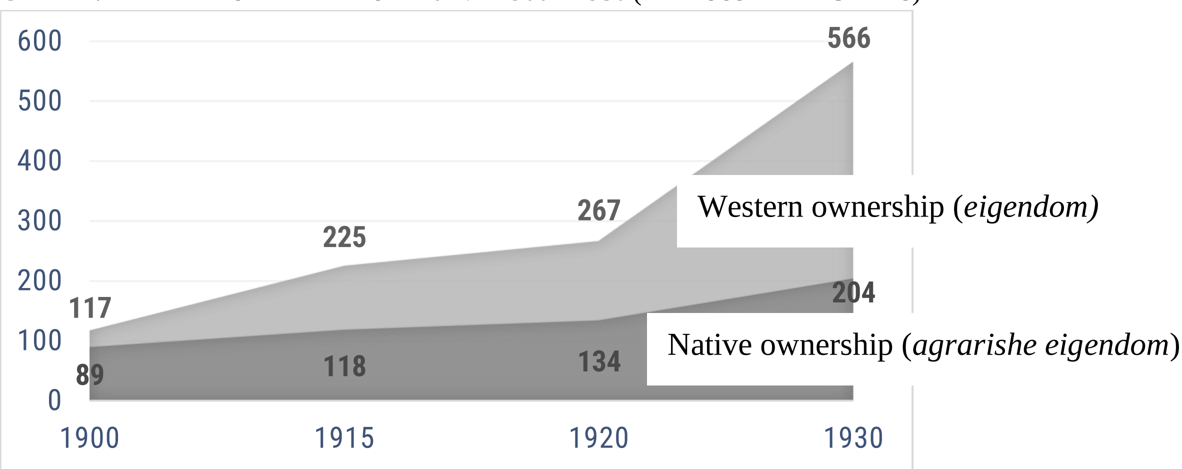
[14] See Government Regulation No. 20 of 1994 on the Share ownership obligation on the foreign investment company.

In line with the new law on capital investment, in agricultural sectors the new law on plantation was enacted in 2014.[15] This law initiated to open foreign investment on agricultural sectors which was previously prohibited. Following this law, the implementing regulation, Presidential Decree No 44 of 2016 on the Foreign Ownership on Plantation stipulated that the foreign investment may reach to 95% of share ownership with the local or domestic partner. However, there is an obligation of the foreign investment company to develop "nucleus" and "plasma" cooperation agreement in which the minimum of 20% plantation areas are devoted to plasma. The nucleus and plasma agreement are the important requirement where agricultural land investment needs also to adhere a global principle of SDGs to eradicate the poverty.

3.1.1. THE LEGACY OF DUTCH COLONIAL PLANTATION

In the late 1800's Dutch colonial government enacted *Agrarische Wet* 1870 (AW 1870) to open foreign investment for plantation. The numbers of plantation lease significantly increased, almost doubling in the early twentieth century. The number of long leases (*erfpacht*) granted under both Western ownership (*eigendom)* and native ownership (*agrarishe eigendom*) increased about five times over thirty years. During the ten years between 1920 and 1930, the figure of plantation leases for plantation doubled. The figures for the thirty-year period beginning in 1900 are shown in the following table.

GRAPH 1: THE AREA OF PLANTATION IN JAVA 1900 – 1930 (IN THOUSAND HECTARES)



Sources: (Furnivall, J.S., Netherlands India: A Study of Plural Economy (1994 (312)).

The numbers of plantation across Java showed that most plantation leases were under *erfpacht*, both long-term and short-term leases. Colonial government-owned plantations only contributed about 3% of total plantation.[16] In East Java particularly the area of plantation leased from customary (*adat)* land was the largest number compared to other parts of Java. This figure also shows that East Java had been a major contributor of plantation revenues during colonial

[15] See Law No. 39 of 2014 on Plantation.
[16] See Kartodirdjo and Suryo, *Sejarah Perkebunan Di Indonesia: Kajian Sosial Ekonomi* , 114.

time[17] and was subject to the most extensive exposure between adat and Western practices. The comparison of plantations is presented in the following table.

TABLE 2. THE AREA OF PLANTATION IN JAVA 1939 (IN HECTARE)

Region	**Gov. owned**	**Private owned**	**Long Term Lease (*erfpacht*)**	**Sultanate Plantation**	**Short term lease from *adat* land**	**Total**
East Java	1663	528	161860	-	64116	228167
West Java	6798	45400	196616	-	14818	263632
Centre of Java	10140	1001	34634	-	19756	65532
Yogyakarta	-	-	-	9748	810	10558
Surakarta	-	-	-	38363	1210	39579
Total	18601	46929	393110	48111	100710	607468

Source: (Van der Kroef in Kartodirdjo, S. and Institute of Southeast Asian Studies, Protest Movements ini Rural Java: A Study of Agrarian Unrest in the Nineteenth and Early Twentieth Centuries (1973)).

East Java and West Java contained major plantation leases that together amounted to about 80% of the total number of plantations in Java. This shows that since colonial times the customary system in Java has been exposed to a modern plantation system.

Another important point is that under the plantation system, the colonial government conducted major forest land clearing and transported migrant workers to clear forest and work on plantations. The colonial government promoted migrant workers to be granted cultivation permits and to work on plantation.[18] This policy escalated the development of plantation which also increased the amount of migration.[19] The grant of land lease and cultivation permit to migrant worker was another mode of customary land dispossession. This shows that the nature of customary systems evolved since the plantation system in colonial times.

Under the domain principle, an adat Indonesian's rights of cultivation and use was classified as native possession *(inland bezitsrecht)* which was as a secondary right granted under state domain (eigendom*).* To this *adat* right was also attached an "encumber domain" whereby the holder could be evicted at any time as determined by the colonial state as the owner of land.[20] This was also applied to inheritable *adat* land (*tanah yasan*). This *adat* land was classified as having an inheritable right of use (*erfelijk individuel bezit)* and therefore the

[17] See Kartodirdjo and Suryo, *Sejarah Perkebunan di Indonesian Kajian Sosial Ekonomi*, 85; See also Howard Dick, 'The Transformation of Comparative Advantage: East Java 1920-1990s' (1995) 31 *Bulletin of Indonesian Economic Studies* 1., 45-51.

[18] The open-door policy during plantation had contributed to the escalation of private investment and number of migrations in plantation area. See Kartodirdjo and Suryo, *Sejarah Perkebunan Di Indonesia: Kajian Sosial Ekonomi* , 96.

[19] Ibid 105. In most plantation villages, currently migrant worker originated from *Maduranese* ethnic is a majority population compared to other ethnics, such as Javanese and *Osing*. See Bumi Rejo, Kepatihan and Sumber Manjing village monographs. (data in Author's file).

[20] Nolst Trenite's proposition 3 and 4. as quoted by Burns, *The Leiden Legacy: Concepts of Law in Indonesia*, 83.

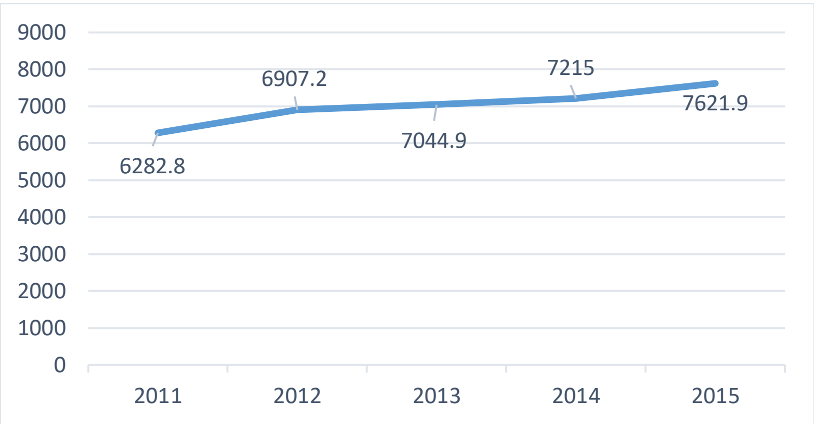
ownership of *adat* land (*tanah yasan*) vested in colonial government. Native Indonesians were only entitled to a possessory right under the colonial land domain.[21]

The plantation system altered customary systems regarding communal *ulayat* rights because the changes in socio-economic and demographic structures of villages greatly affected the nature of *ulayat* rights. Those changes include extensive land leases to non-villagers, the grant of land lease to migrant workers and colonial forms of land acquisition. These factors led to a lessening of *adat* authority on controlling and exercising *ulayat* rights. These phenomena clearly show that customary system has evolved since colonial times due to structural changes held on *adat* community.

3.1.2. THE AGRICULTURAL LAND INVESTMENT POST LOCAL AUTONOMY

Since local autonomy policy in 1997, local government is delegated substantial authorities by central government including to administer the foreign investment. The foreign investment has been liberated to various fields including the plantation. The increases of the plantation since the last ten year is progressing however the total area of the plantation are still far below the expectation of the increases of one million hectare per year.[22]

GRAPH 2. THE GROWTH OF PLANTATION AREA (IN THOUSAND HECTARES)



Source: National Statistics Bureau, https://www.bps.go.id/statictable/2009/09/08/1665/luas-areal-tanaman-perkebunan-besar-menurut-jenis-tanaman-000-ha-1995-2015-.html (retrieved on 10/04/2019)

Most of the plantation area are community owned plantation which is accounted for 41% of the total plantation area whereas foreign investment company is about 19% of the total plantation area. The domestic company is on the second biggest area which is about 34% of the total plantation. In term of the productivity however the foreign investment company contributes to the largest revenues as they are mainly for export purposes. The figure of the plantation ownership is as follows.

[21] Holleman, J F, *Van Vollenhoven on Indonesian Adat Law* (1981), XLVII.

[22] See Strategic Planning 2015-2019, Department of Plantation,http://ditjenbun.pertanian.go.id/ tinymcpuk/gambar/ file/info-publik/Rentra%20Ditjenbun%202015-2019.pdf

TABLE 3. THE OWNERSHIP OF OIL PALM PLANTATION

	Area (million Hectares)	%
Foreign investment	2,09	18,5
Domestic investment	3,89	34,4
State Owned	0,75	6,6
Community	4,57	40,5
Total	11,30	100

The current legal framework existed in different political situation post-local autonomy however has not been successfully reiterated the legacy of colonial plantation system. For five years period of 2011-2015 the plantation area growth insignificantly. The legal framework itself seems to be insufficient instrument to scale up the plantation industry. The other factor that may contribute to the deficiencies is the contract provision discussed in the following section.

3.2. UNIFORM AGRICULTURAL LAND INVESTMENT CONTRACT

In practice, the agricultural land contract utilizes the uniformed/standard contract which is drafted based on the Book II Indonesia Civil Code. The principle of contract used in Indonesia Civil Code was adopted from the 18th century Dutch Civil Code. The principle is simple and shallow. It is based on freedom of contract. The principle is divided into two main categories as objective and subjective principles. These principles are unable to accommodate the current business practice as well as community needs. The agricultural land contract particularly consists of:

1. Parties. The parties primarily cover only the contracting parties who have direct interest to the contract. Meanwhile in agricultural land contract, several parties may indirectly have an interest to the contract. The stakeholder of the contract can be local community, local government, the security officers and other influential people. These parties need to be included in the contractual agreement to ensure that their duties and liabilities shall also be articulated.
2. Rights and Obligation. The rights and obligation only limit to contracting parties as they are stated in the contractual agreement.
3. Period and Termination of Contract. The provision consists of the validity of the contract and the condition of termination. It is not however stipulated on the duties of the parties to perform the rehabilitation process.
4. The Force Majeure. Force Majuro provision consist of the condition of non-performance due to various aspects.
5. Last provision is dispute settlement. It stipulates general provision of the dispute settlement both through non court and in court settlement.

The simple and too general of the contract provision create an uncertainty and ambiguity which is unable to satisfy the demand of the modern business in agricultural land investment contract.

3.2.1. UNIDROIT MODEL CONTRACT ON AGRICULTURAL LAND

The UNIDROIT format and provision of the agricultural land investment contract are used to compare the existing agricultural land contract. The comparison between both contracts will be evaluated using swot analysis to reveal the threat as well as the opportunities of the adoption. The UNIDROIT model contract on agricultural land investment is created by using the previous standard contract of the Uniformed Standard Contract on *Voluntary Guideline for Responsible Governance of Tenure of Land, Fisheries and Forest* (VGGT) and the *Principles for responsible Investment* (CFS-IRI).[23] In addition provisions on the International treaties such as International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention on the Elimination of Racial Discrimination (CERD), The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), The Convention on the Rights of the Child (CRC), The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) are also being considered on the draft.

The model contract of the agricultural land investment (ALIC) consists of six major parts, including:[24]

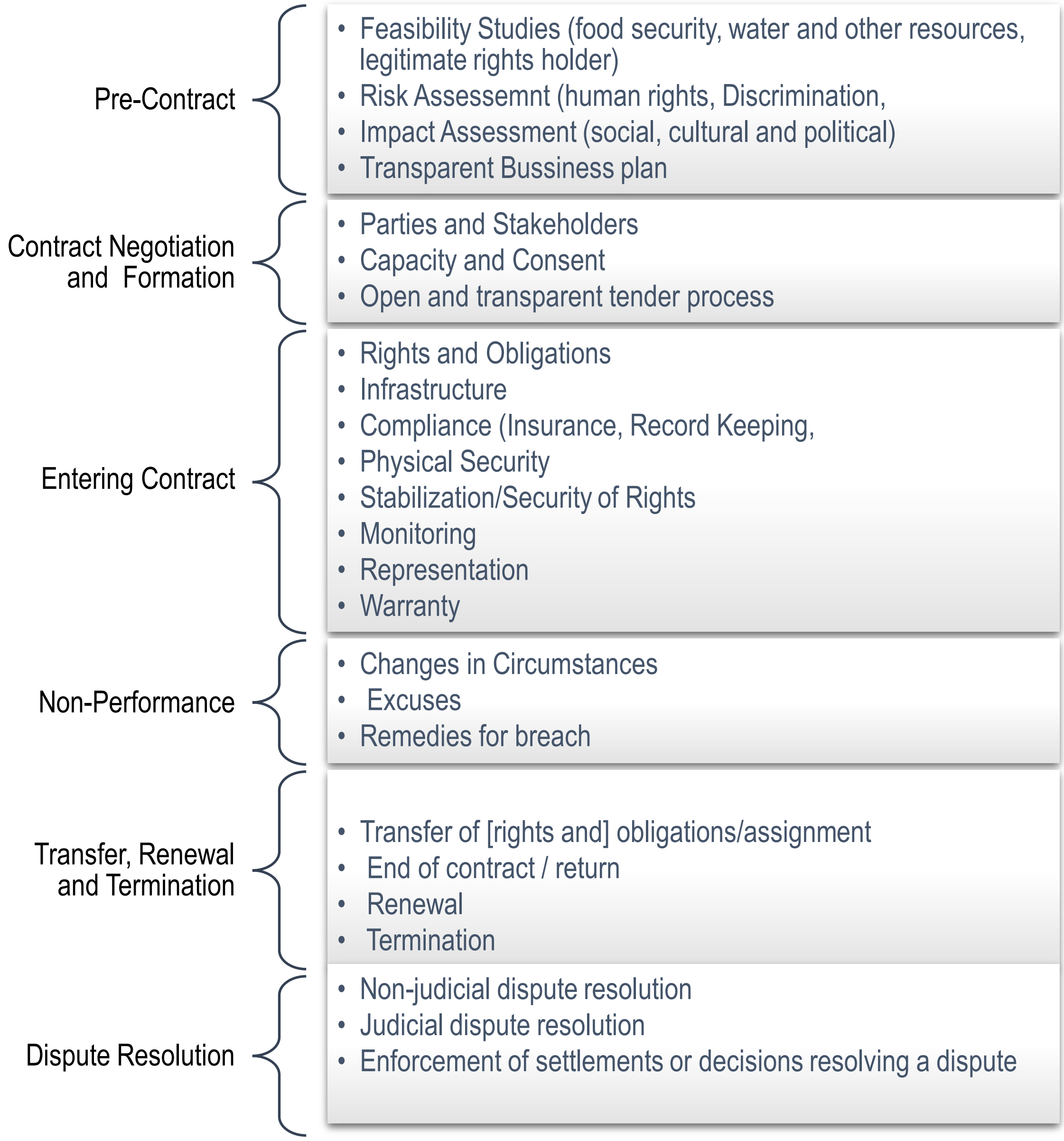
- *Pre-contract provision,*
- *Contract negotiation,*
- *Entering contract/contract provision,*
- *Non-Performance Clause,*
- *Transfer, Renewal and Termination, and*
- *Dispute Resolution.*

Those six components are the minimal requirement of the UNIDROIT model contract on the agricultural land investment that can be extended for the need of the interest parties. In more detail the UNIDROIT model contract is as follows

[23] Food and Agricultural Organization, *Voluntary Guideline for Responsible Governance of Tenure of Land, Fisheries and Forest* (VGGT), Lihat juga *Principles for responsible Investment* (CFS-IRI)

[24] Final Draft Agricultural Land Investment Contract (2020). https://www.unidroit.org/english/documents/2020/study80b/s-80b-alic-draft-e.pdf

GRAPH 3. UNIDROIT MODEL CONTRACT ON AGRICULTURAL LAND



Source: Final Draft Agricultural Land Investment Contract (2020).
https://www.unidroit.org/english/documents/2020/study80b/s-80b-alic-draft-e.pdf

In addition to the model contract provision, several the principle of international conventions are also considered to be inclusive on the contract. The principles of the convention include:

a. Risk and Impact assessment: This is articulated in various convention such as Universal Declaration of Human Rights, United Nation Declaration of the Recognition of Indigenous People (UNDRIP), CEDAW etc. Risk and Impact Assessment need to be undertaken during feasibility study including human rights risk, social, cultural, economic and political impact, legitimate tenure holder (indigenous people), food security, environment preservation, discrimination etc.
b. Transparency and accountability. This principle has been a very strong provision to prevent the corruption and public distrust as part of the promotion of good governance.
c. Social Obligation. Social obligation may include local food security, fair compensation, respect to local practices, local capacity building, etc.

d. Environment Obligation. Environment obligation may include impact assessment and management on the following aspects: pesticide utilization, pollution prevention, land fertile preservation, bio-diversity preservation, cultural heritage preservation and waste management.
e. Adherence to the rule. The adherence to the existing rules such as a fair and good business practice, anti-corruption provision, anti-monopoly and oligopoly.

The more comprehensive contract provisions based on ALIC adherence to various developmental objectives could be more likely to satisfy stakeholders' interests. The Agricultural Land Investment Contract (ALIC) model provides model of equitable agricultural land investment contract. As part of the ALIC model contract, dispute resolution needs to adapt to country-specific situation in which the dispute settlement commonly bears the existing political and cultural boundaries. The Indonesia specific dispute settlement mechanism is presented in the following part.

3.3. FACTORS AFFECTING LAND DISPUTES SETTLEMENT

Agricultural land disputed occured generally have a root that is relatively the same, namely a gap in land tenure which encourages poor peasants to cultivate land in the plantation area. In some cases of disputes encountered, many farmers in the village did not have land but on the other hand there was land that was abandoned by the plantation holding company. This condition encouraged the poor peasants to occupy abandoned plantation land, as in the case of PT. Tratak Plantation Company. Provision of concession rights for a long time to the owners of capital who in reality have not succeeded in developing their plantation business has led to land neglect.

As for other disputes, landless peasants and farm laborers claim that part of the land in the plantation area belongs to their ancestors so that the poor peasants reclaim, as happened in the case of PT. Ambarawa Maju, PT. Simbangjati Bahagia, PT. Segayung and PT. The show. In reality, plantation land aquitition that is not yet clear in cases of land disputes has triggered a prolonged dispute due to the land rights of poor peasants living around the plantations have been dispossessed. Similarly, cases of disputes relating to profit sharing schemes in cultivating land which, according to poor peasants, are seen as unfair. As found in the case of PT. Tratak Plantation Company and PT. Seashell. The profit sharing conflict subsequently ignited the occurrence of land disputes.

In resolving plantation land disputes in several areas in Batang Regency as stated, the power approach still dominates the dispute resolution process. In addition, the power approach also manifests itself in a repressive way of resolving disputes to enforce security and order in the community. The power approach was carried out by mobilizing all state apparatus in an effort to resolve the dispute issue. In this context, the involvement of many officials in fact opened the space for fraud to occur because of the interests of each actor. As happened in most cases of land disputes studied.

It also found that in land dispute resolution, it turned out that it was not only the approach and involvement of the actors who gave their influence. But also the mechanism and strategy chosen to resolve the dispute. Because the dominant actors involved, also the mechanisms and strategies chosen in dispute resolution are different, it shows that land disputes are complex. So to solve it, an approach is needed from various aspects, not only from the legal aspects but also from non-legal aspects.

3.3.1. Strategy and Mechanism

Until now, land dispute cases involving community farmers who live around the plantation area (in general are landless cultivators and farm laborers) and plantation HGU holders in the Batang Regency region are in different stages. Although the parties involved in the dispute resolution process in general are the same, namely the Office of the Agrarian and Spatial Planning / National Land Agency (Kanwil ATR / BPN) in Central Java and the Batang Regency Land Office, Batang Regency local government, politicians, police officers (Sector Police (*Polsek*)) and soldiers (*Komando Military District*) Batang, a cross-district organization such as the Batang Farmers Association Forum (FPPB) and the local farmer organization (OTL).

1. Approach Being Used

   In general, the approach used in the dispute resolution process is an approach to power that is legal-positivistic or legal-formal. In this thought the law is an explicit order from a sovereign ruler, which is stated clearly and explicitly. Therefore the law conceptualized as such is norms in written form, generally accepted at a certain time and in a certain area, and announced as an explicit product of authority that has legitimacy (borrowing the term John Austin as a command of the sovereign). This law, with reference to Hans Kelsen's opinion, is a coercive order.

   Apart from using a legal-positivistic approach, land dispute resolution also utilizes a legal-sociological approach. This is because the complexity of land disputes makes it impossible to use just one approach in resolving the dispute. The legal-positivistic approach is unable and impossible to answer the root causes of land disputes objectively rationally. Likewise the legal-sociological approach cannot produce decisions that directly have legal force because they do not have legitimacy for that.

   In the Indonesian context, the use of both approaches in land dispute resolution has strong relevance because law is part of ongoing social transformation in the community. Law is not merely written text in the form of legislation that is made in a vacuum that is sterile from the workings of aspects outside the law itself. The presence of law must be seen in a social perspective because the law is not only a rule but also a behavior.

   The approach used by actors in the land dispute resolution process cannot be separated from the purpose of resolving the dispute itself. If the aim is to impose the enactment of the norm, uphold rights without regard to relationships that have existed by explicitly establishing that one party is clearly guilty and the other party is clearly correct, the legal-positivistic approach is more appropriate. But if the goal is to maintain relations, maintain harmony, and reconcile by bringing together the interests of the parties to the dispute, the legal-sociological approach is more suitable for that.

   In particular, taking into account the reality obtained at the locus of study, the actions of citizens in relation to the purpose of dispute resolution can more be incorporated into the type of purpose rational conduct as Weber thought. Considering that in the dispute resolution process the community members were aware of their choices for the purpose of fighting for control and utilization of land. They also jointly determine the choice of these objectives by considering the modalities they have.

The other that need to be considered with regard to the approach in land dispute resolution in addition to the objectives of dispute resolution described earlier are characteristic of the dispute. In general, land disputes are multidimensional and multifaceted in nature, so that the resolution cannot only use one type of approach, as has been done so far, namely the formal legal approach. Also needed an approach which according to David Bloomfield emphasizes empirical conditions (practice generated approach) so as to enable the resolution of conflicts and / or disputes to take place flexibly and dynamically, depending on the relationship of objects and subjects as well as the social and cultural structure behind them. Bloomfield argues that the conflicts that occur are generally multidimensional and multifaceted so that the solutions are not always linear and sequential.

2. Dominant Actors Participating

The actors involved in resolving disputes play an important role in the process. Actors involved in the dispute resolution process can act as a deterrent to continuing disputes (dispute preventor) or even exacerbate disputes (dispalator dispute). The involvement of dominant third parties (actors) will influence the mechanism and dispute resolution strategy so that the outcome (output) of the dispute resolution can also be different.

The existence of dominant actors originating from formal institutions has a tendency to use formal mechanisms that are more quickly and decisively results oriented. Although the dispute resolution process in fact ignores the element of justice (fairness). Even in the process intimidation or pressure can occur. While the dominant informal actors who come from the community itself (figures who have traditional and charismatic authority), as well as academics and NGOs, tend to take efforts to maintain social integration and harmony. They better understand the situation and conditions that exist in the community so they try to bring together the interests of the parties to the dispute by looking for the right and acceptable middle ground for each party. Informal dominant actors will place more emphasis on mentoring and capacity building for parties to seek agreements that can benefit both parties. Such a process can take a long time and there is often manipulation and even escalation of disputes caused by uncertainty and the lack of guarantees of protection from weak parties against "provocateurs" who want an escalating conflict.

In the dispute resolution process in Batang Regency, the dominant actors who act consistently and become part of the land dispute resolution process can be grouped into 2 (two), namely: (1) Formal Dominant Actor (FDA); (2) Informal Dominant Actor Groups (IDAG). This formal dominant actors (FDA) includes BPN cq District / City Land Offices, Regional Governments (Districts/Cities), security forces such as the police (Sector Police (Polsek)), soldiers (Komado Rayon Militer (Koramil)). Some politicians also take part in this process but are not intensive. Politicians tend to take advantage of this situation to gain votes in the election of District People Representatives, as well as in regional head elections. They have no direct interest in being involved in the dispute resolution process, but the presence of politicians has an influence in carrying out mass mobilization and support. This is often used by certain groups to seek community support.

The Informal Dominant Actor Group (IDAG) is dominated by community leaders, academics, non-governmental organizations (NGOs). Their presence is to provide assistance in the dispute resolution process. IDAG prioritizes protection for citizens (poor peasants) who have low bargaining positions in the process of dispute resolution (process oriented). Through this assistance it is hoped that dialogue and compromise can occur which can benefit both parties. In the early stages IDAG disputes worked more informally to provide assistance in the dispute resolution process. However, the initiative to resolve disputes originated more from the parties themselves by involving IDAG as a mediator in the process. On several occasions IDAG took the initiative to carry out dialogues with the parties, especially during the time when the conflict tended to escalate which could lead to clashes between peasant farmers and farm laborers with masses from plantation companies holding HGU. The effort is to reconcile for the sake of maintaining harmony in the community. But if the conflict erupts, IDAG has the initiative to reconcile through intensive dialogues and mediate the dispute resolution process. IDAG is more focused on dispute resolution so that it can benefit both parties (win-win). The approach taken is not formal but substantial, with an emphasis on strengthening both parties to jointly decide on the dispute through the search for a middle ground that can bring all interests together.

3. Selected Mechanisms and Strategies

In each community there can be found a variety of ways to resolve the disputes it faces. Choice of the ways or mechanisms used to resolve inherent disputes in trust that develop in the community. Trust in the community in the locus of study is based on the value of harmony (togetherness) that is closely embedded in Javanese culture in order to maintain a harmonious situation in society. In a community like this, the purpose of dispute resolution is to maintain relations in order to maintain harmony so that the settlement mechanism is in the form of reconciliation and compromise by involving third parties in this case the mediator, peace-maker. But in reality the purpose of upholding rights by pushing ways to be declared as a party that is clearly true and the other party as clearly guilty, is also found in the lives of the people in dispute with plantation HGU holders in Batang Regency.

In general, the dispute resolution paradigm that exists in the community consists of litigation and non-litigation, in which an understanding is often aligned with dispute resolution mechanisms through courts (in-court settlement) and out of court (out-court settlement). In the context of this study the emphasis is not on the issue of using a court institution or not using it, but rather the approach chosen in the process of resolving disputes and the results of resolving the dispute. Therefore, from the dispute resolution approach can be obtained an overview of the values and norms that develop in the community in relation to the land and the operation of the law in regulating these vital resources. As for the results of dispute resolution, it can be known the purpose of each party to the dispute. This is needed to identify institutions or institutions that need to be developed to meet these objectives.

The mechanism and strategy of the dominant actor in the dispute resolution process, both non-litigation and litigation can be seen in the following table:

TABLE 4. MECHANISM AND STRATEGY OF AGRICULTURAL LAND DISPUTE RESOLUTION

Mechanism/ Strategyy	**Formal Dominant Actors**	**Informal Dominant Actors**	**Result**
Non-Litigation (Negotiation dan Mediation)	- confirms legal relationship between cultivators and HGU holders - offer profit sharing - offering shared cropping schemes	- farmers can still work on plantation land - abandoned plantation land was redistributed	- did not reach agreement - temporary results to reduce conflict
Mediation–Arbitrate	- encourages partnership programs with cultivators	- involving a third party, namely the National Land Agency as a mediator and at the same time functioning the arbitrator - review or test plantation land as abandoned land or converted land not in accordance with its designation - determination of abandoned land status	- determination the status of abandoned land - redistribution of land to cultivators -
Litigation	- the validity of ownership through a review of title certificates (HGU) - emphasizes formal evidence on the basis of positive rights and laws - Unlawful acts by looting plantation land	- acquisition or land conversion processes that ignore due process of law - social aspects and community needs for land - Western land originating from communal land	- winning one party

Because of the interests of the conflicting parties and the characteristics of a polysentric (multiple / varied) land dispute, the land dispute resolution model cannot be solved using just one approach (single approach). The proposed "Two Phase" land dispute resolution principle in principle separates the dispute resolution process into 2 (two) phases in the form of non-litigation settlement and litigation settlement, by including the conditions and context of the dispute which includes the involvement of the dominant actor, the use of the internal approach dispute resolution, and choice of mechanisms and dispute resolution strategies, which can then be used to predict the success or failure of the land dispute resolution process

3.3.2. TWO-TIER AGRICULTURAL LAND DISPUTE SETLEMENT

Agricultural land dispute settlement is complex in nature due to local characteristics, the approach being used and the capacity of the involved parties. Those are intertwined overarching legal and non-legal issues. Dispute settlement often proceeds in a nonlinear as well as non-sequential way that becomes uncertain and unpredictable. Considering those barriers, two-tier dispute settlement model is recommended to prevent escalation of dispute and complexities that would create other social unrest.

The two-tier model clearly distinguishes the dispute settlement mechanism based on the dominant actors involved either formal or informal actors. By understanding the involved dominant actors, it can be suggested the dispute settlement process that should be undertaken. Two-tier model would give better prediction of the resolution and outcome. In first stage, non-litigation process through either negotiation or mediation is initiated by parties. In this stage the outcome of resolution is highly determined by the dominant actor involved. When the dominant actors consist of formal authorities such as civil servants, police officers and army, non-litigation process would most likely be failure. The non-litigation focuses more on presenting evidence and legal arguments. Due to the failure of reaching the resolution, it then moves to second stage of litigation. The dispute settlement aims at primarily enforcing the law. In this case, the first stage of dispute settlement should be avoided. The dispute settlement should move to stage two. The stage two of litigation examines the evidence and legal arguments. The decision is made against the law and regulation and favors the party with the strongest legal evidence. The plantation company is more likely to win the case. The decision however will not last long as the community commonly reclaim the disputed land.

In contrast, when the involved dominant actors consist of informal actors such as non-government organization, lecturer or respected key persons, the first stage of non-litigation would be more effective. The negotiation and mediation are merely seeking compromises and mutual understanding. These dominant actors play important role in creating mutual understanding and compromises. The non-legal approaches are highlighted in order to reconcile the disputant and reach the consensual agreement. The agreement is commonly endorsed by the public authority such as National Land Agency (Badan Pertanahan Nasional) in province or district level. According to Presidential Decree Number 20 of 2015 on National Land Agency. It is stated that National Land Agency has an authority to administer land including to settle land disputes in its jurisdiction. In addition, the consensual agreement can be executed by the court based on the Supreme Court Regulation Number 1 of 2016. The signed agreement is binding and can be executed within 30 working days. This formality guarantees the execution of the consensual agreement.

In the second phase, dispute settlement is undertaken through litigation process. The litigation is done either by National Land Agency or court. On the second phase parties expect the decision made by public authorities to justify the claim. Therefore, the process of settlement is more adversarial to examine the evidence and legal argument. National Land Agency receives the claim from parties and setup the land dispute tribunal in its jurisdiction. The tribunal examines administrative evidence and validity of entitlement. The NLA proposes the mechanism to the involved parties to resolve the disputes. Negotiation and mediation will be offered at the first stage and then move to semi-litigation process where the examination of evidence and legal arguments are taken place.

The informal dominant actors use the NLA forum as a terminal process of dispute settlement to justify the entitlement and the recognition of the rights. As the negotiation and mediation has already reached consensual agreement, the NLA forum basically serves to legitimize the agreement. In contrary the formal dominant actors use the NLA forum to legitimize and justify the claim therefore the NLA forum serve to adjudicate the parties by examining the evidence and legal argument. The NLA forum is used by parties as "a pre-trial medium" in order to suspend the dispute. This suspension of the dispute may escalate conflict.

The last phase of dispute settlement is done by the court. The court proceeding is highly formal and focuses on the examination of the evidence against the existing law. The parties have to prepare necessary formalities including formal evidence and legal argument. Court only examines legal issues and is commonly ignorance to the non-legal issues. Due to multidimensional nature of disputes, non-legal issues play important role on the quality of decision including the validity of entitlement that needs historical prescription, the protection of vulnerable people as the basic human right and promoting sustainable development in the rural areas to elevate community welfare as the nation objectives. In practice, the court is unable to consider those non legal issues that are the essential

Because of the nature of the multi-dimensional conflict, the judiciary in general cannot accept considerations that are highly non-legal considerations in land conflicts. Because of its formal and positive nature, many non-legal aspects that are ideological and philosophical are ignored in the litigation process in court. The following is a chart of the intended "Two-Tier Model" of land dispute resolution:

FIGURE 1. TWO-TIER MODEL OF AGRICULTURAL LAND DISPUTE SETTLEMENT

"Two-Tier Model" land dispute resolution is an alternative land dispute resolution model that can be used to realize optimal results without having to go through a process that empirically does not produce the expected settlement and even the process of social disintegration and disharmony that requires a reconciliation process. This "Two Phase Model" is an improvement from the previous completion model that combines two strategies, namely non-litigation with administrative review and non-litigation with litigation. Through this model prognosis can be known the results of the dispute resolution process carried out. By considering 2 (two) dimensions, namely the dimensions of the dominant actor and approach, and the dimensions of the mechanism and strategy, the "Two Phase Model" can provide a comprehensive explanation of the land dispute resolution process that provides the best solution for poor peasant people regarding their access to control and utilization of land. In the opinion of the author, this "Two Phase Model" can prevent a protracted dispute resolution process that can lead to uncertainty and even conflict resolution.

Considering the complexity of land dispute problems "from the actors involved, sources of conflict, cultural, social and political factors, land dispute resolution" needs to be organized and systematic which is permanent rather than ad-hoc. The issue of land dispute resolution "has various dimensions from legal, political, social and cultural and economic dimensions. The resolution of land issues especially related to land use and control needs to be done by a special agency for land dispute resolution.

4. CONCLUSION

To reiterate the legacy of colonial plantation seems not only requires a legal framework to enable scaling up plantation industry in post decentralization era but it needs a more equitable model of contract provision that satisfies the stakeholders' interest. Considering that the agricultural land dispute is caused by multi-dimensional factors, the conventional model contract of agricultural land based on Book II Indonesia Civil Code would be a primary factor of uncertainty and insecurity. The current UNIDROIT ALIC provides more security and certainty as the contract provisions adhere the general principles of the responsible and equitable contract in agricultural sector in which the non-legal provisions have also been included in a ALIC model contract.

In addition, as the agricultural land dispute that always rooted in political and cultural setting, the understandings of the mechanism and strategy chosen, the role of the dominant actor are important because the success or failure of the dispute resolution process can be predicted in advance from the approach used by the dominant actors. Related to this, the writer proposes a "Two Tier" Model of land dispute resolution through this study. By considering the complexity of land dispute cases that have an impact on solving complex disputes.

The "Two Phase" model in land dispute resolution is intended to provide more optimal results within the framework of agrarian reform, namely the creation of agrarian justice for poor peasant people (landless peasants and farm laborers). The model departs from the characteristics of conflicts and or land disputes, approaches to dispute resolution, capabilities of the actors involved in dispute resolution, and the dispute resolution process which includes the following mechanisms and strategies chosen, as well as political support in the dispute resolution process

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THE LEGAL POLICY OF REGULATING THE CONCEPT OF FUTURE VALUE AMID THE DISCOURSE ON STATE FINANCES IN STATE-OWNED ENTERPRISES

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Abstract

The legal position of state finances also determines any state finance loss which occur as a result of a business decision made by SOE. Business decision made by the BOD of a company has significant impacts on the performance of an LLC such as revenue and increased value of the company. In order to generate profit, the BOD must be able to take appropriate corporate action. BOD of LLC often takes future value action by performing risky action which may damage the company in expectation of highest possible profit for the company in the future. In the context of SOE management is often viewed as detrimental to state finances because it's considered a corporate crime that ends with corruption. Problems occur when performing assessments of state loss as SOE and Law Enforcers have different perspectives. Law Enforcers often can't see the future value of a corporate action taken by SOE Persero. The problem in this paper is what is the Legal Policy of Regulating the Concept of Future Value in Determining State Financial Loss? Research method was judicial normative, which is a study that emphasizes the usage of written legal norms are related to the source's perception and view. Research result showed that if loss happened from the policy performed by the BOD of SOE (LLC) in corporate action for future interest of company shouldn't be automatically consider as criminal action as state financial loss because it must be investigated first and if the loss is smaller than profit generated by SOE also doesn't affect state assets which is deposited to SOE be viewed as an action by them to realize the vision and mission of SOE.

Keywords: *Future Value, SOE, Business Transaction, Legal Policy, State Finance*

1. INTRODUCTION

Indonesia must increase national economic growth evenly. Economic growth also must be encouraged by improving the welfare of the people of Indonesia in real terms[1]. One of agencies which have an important role in realizing this, is State-Owned Enterprise (SOE), which is a business unit that produces goods and/or services required for the benefit of the people. By establishing SOE, State plays its role as economic actor for public benefit by providing goods, services, and looking for profit for state revenue[2].

Politically and economically, there are three reasons for SOE establishment in Indonesia. First, being a vessel for state business through nationalization of foreign assets, e.g., in the 1950s, the Government nationalized Dutch companies in Indonesia. Second, building industries required by the society which the society (or private party) can't enter due to large investment or very high business risk. The government has done this in various ways, e.g., building urea fertilizer factories in several regions in Indonesia in the 1960s. Third, build very strategic industry related to state security and stability, e.g., PT Pindad (building industries of weaponry), and Perum Bulog (food stock management)[3].

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[1] RM. A B. Kusuma, Lahirnya UUD 1945 (Jakarta: Yayasan Paneur Siwah, 2009), 474.
[2] Safri Nugraha, Pengkajian Hukum Tentang Privatisasi Perusahaan Milik Negara Ditinjau Dari Undang-Undang Dasar 1945 (Jakarta: Badan Pembinaan Hukum Nasional, 2011), 41.
[3] Riant Nugroho and Randy R. Wrihatomolo, Manajemen Privatisasi BUMN (Jakarta: Gramedia, 2008), 15.

SOEs in Indonesia are found as the implementation of politics and economy mandated by Indonesia Constitution Article 33 (2), (3) and (4)[4]. The mandates also stated in Article 2 verse (1) of Law Number 19 of 2003 on State- Owned Enterprise (SOE Law), which states that the objectives of SOE are:

a. "Make contributions to national economic development in general and state revenues;
b. Make a profit;
c. Establish public benefit through the supply of high quality and affordable goods and/or services for the life of many people;
d. Become the pioneer of business activities that cannot be performed by the private sector and cooperatives;
e. Actively provide guidance and assistance to business people from the economically weak group, cooperatives, and society."

SOE Law defines SOE as an entity, the capital of which is in part or in whole owned by the State through direct participation that is derived from the State's separated assets. The definition of "Separated" in the Elucidation of Article 2 of SOE Law is separation of state assets that are derived from the State Budget to be used as the State's capital participation in SOE for henceforth the development and management are no longer based on the system of the State Budget, but development and management based on the principles of a sound company.

SOE Law is the basis for SOEs to be one of the economic actors in the national economic system besides the private sector and cooperate to support economic democracy. Moreover, SOEs expected to optimize their role and be able to maintain their presence in the world's economic development which becomes more open and competitive through the development of cooperative culture and professionalism, such as improvement and monitoring through the principles of GCG.

In practice, direct capital participation by the Government to SOEs through separated state assets often brings forth a dilemma for the (BOD), especially related to decision making for the interests of the Company management, particularly in making transaction and investment which contain business risk or legal risk. There is a difference in the understanding of state agencies, especially Law Enforcers which encourage and make great contributions to the situation. Moreover, differences in the principles of norms regulated by legislations also contribute to the difference in understanding.

The definition of state finances in Law Number 17 of 2003 on State Finances (State Finances Law) creates a dilemma when facing the definition of the word "separated" SOE capital. On one hand, SOE Law states that direction and management of state capital are separate to be the capital of SOE. Therefore, the management is no longer based on the APBN system, but based on the principles of company management and sound business mechanism. On the other hand, based on the State Finances Law, state rights and obligations still exist when state capital which has been separated become the capital of SOE, so there is confusion on the role of the State only as a shareholder in SOE or involved as a public entity in SOE.

[4] M. Iqbal Asnawi, "Implikasi Pengelolaan BUMN Persero Dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas," *Jurnal Hukum Samudra Keadilan* II, no. 1 (2016): 127, https://ejurnalunsam.id/index.php/jhsk/article/view/32.

Unclear content of Legislation is also found in the definition of state finances in the Corruption Law. According to the Corruption Law, state finances refer to the entire state assets in any form, whether separated or not separated, including within it all parts of state assets and all rights and obligations arising due to: being under the control, management and responsibility of SOE/ROE. The differences bring forth a consequence for BOD of SOE which puts them in a difficult position when making the decision, especially decision which has a risk of loss. Any loss incurred may cause them to be accused of incurring loss to the State[5].

There is controversy on SOEs' source of assets which is separated state assets, especially in terms of how SOEs' assets are treated as a part of state finances. Although SOE Law mandates the management of SOE Persero based on LLC Law, if state loss happens in SOE Persero, the Law Enforcers will use Article 2 letter g of the State Finances Law which states that separated assets are state assets the same as the Law Number 31 of 1999 as amended by Law Number 20 of 2001 on Eradication of Corruption (Corruption Law)[6].

Besides various legislations, BOD must perform business analysis on action which will be done, considering SOE also has the objective of making profit. In taking corporate action, BOD must consider various aspects and/or revenue they may gain as reward of the corporate action. Corporate action doesn't always look 'good' at the start of the implementation. BOD often must take extreme steps that are unusual for most people to save the Company and/or make maximum profit by utilizing some facilities and policies which have been released before which no longer produce maximum revenue.

There are at least two opinions on state assets in capital participation in SOE. First opinion still considers separated state assets as state finances, meaning state's participation from the State Budget is still considered a state asset[7]. The view is adopted by the Law Enforcers, Corruption Eradication Commission (KPK) and Audit Board of the Republic of Indonesia (BPK) as well as the Central Audit Board of the Republic of Indonesia. Second opinion considers separated state assets to no longer be a part of state finances because the status has turned into the finance of another legal entity, in this case SOE, and the responsibility is similar to the management and capital participation in private companies. The view is adopted by Arifin P. Soeria Atmadja and Erman Radjaguguk[8].

Since the position of the government is as a Shareholder in a Limited Liability Company (LLC) or performing capital participation, their position isn't as a public legal entity, because the duty of the government is to be a public legal entity, which Lemaire refers to as *Bestuurzorg*, to organize public welfare, in which the head of state administration is given freedom to act quickly and appropriately (*doeltreffen*) to address interests for public welfare[9].

Basically, in conducting its business activities, SOE conducts business like other enterprises, i.e., to make a profit. However, in reality, not all SOEs can make profit. Therefore, it's possible that BOD makes business decision which doesn't match the agreed business strategy.

Although GMS has made decision on the performance assessment of the BOD, including Board of Commissioners by giving *acquit et discharge*, financial still may happen to

[5] Prasetio, *Dilema BUMN: Benturan Kepentingan Business Judgment Rule BJR Dalam Keputusan Bisnis Direksi BUMN* (Jakarta: Rayyana Komunikasindo, 2014), 107.
[6] *Ibid*.
[7] Alfin Sulaiman, *Keuangan Negara Pada Badan Usaha Milik Negara Dalam Perspektif Ilmu Hukum* (Bandung: P.T. Alumni, 2011), 15.
[8] *Ibid*.
[9] *Ibid*.

Persero which will be an object of investigation of the Law Enforcers even the court[10]. Actually, the authority of BOD to take legal action isn't limited to the actions mentioned in the purpose and objectives, but also include other actions, i.e. actions which according to custom, fairness and propriety may be concluded from the purpose of intention of the Company[11]. Basically, the business decision made by BOD, in this case, SOE, has significant effect on company performance. Good company performance can generate benefits in terms of income and value of the company. A company that has good performance can increase its value in the present and future value. The future value of a company can be seen from the growth of the company's stock value in the future[12]. High future value gives profit to company shareholders, the government.

Problems often occur when making an assessment of whether any state loss happens, leading to different perspectives between SOE and the Law Enforcers. Law Enforcers often can't see future value of the action of an SOE Persero, which is a business action. The principle of taking a little loss to gain future profit in the perspective of policymakers in SOE is unacceptable for Law Enforcers and other state agencies, such as BPK and BPKP, which consider the state loss to not only be real but also potential, such as state revenue which will be received.

Therefore, the formulation of the problem in the present study was What is the Legal Policy of Regulating the Concept of Future Value in Determining State Financial Loss?

2. RESEARCH METHOD

The research method used in this study was judicial normative through statute, case, historical, comparative, and conceptual approach[13] and descriptive to gain a comprehensive, complete, and systematic picture of the research problem. The data comes from secondary data that uses primary legal material in the form of relevant legislations, secondary legal materials, and tertiary legal materials. The data collection techniques in the study were literature study and interviews. The data processing method went through editing process and the data analysis was performed qualitatively.

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[10] Prasetio, *Dilema BUMN: Benturan Kepentingan Business Judgment Rule BJR Dalam Keputusan Bisnis Direksi BUMN*, 107.

[11] Hasbullah F. Sjawie, *Direksi Perseroan Terbatas Serta Pertanggungjawaban Pidana Korporasi* (Bandung: P.T. Citra Aditya Bakti, 2013), 111.

[12] John J. Ballow, Roland Burgman, and Michael J. Molnar, "Managing for Shareholder Value: Intangibles, Future Value and Investment Decisions," *Journal of Business Strategy* 25, no. 3 (June 2004): 26, https://www.emerald.com/insight/content/doi/10.1108/02756660410536973/full/html.

[13] Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2010), 93.

3. ANALYSIS AND DISCUSSION

3.1 The discourse of State Finances in SOE

The definition of state finances is written in the State Finances Law and Corruption Law which state that:

1) Article 1 number 1 State Finances Law defines state finances as all rights and obligations of the State that can be valued in money, in the form of cash or goods that can be owned by the state in connection with the implementation of the rights and obligations. This is further explained in Article 2 letter g, covers state assets/regional assets managed on its own or by other parties in the form of cash, securities, receivables, goods and other rights that can be valued in money, including assets separated on state enterprise/local company.
2) The general elucidation of PTPK Law explains that state finances are the entire state assets, whether separated or not separated, including inside it all parts of state finances and all rights and obligations arising due to:
   a. being under the control, management and responsibility of the office of state agency, whether at the central or regional level;
   b. being under the control, management, and responsibility of SOE/Regional-Owned Enterprise (ROE), foundation, legal entity, and the company which includes state capital, or company which includes third party capital based on agreement with the State

Although those Laws have firmly place separated assets in SOE as a part of state finances, the stipulations often oppose the views of the principle of autonomy of private legal entity and theory of state finances transformation. According to these views, by changing the legal form of a SOE into Persero, the status of state finances which come from the separation of state finances in SOE (which in the SOE Law are said to no longer be subjected to the principles of State Budget Management) are no longer within the reach of the supervisory system of BPK on the usage of cash from the State Budget. This view puts aside the interests of the State to secure state money which enters the cash of SOE through subsidy mechanism, an appointment for public service, and capital participation.

Furthermore, the thought above isn't without legal basis. In general, those who have this view base it on Article 1 clause (1) of SOE Law. The Article is understood as when state assets have been separated, the assets are in the realm of private law. Article 11 of the SOE Law states the management of SOE Persero is performed based on Law Number 1 of 1995 on LLC and implementation (the LLC Law currently has been amended by Law Number 40 of 2007). It means that the LLC Law is consistent with the *lex specialis derograt lex generalis* which applies for SOE Persero. Therefore, if an SOE Persero experiences a loss, the loss isn't a state financial loss but a company loss, or often referred to as business risk as a private legal entity.

Differing views on the scope of state finances as described above continue until the issue is submitted for Material Test in Constitutional Court. Constitutional Court decisions Number 48/PUU-XI/2013 is related to the request to examine Article 2 letter g and letter i of the State Finances Law, and Verdict Number 62/PUU- XI/2013 is related to the request to examine Article 6 clause (1), Article 9 clause (1) letter b, Article 10 clause (1) and clause (3) letter b, and Article 11 letter a of the Law Number 15 of 2006 on the BPK. Both requests for examination essentially contain the same intention, questioning the definition of state assets in the context of separated state assets in SOE/ROE and challenge the authority of BPK to examine state finances management and responsibility in terms of separated state assets in the SOE/ROE.

The Verdicts above, confirmed that the status of state assets that come from state finances and separated from State Budget to be included as capital participation in SOE is still considered as state financial regime. The release of the Verdict ends the debate on the phrase "**assets separated on state enterprise/local company**" in Article 2 Letter g of the State Finances Law which is one of the elements of state finances.

LLC are generally profit-oriented to maintain the continuity and development of the companies. Therefore, BOD must be granted an authority to perform organizational management to reach optimal result. Through the granted authority BOD also must be given responsibility to manage the Company.

Consequence of capital participation of the Government on LLC is the Government must bear the risk and be responsible for the loss of the business they funded[14]. Therefore, the position of the Government isn't as a public legal entity. If the Government as a public legal entity must also bear the loss, it's feared that the public function won't be optimal[15]. The removal of Persero from state control means consequences and debts arising from the activity of the Persero as a legal subject must be borne alone by the Persero. Bill for Persero can't be demanded from the personal properties of the managers and Shareholders[16]. The rationale above makes the Government as the Shareholder in SOE as a private legal entity.

State loss according to Bohari as quoted by Djafar Saidi isn't a loss in the definition in the world, because it's a company, but a loss which happens due to violation of law. In this regard, other factors causing state financial loss are inappropriate implementation of policy, enriching oneself, others, or corporation[17]. The definition of state financial loss also can be found in several legislations such as:

Article 1 Number 15 of Law Number 15 of 2006 on BPK states that:

> "state/Regional loss referred to here is a real shortage of money, securities, and goods, of which amount is caused by unlawful actions, either intentionally or negligently."

The elucidation of Article 32 verse (1) of Law Number 31 of 1999 Jo. Law Number 20 in 2001 on Eradication of Corruption states that:

> "state financial loss is a loss of which the amount has already been able to be calculated based on the finding of the authorized agency or appointed public accountant."

Separation of state assets performed by the state as a public legal entity is a state administrative legal action with the objective that the legal status of the separated assets is no longer subject to the State Budget mechanism. It means that separated state assets are subject to the legal mechanism in effect in the legal entity which receives the separated state assets.

According to the Elucidation of Article 4 of SOE Law on State- Owned Enterprise, separated means separation of the state assets from the State Budget to be used for state's

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[14] Arifin P. Soeria Atmadja, *Keuangan Publik Dalam Perspektif HukumL Teori, Kritik Dan Praktik* (Jakarta: Rajawali Press, 2009), 115.
[15] *Ibid*.
[16] Rudhy Prasetya, *Kedudukan Mandiri Perseroan Terbatas Disertai Dengan Ulasan Menurut Undang-Undang Nomor 1 Tahun 1995* (Bandung: P.T. Citra Aditya Bakti, 1995), 50–51.
[17] Muhammad Djafar Saidi, *Hukum Keuangan Negara* (Jakarta: Rajagrafindo Persada, 2013), 11.

capital participation in an SOE, and further, the direction and management thereof are no longer based on the State Budget system, but on the principles of sound corporate governance.

Separation of state assets according to Appendix X of the Regulation of Minister of Finance Number 96/PMK.06/2007 concerning Procedures for Implementation of the Use, Utilization, Removal, and Transfer of State Assets is a transfer of ownership of state assets which are initially state assets that aren't separated into separated state assets to be calculated as capital of a legal entity. It means there is transfer of ownership.

The calculation of the value of state financial loss in corruption in the agency is performed through two mechanisms:

a. Investigative examination on the initiative of the agency on the return of regular examination results or due to complaint and request of legislative institution related to suspicion of unlawful management and responsibilities of state finances which result in state financial loss.
b. Investigative examination of calculation of state financial loss on the request of the Law Enforcers in stages of investigation.

According to the legal theory of state budget and public finances, separation of state assets is a legal action of the State as a public legal entity to another legal entity so that all of their rights and obligations are transferred from state rights and obligations to the rights and obligations of the legal entity. Therefore, the State as a public legal entity and State Budget as state finances don't get any obligation on the separated assets, including obligation to pay bills or any risk arising from the separated assets.

This is clearly regulated in Article 1 Number 1 of Law Number 1 of 2004 on State Treasury (State Treasury Law). The state treasury is "the management and accountability of state finances, including separated investment and wealth set out in the State Budget and Regional Budget." The stipulation uses the phrase "separated investment and wealth set out in the State Budget and Regional Budget," meaning as long as the wealth is still set in State Budget/ Regional Budget, legal action of separation of wealth using government regulation hasn't been performed, it's still included in state treasury. However, after the state assets are separated using government regulation and become the assets of legal entity which receives them because all of the rights and obligations are no longer the rights and obligations of the State. Concrete legal evidence that separated state assets are no longer state assets are[18]:

a. The money is no longer stores in the state cash as the state money storage which is determined by the minister of finance as the state general treasurer;
b. The rights and obligations arising over the separated state assets no longer uses the State Budget Law as the basis of income and expense;
c. The minister of finance as the state general treasurer doesn't have authority over separated finances unless in their position as the representative of the State as a Shareholder whose legal position is equal to other Shareholders in accordance with LLC Law;
d. Invoice and/or risk arising over the separated state assets aren't the burden of the State Budget and don't appear in the budget implementation list (DIPA).

The massive scope of state finances in Article 2 of the State Finances Law and Elucidation of Article 1 of Corruption Law leads to expanding scope of state loss, whether the

[18] Amrizal Syahrin, Dian Puji N. Simatupang, and Taufik Basari, *Laporan Bedah Kasus Tindak Pidana Korupsi Pengadaan Pesawat Terbang PT. Merpati Nusantara Airline Nomor Register Perkara 36/Pid.B/TPK/2012/PN.Jkt.Pst. Atas Nama Terdakwa Hotasi D. P. Nababan* (Jakarta, 2015), 32.

loss of the State as a public legal entity or the State as a private legal entity. In this case, state loss is formulated as shortage of money, securities, and goods, regardless of the cause of the state loss. State loss must be viewed in three related legal systems, i.e. civil, state administrative, and criminal law. Therefore, the trend of state loss isn't always directed to the criminal law system by ignoring state administrative law and civil law. Today's ignorance of the two legal systems is caused by poor understanding of the state administrative law theory, that neglected.

Regarding the state financial loss, now there's a single understanding that the status of separated state finances in SOE is a part of state financial regime. However, it doesn't mean that all stipulations of legislations for State Organizing Organs in *mutatis mutandis* applies on SOE, because the direction and management of separated state assets aren't performed based on the State Budget system but based on the principles of GCG.

Constitutional Court in one of their considerations also states that the governance in the arrangement of SOE and its assets should use corporate mechanism to be able to follow the world's development and competition and performs capital accumulation, which requires immediate decision making. Therefore, it's clear that the paradigm of the function of SOE is as an extension of the company which is run based on business judgment rules, which is different from government administration which is performed based on government judgment rules.

In the Articles in the State Finances Law, Corruption Law, and Constitutional Court view in the judicial review of the Corruption Law, there are definitions of state finances. The definition of state finances in the State Finances Law and the Corruption Law, all rights and obligations of the State that can be valued in money, as well as everything in cash or in the form of goods that can be owned by the state in connection with the implementation of the rights and obligations, including **separated assets in state enterprise/local company or under the control, management and responsibility of SOE/ROE.**
The Constitutional Court through the Verdict No. 62/PUU-XI/2013 states:

> "….. SOE which is truthfully performing management on **state financial management** is also subject to constitutional supervision …..."

Therefore, it's concluded that BOD in SOE Persero which managed enterprise of which the shares, partially or entirely, is owned by the State must consider 2 (two) legislations at the same time, i.e. regulation of Company management according to LLC Law and SOE Law, and legislations relate to state finances to avoid various risk which may cause loss, whether loss which is purely business loss, or loss which happens due to negligence which results in in-state loss.

From the perspective of corruption, although the Corruption Law doesn't provide any clear definition of state loss, according to the Constitutional Court in Verdict No. 25/PUU-XIV/2016:

> "… state loss due to administrative error isn't an element of corruption. State loss becomes an element of corruption if there are elements of a **violation of the law and abuse of authority**."

Further, the Constitutional Court states that:

> "…state loss is an implication of 1) unlawful action which benefits oneself or another person or a corporation as referred to in Article 2 verse (1) of the Corruption Law; 2) abuse of authority with the

> objective of benefiting oneself or another person or a corporation as referred to in Article 3 of the Corruption Law…. The elements of state financial loss are no longer understood as estimation (potential loss) but must be understood as having happened or real (actual loss) to be able to be applied in corruption."

Article 1365 of the Civil Code establishes that every unlawful action which causes a loss on another person requires the person who performs the action to compensate for the loss[19]. Related to the content of Article 1365 of the Civil Code, M.A. Moegni Djojodirdjo as quoted by Sedyo Prayogo states that[20]:

> "Article 1365 of the Civil Code doesn't provide formulation but only regulates that if one experiences a loss due to unlawful action performed by another person on them, they will be able to file a claim to District Court successfully".

Unlawful action in Article 1365 of the Civil Code initially contained a narrow definition that unlawful action is an action that violates legal rights and obligations according to the law, or in other words unlawful action (*onrechtmatigedaad*). The definition is significantly affected by the view of Hoge Raad in the famous case of *Lindenbaum vs. Cohen* so, today the definition of unlawful is expanded to every action which violates propriety, caution, and decency in the relation among members of the society and with other people's property[21].
Hoffman explains that an unlawful action must have four elements, i.e.[22]:

a. Someone must perform the action;
b. Action must be against the law;
c. Action must incur damage on someone else);
d. Action is due to mistake which can be blamed on them).

Regarding the corporate action which has been performed by the BOD and BOC of SOE, if the corporate action doesn't generate revenue as expected or even incurs loss, in the view of Law Enforcers, the element of unlawful action and abuse of power can be references whether the loss due to corporate action is purely corporate action or action which harms state finances. Based on the elements of state loss adopted by the Law Enforcers, not all losses on state finances (whether state finances which aren't separated or separated state finances in SOE/ROE) are categorized as state loss, unless the loss is caused by unlawful action, either intentionally or negligently.

In the view of the Ministry of SOE and SOE managers, the loss happening in SOE doesn't automatically cause state loss, as long as the loss doesn't reduce the equities of the company or make the equities smaller than the capital transferred by the government. Because the separated assets are capital, as long as the capital invested by the State in the SOE doesn't diminish, then it doesn't cause state loss, because the state financial record is also not diminished. State loss only happens if the loss in SOE causes the equity value of the capital transferred by the Government in the form of shares is reduced.

From a business perspective, company loss can't be assessed per transaction and be declared as fraud. The assessment of whether the SOE experiences a loss or not can only be

[19] R. Soebekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2004), 346.
[20] M. A. Moegni Djojodirjo, *Perbuatan Melawan Hukum* (Jakarta: Pradnya Paramita, 2009), 17.
[21] Rosa Agustina, *Perbuatan Melawan Hukum* (Jakarta: Fakultas Hukum Universitas Indonesia, 2008), 281.
[22] Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Material Dalam Hukum Pidana Indonesia* (Bandung: P.T. Alumni, 2012), 284.

done at the end of fiscal year. In other words, a loss in a business transaction is a company loss that can't be called state loss yet. However, after the losses are accumulated at the end of the fiscal and are found to cause the equities of the company to be under the transferred capital, the company loss can be referred to as state loss. Then, the state loss can be investigated to see whether it's caused by unlawful action or purely business risk.

3.2 Legal Policy in Regulating the Concept of Future Value in Determining State Financial Loss

Future Value is the value in the future of an amount of money in the present or a series of payments which is evaluated using a certain interest rate. Money value in the future (Future Value) is determined by certain interest rate in effect in financial market. The higher the interest rate, the higher the money value in the future. Therefore, investors' mindset and behaviors rely on interest rates. If the interest rate is high, they will lend money or deposit money, and if the interest rate is low, they will borrow money for business activities.

However, just as a decision making doesn't always yield maximum result, corporate action also has business risks in the forms of loss and/or not achieving returns as initially calculated. As a decision, corporate action is often 'bloody' to start to produce future value or value added in the future.

According to Lawrence J. Gitman as quoted by Moh. Benny Alexandri in *Manajemen Keuangan Bisnis*, time value of money is defined as

> "Money that the firm has in its possession today is more valuable than money in the future because the money it now has can be invested and earn positive return".

The money we currently have will be more valuable because the current money already can be used, thus able to generate positive benefits[23].

According to Sutrisno, there are two configurations of the concept of the value of money (Time Value of Money), so the concept of time value of money can be separated into[24]:

a) Future value
b) Present value

[23] Moh. Benny Alexandri, *Manajemen Keuangan Bisnis Teori Dan Soal* (Bandung: Alfabeta, 2008), 53.
[24] Sutrisno, *Manajemen Keuangan: Teori, Konsep Dan Aplikasi* (Yogyakarta: Penerbit Ekonisia, 2000), 111–114.

The concept of Future Value is closely related to policy in investment. The investment policy is related to the future, but the assessment of the benefit is performed in the present. Therefore, in particular net income of investment which will be received in the future must be valued now, whether it's received once or gradually, by using the calculations above.

Revenue in the future is essentially net cash flow from investment which will consist of project cost/initial investment (initial outlays). The cost covers costs to get investment and investment costs, as well as working capital to finance the initial operation of the investment project.

a) Cash flow and cash outflow during the investment project.
b) The residual value of the investment project.
c) Other cash inflow and cash outflow outside of the implementation of the investment project.

In general, the future value can be defined as value of money which will be received in the future from an amount of capital invested by someone with certain interest rate, or can also be defined as a business plan performed in the present with the prediction that it will bring profit in the future.

As an organization which accommodates economic activities, Company Organs, especially BOD, must be able to make breakthroughs, updates, and effort to seize opportunities calculatedly in facing business risks, because a business in certain condition can generate profit and can also suffer a loss. The paradigm of the function of SOE as an extension of the State which is performed based on the business judgment rules, is an adequate foundation to participate in every business opportunity, including performing business activities (which contain Future Value aspect) which could benefit the Company.

To faces the business world which becomes more open and competitive, corporate action which contains the Future Value aspect must be able to be formulated in a planned and measured way, as well as performed professionally. The principles of GCG can't be put aside. The process and mechanism of the implementation should meet the stipulations of the legislations and business ethics which reflect transparency, accountability, responsibility, independence, and fairness. Therefore, Future Value can be applied in the business activities of SOE as long as it's entirely aimed for the interests of the Company consistent with the purposes and objectives of the Company, as well as consistent with policies which are considered appropriate within the limits set by Legislations in effect and articles of association. Some of the reasons for the importance of regulatory arrangement in Indonesia are[25]: 1) Hyper-regulation; 2) Conflicting; 3) Overlapping; 4) Multi interpretation; 5) Inconsistency; Ineffective; 7) Creating unnecessary burden; 8) Creating high-cost economy.

In order to solve today's problems, President Jokowi in the Closed Meeting in the Presidential Office in 7 January 2017 confirms and instructs legal reform to not only touch the downstream sectors related with public services, but also the upstream sectors related with regulatory reform, procedure, and regulatory arrangement which must be the priorities of legal reform today[26].

[25] Arfan Faiz Muhlizi, "Penataan Regulasi Dalam Mendukung Pembangunan Ekonomi Nasional," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 3 (December 18, 2017): 355, https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/191.
[26] *Ibid*.

Formation of law is a part of activities in regulating a society which consists of associations of individual humans with all their dimensions[27] so that designing and forming law which is acceptable for the general public is a difficult task. The difficulty comes from the reality that forming law is a form of communication between the stipulating institution, i.e. legislative power holders, and the society in a country[28].

Difficulties in forming law are now more significant in Indonesia which facing various social problems based on multidimensional structural and cultural issues. In reality, law formation today and in the future will keep increasing as a response to the demands of the society as the development and condition of the society become increasingly complex[29].

Law formation will follow the social-political structure of each country. In countries that follow the authoritarian political configuration, the legal establishment will show authoritarian characteristics as well. Meanwhile, when the process of legal establishment takes place in the context of social-political structure of a democratic country, there will be compromises in conflicts of different values and interests in the society[30].

For better regulation of future value transaction policy and to meet legal certainty aspect, stakeholders and shareholders must have the same understanding at the level of the legislators and the level of the executors of regulation, so all parties, understand the rules in managing SOE as a state business entity.

SOE Persero is essentially an LLC, so all stipulations and principles apply to an LLC SOE Persero. Vision and mission of SOE are inseparable from vision and mission of the State as the forming body. Similarly, the corporate action it performs can't purely be business action. The business performed by SOE also contains "Government request". For example, the construction of telecommunication facilities by PT Telkom Indonesia (Persero), Tbk in remote areas contains the vision and mission of the Government which are delegated to them to perform.

In this case, SOE can perform corporate actions that can be categorized into two categories. First, corporate action which is performed purely as a business activity and second, corporate action which is performed to implement the vision and mission of the Government which must be achieved. Corporate action by Company may not be performed thoughtlessly by BOD. Every action must refer to provisions of legislation and Company regulations in the Articles of Association of the Company. This is attempted to be implemented by the principle of GCG which is currently required by Government to be implemented in private and SOE Companies.

Basically, business decision made by BOD, in this case SOE, has significant impacts on company performance. Good company performance can't generate profit in terms of revenue and value of the company. A company with good performance can improve its value in the present and future, or also referred to as future value. Future value of a company can be

[27] Satjipto Rahardjo, "Penyusunan Undang-Undang Yang Demokratis.," in *Seminar "Mencari Model Ideal Penyusunan Undang-Undang Yang Demokratis Dan Kongres Asosiasi Sosiologi Hukum Indonesia" 15-16 April 1998* (Semarang: Fakultas Hukum Universitas Diponegoro, 1998), 3–5.
[28] Pierre Andre Cotte, *The Interpretation of Legislation in Canada,* 2nd ed. (Quebec: Les Editions Yvon Balais Inc., 1991), 4.
[29] Roman Tomasic, *Legislation and Society in Australia* (New South Wales: The Law Foundation of New South Wales, 1979), 9.
[30] Anis Ibrahim, *Legislasi Dan Demokrasi: Interaksi Dan Konfigurasi Politik Hukum Dalam Pembentukan Hukum Di Daerah* (Malang: In-TRANS Publishing, 2008), 104.

seen from the growth of share value of the company in the future[31]. High future value benefits company Shareholders. In this case, the major Shareholders of SOE is the Government of the Republic of Indonesia.

According to a source in the Ministry of SOE, Future value isn't a mistake or truth because, future value is a business planned implemented in the present to generate profit in the future. In calculating business prediction and future value of a corporate action, decision making should be considered and performed well, meaning it shouldn't violate the legislations and Articles of Association of the Company. BOD must show that what they do isn't a moral hazard and there is prudence factor as regulation by the LLC Law. As more detailed technical rule, a Company can make a SOP to be the basis of every activity and/or decision making.
Corporate action taken by the BOD must not contain bad intention and perform with caution. For example, before taking an action, the BOD can appoint an independent consultant, e.g., technical, business, legal, and other professionals, to perform a study and provide opinion related to the corporate action. Directions from independent consultants can be inserted in SOP. The appointment of independent consultant also must be inserted in the Company's SOP as an implementation of the prudential principle. If after all prudential steps are taken, Company still suffers a loss, it's called business loss.

SOP could be one of the keys to the implementation of the prudential principles of the BOD and the Board of Commissioners. Besides making SOP which contains the direction of an independent consultant, all actions to be taken should get legal opinions from the State Attorney or Civil Deputy Attorney General and State Administration to see whether the corporate action is relatively safe to take.

To support this, a conception must be adopted by all parties as a part of the policy of forming better legislation in state assets management, especially in managing state business in the form of SOE, so that in the future in the management of SOE business transaction which expect the greatest profit (future value) and to secure the BOD in case of loss due to lawful actions consistent with the doctrine of business judgment rules which is explicitly regulation in the LLC Law. The Author suggests a concept as the final conclusion of the research discussion that in the future, in the context of future value transaction performed by the BOD of SOE (LLC) incorporate action performed for the interests of the company, an action of the BOD which in representing SOE can't be considered state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital transferred to the SOE.

Therefore, an action by the BOD in representing SOE can't be considered state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital transferred to the SOE. Using the policy formulation, all parties, including the Law Enforcers, Practitioners and Academicians have the same understanding about when SOE loss can be viewed as a state financial loss or business loss.

For example, PT A (SOE) receives state capital participation in the amount of 100 billion rupiah, so that the State becomes the largest shareholder of SOE, having more than 51% of shares. In case some business transactions and corporate actions performed by the SOE manage to generate a profit of 150 billion, while in a business transaction as a part of corporate action, the SOE suffers a loss of 130 billion, the author believes that the transaction can't be

[31] Ballow, Burgman, and Molnar, "Managing for Shareholder Value: Intangibles, Future Value and Investment Decisions," 26–34.

considered a state financial loss because principally the state assets which is invested in the SOE don't diminish. Moreover, the transactions performed by SOE still generate profit, so that principally the SOE still gets a profit of 20 billion despite suffering a business transaction loss.

This concept will bring great benefit for the State and BOD of SOE because:

1. BOD can move freely in generating profit for SOE and performing business transaction to achieve SOE objectives without worrying about unclear state finances.
2. State can see whether there is any state financial loss from the amount of decrease in the state capital from the total capital previously transferred by the State to the SOE.

4. CONCLUSION

The policy of formation of legislations on regulating the concept of future value should be made so in the future, the context of future value transaction performed by the BOD of SOE (LLC) incorporate action performed for the interests of the company can't be considered as a state financial loss if the value of the business loss is smaller than the profit generated by the SOE and doesn't affect state capital (state assets) transferred to SOE. Also, if any loss happens because of the actions of BOD, it must be investigated first to see whether the loss is caused by violation of the law, like enriching oneself, others, or a corporation, or purely business risk taken by BOD using Good Corporate Governance. Through the formulation of the policy, all parties can have the same view whether SOE loss is state financial loss or business loss.

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STRENGTHENING LEGAL CERTAINTY ON THE ELECTRONIC REGISTRATION SYSTEM OF FIDUCIARY DEED IN INDONESIA

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Abstract

Fiduciary guarantees constitute a type of guarantee commonly used by the business society to obtain loan from Banks or other financial institutions. As part of legal guarantee and for the sake of legal certainty, the document of fiduciary has to be registered. Administratively, since the government established an electronic fiduciary registration system, the system has in fact, not been fully supported by appropriate legal grounds. The prevailing law No 42/1999 silent on the registration system so that the registrar office conducts it manually up to year 2013. This research aims to explore and analyze regulations regarding the legal status of fiduciary agreements along with its electronic registration system and the role of Notary Public with the aim of providing recommendation to the ideal registration system supported by proper laws and regulations. Methodology of this study is based on normative legal research which carried out several approaches such as statutory approach, comparative approach and conceptual approach. In this paper, the normative legal research is also supported by empirical one. The results of the study essentially show potential problem on the legality of certificate of fiduciary notarial deed. In addition, legitimacy of registrar office is also questioned. Consequently, there is a need for amendment and harmonization of Law No. 45/1999 concerning Fiduciary Guarantee as well as its implementing regulations. Ultimately, the Indonesia fiduciary guarantee and its registration system will always be in harmony with the values of legal certainty, justice and usefulness.

Keywords: *Fiduciary Guarantee, Electronic Registration System, The Role of Notary*

1. INTRODUCTION

In the effort to support economic activities, particularly through the distribution of funds to the public, banks do this through their credit instruments, including through financing based on the principle of Sharia.[1] In essence, both activities are banking instruments functioned for provision of funds based on a loan agreement with a specified time period. Specifically, for credit lending, the basic elements considered for this bank credit are as follows: [2] (1) legal subject, (creditor and debtor);[3] (2) value of credit[4] (3) element of trust[5] (4) element of time, and (5) element of reward.

These five basic elements of credit lending cannot be ruled out except with an agreement. However, in its practice, credit lending requires the need for collateral. It is

[1] Definition of credit that is stated refers to the provisions of Article 1(11) Law No. 10 of 1998 as an amendment to Law No. 7 of 1992 concerning Banking. Meanwhile, Financing based on Syariah principle refers to the regulation of Article 1 (12) of Law No. 10 of 1998 as an amendment to Law No. 7 of 1992 concerning Banking.
[2] Conceptually, the elements contained in the general debt-receivable relationship. See Gatot Supramono, Debt Agreement *'Perjanjian Utang Piutang'*, Kencana, Jakarta, 2013, p. 13-17.
[3] However, in practice this equal relationship often does not occur. See Gatot Supramono, *Ibid*., p. 22-25.
[4] In relation to the loan relationship, this element relates to the value of the debt. See Ibid., p. 15-16.
[5] This element relates to several things such as: (1) Character of the debtor (its character); (2) Debtor's ability; (3) Capital; (4) Guarantees; (5) Debtor's economic condition. Irma Devita Purnamasari, *Kiat-Kiat Cerdas, Mudah dan Bijak Memahami Masalah Hukum Jaminan Perbankan*, p.19-20; Compare with *ibid.*, p. 13-17

generally done by taking into consideration the business prospect, character, loyalty and reputation of the debtor for as long as the debtor is in business with the bank or other parties.[6] In short, many factors are always considered to determine the size of the credit loan and the calculated value of collateral[7] in order to protect the lending funds from proper and reasonable loss. [8] This is to anticipate risk for non-performing loans that may happen. [9]

So far, efforts by banks to minimise risk of failing to pay eventually leads to financial institutions to oblige debtors to lend collateral which serves as a guarantee. In the case where the guarantee is in the form of collateral, then its value must be higher than the amount of credit agreed upon. Surely, the purpose of collateral is to protect credit from the threat of loss. In brief, the potential of loss must be anticipated with an instrument of guarantee. One form of this is collateral.[10] Juridically, fiduciary guarantee is regulated under Law 42 of 1999 on Fiduciary Collateral (Fiduciary Law). However, for as long as 20 years of its implementation, the Fiduciary Law has highlighted various flaws. Among others are lack of legal clarity and certainty regarding who shall register the deed of fiduciary;[11] and its collateral registration.[12] Also, the existence of issues relating to the legal basis and mechanism of electronic registration of fiduciary collateral at the Fiduciary Registration Office[13] and the legal certainty to creditors to execute the collateral. [14]In addition, the absence of a Central Fiducia Database on a national scale which records all fiduciary collateral, fiduciary objects as well as fiduciary collateral certificate;

The flaws as such have led to the need for more study defined as the following research questions:

Firstly, how are the laws define the legal status and position of fiduciary deeds in loan agreements as well as the obligation to register it electronically in Indonesia?

Secondly, how is its implementation, particularly with respect to the recipient of the fiduciary to register the fiduciary deed electronically?

Thirdly, what are the ideal laws needed to support electronic fiduciary collateral registration systems?

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[6] Kasmir, Dasar-Dasar Perbankan, Jakarta, PT. Raja Grafindo Persada, 2005, p.7.

[7] Widjanarko, Hukum dan Ketentuan Perbankan di Indonesia, Jakarta, Pustaka Utama Grafiti,1994, p.26.

[8] Salim HS, Perkembangan Hukum Jaminan di Indonesia, Jakarta, PT. Raja Grafindo Persada, 2014, p. 15.

[9] Johanes Ibrahim, Cross Default dan Cross Collateral sebagai upaya Penyelesaian Kredit Bermasalah, Bandung, Refika Aditama, 2004, p. 27.

[10] Tan Kamelo, Hukum Jaminan Fidusia: Suatu Kebutuhan yang Didambakan, Bandung, PT. Alumni, 2006 p. 4.

[11] This is because the fiduciary registration should be the obligation of the Notary and not an obligation of the fiduciary recipients or creditors. Because, as a state official, a Notary is the hand of the government to administer fiduciary registration in an orderly, safe, and legal manner. Law No. 30 of 2004 concerning Notary as amended by Law No. 2 2014.

[12] Fiduciary registration is basically a registration of deed and not a registration of fiduciary objects or collateral items. Consequently, any data changes to the fiduciary collateral data as recorded in the fiduciary certificate should be done by a notarial deed because it is an addendum to the contents of the fiduciary deed.

[13] In the event that the online registration system is on a national scale, the provisions requiring registration by a Notary in the legal jurisdiction of the Law and Human Rights Regional Office become irrelevant and cannot be implemented. Therefore, the development of the information technology and online registration administration system which is only regulated in this Ministerial Regulation needs to be improved. The basis of regulation is in the Fiduciary Law. No. 42 of 1999.

[14] D.Y. Witanto, Hukum Jaminan Fidusia dalam Perjanjian Pembiayaan Konsumen: Aspek Perikatan, Pendaftaraan dan Eksekusi, Bandung. Mandar Maju, 2015 p. 57.

From a theoretical viewpoint, this legal research uses Gustav Radbruch's concept of the three fundamental pillars of law, which are justice, legal certainty and expedience.[15] More specifically, its applies the justice theory by John Rawls[16], and the theory of responsive law by Philipe Nonet.[17] The ground to use Gustav Radbruch's theory is that culturally, the law cannot stand alone formally among society, instead it must be directed towards its purpose, which is to regulate life peacefully, by way of:[18] (1) creating an organized society; (2) creating public order; and (3) creating equality within society.

2. RESEARCH METHODS

As indicated above, the focus of this research is the legality and legitimacy of the application of fiduciary collateral registration online in Indonesia. This matter is importance as the Fiduciary Law does not mandate the use of electronic systems for registration, but it acknowledges registration through offline or manual means.

Considering that context, methodology used in this research is normative legal research[19] with focus on reviewing the law and regulation supported by empirical legal research. It does apply historical approaches and comparative approaches[20] based on selected legal sources.

3. ANALYSIS AND DISCUSSION

3.1. Regulations Regarding Fiduciary Collateral Online Registration

As an economic instrument, fiduciary collateral institutions have been known since the Ancient Roman times. However, different to the concept of modern fiduciary, the old one was a legal institution with a wide range of slave or variety of objects which can be transferred to a third party. [21] This collateral institution then died down and then appeared again during the modern civilization through a series of precedents or court decisions. Finally, this concept is obtaining a specific law in Indonesia called the Indonesian Fiduciary Law enacted in 1999. [22]

So far, the existence of Indonesian Fiduciary Law can be considered to provide legal certainity to the public. Strengthening the aspect of legal certainty through the Fiduciary Law is not restricted in general fiduciary collateral institutions all this time. However, this has been further developed through the addition of new norms which impose a criminal sanction[23] for the violation as well as the administrative order which must be obeyed. Among others, the obligation to register fiduciary collateral so that the said collateral can officially serve as a legal foundation for fiduciary recipient to invoke their preferred right attached to fiduciary recipient

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[15] M. Muslih, "Negara Hukum Indonesia dalam Perspektif Teori Hukum Gustav Radbruch," *Legalitas*, Vol. IV No. 1, 2013, Faculty of Law Universitas Negeri Gorontalo, p.143

[16] John Rawls, *Teori Keadilan : Dasar-Dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial dalam Negara*, Translation of Uzair Fauzan, Heru Prasetyo, Yogyakarta, Pustaka Pelayar, 2006.

[17] Philippe Nonet and Philip Selznik, Hukum Responsif, Translation of Raisul Muttagien, Nusa Media (Bandung 2005).

[18] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty, 2003), p. 77.

[19] It means that legal research which places the law as a norm system. The norm system in question is about the principles, norms, rules of the laws and regulations, court decisions, agreements and doctrines (teachings) Salim HS., Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Desertasi,* PT. RajaGrafindo Persada, Jakarta, 2014, p. 13.

[20] Peter Mahmud Marzuki, *Penelitian Hukum, Op. Cit.*, p. 93.

[21] Herlien Boediono, Third Book, p. 202.

[22] *Ibid*.

[23] This provision could be found under Article 35 and Article 36 of Fiduciary Law."

towards other creditors.[24] In brief, the enactment of the Indonesian Fiduciary Law indirectly causes the transfer of authority to execute collateral from the deed of fiduciary issued by the state. Consequently, the fiduciary collateral certificate holds executorial power, similar to a court decision that holds legal force.[25]

To support the implementation of the Fiduciary Law, the government has issued some regulations regarding the implementation in accordance with its delegation of authority as stipulated in its Article 5(2) and Article 13[26]. Among others, Government Regulation No. 21 of 2015 concerning Fiduciary Collateral Registration Procedure and Deed of Fiduciary Collateral Fee. This regulation was enforced to replace Government Regulation No. 86 of 2000 on the same subject. From a substantial standpoint, there is no significant difference between the two[27]. However, the drafting of Government Regulation No. 21 of 2015 was a step to harmonize some technical regulations relating the fiduciary collateral. Among these regulations were The Decree of Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral; and No. 10 of 2013 concerning The Procedure of Electronic Registration of Fiduciary Collateral.[28]

The efforts to harmonize these regulations must be done as Government Regulation No. 86 of 2000 did not accommodate electronic registration of fiduciary collateral. This meant there is an absence of law which underlies the practice of electronic registration for fiduciary collateral. The problem is, this deficiency was not followed by amending Fiduciary Law up until this point. As a legal consequence, there exists flaws in the legality of the electronic registration of fiduciary collateral[29]. Surely, there is exists weakness from the aspect of legal certainty. From a normative aspect, there is no harmony between of the Fiduciary Law and the provisions in Article 3 of the Decree of The Ministry of Law and Human Rights No. 9 of 2013[30]. In other words, there is an inconsistency in the Ministerial Decree towards the Fiduciary Law.

3.2. Implementation of Provision on Electronic Registration of Fiduciary Collateral Deed

The enactment of an instrument to regulate electronic registration of fiduciary collateral is based on Government Regulation No 21 of 2015[31], this essentially is a policy which cannot wholly resolve the issue relating to the deviations towards the hierarchy of law[32] and the principles of good governance. The Fiduciary Law yet to be revised is clearly the main

[24] Number 3 Paragraph 4 General Explanation of Fiduciary Law.
[25] Article 15(2) Fiduciary Law.
[26] Article 5(2) Fiduciary Law reads as follows: *"The preparation of the Fiducia Security deed as referred to in section (1) is subject to any cost whose amount is regulated further under Government Regulation."* Meanwhile, Article 13 paragraph (3) of Fiduciary Law reads *"Further provisions on the procedures of Fiducia Security registration and the registration fee are regulated in Government Regulation."*
[27] See the second paragraph in General Explanation of Government Regulation Number 21 of 2015.
[28] This regulation revokes the Decree of the Minister of Law and Human Rights No. M.01.UM.01.06 of 2000 concerning Forms and Procedures for Registration of Fiduciary Guarantees.
[29] Compared with the thesis of Dita Sabila, Faculty of Law, Universitas Sumatera Utara, 2018, *Perkembangan Pendaftaran Jaminan Fidusia dari Sistem Manual ke Sistem* Online *serta Hambatan-hambatannya*.
[30] The Article reads: "Electronic Fiduciary Guarantee Registration as referred to in Article 2 can be done through the Electronic Fiduciary Guarantee Registration service kiosk in all fiduciary registration offices."
[31] This Government Regulation amends Government Regulation No. 86/2000 concerning the same rules.
[32] Read, Jeremy Bentham. *Teori Perundang-undangan : Prinsip-prinsip Legislasi Hukum Perdata dan Hukum Pidana*, 2006 translation by Nurhadi,

weakness in the implementation of online registration of fiduciary collateral. Mean time, the Fiduciary Law alone has different issues which must be resolved through clear regulations. Some problems include: a. The growth of privately made fiduciary collateral deeds; b. Many notaries still include a clause concerning the transfer of ownership from the owner of the fiduciary collateral to the recipient of the fiduciary collateral;[33] and c. There exists a guarantee for legal certainty, specifically the authority for the registration of fiduciary collateral deeds.

In an ideal legal perspective, the application of the fiduciary collateral online registration system should be done based off of the Fiducary Law. This means, the registration of fiduciary collateral deeds should be done by still requiring the fiduciary recipient to visit to the Fiduciary Registration Office[34] which is located at the residence of the fiduciary giver[35]. However, in practice, since the implementation of online registration, then the registration of the deed can be made without restriction to the territory or region. This legal reality has become reason for the emergence in disharmony between the Fiduciary Law and the Decree of The Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral. However, this matter does not lessen the meaning and benefit of the aforementioned registration system which has successfully optimized the benefits of the fiduciary collateral systems for the business of banking in Indonesia.[36]

It needs to be noted that data on objects as fiduciary collateral that has been recorded in the Ministry of Law and Human Rights of 2017[37], shows the urgent need to provide a strong and clear legal basis to enact an online registration system for fiduciary collateral. To strengthen the said legal basis, it must start by revising the Fiduciary Law which is to be followed up with an improvement towards government regulations and other regulations below it. By amending the said law then inconsistent norms in other regulations relating to the enactment of electronic registration of fiduciary collateral in Indonsia can be removed. These various legal steps require complete and clear mapping so the legislative agenda can be done completely and properly. This legal research certainly shows that the Fiduciary Law naturally has its weaknesses, especially in regard to[38] the legal substance on:

a. The position and level of priority of fiduciary collateral in comparison to other objects of guarantee;
b. The possible online registration system for fiduciary collateral; and
c. The time period for registration.[39]

The whole problems identification can be approached from a normative aspect and evaluation from an empirical perspective at once, in the sense of by doing a comparative study.

[33] Normatively, this raises problems regarding the ownership status of objects that are the object of collateral. Therefore, the fiduciary recipient is not the real owner. Fiduciary recipients are only holders of material security guarantees as well as other material guarantees such as mortgages, mortgages and mortgage rights.
[34] See Article 12 paragraph (1) Fiduciary Law.
[35] See Explanation Article 11 Fiduciary Law.
[36] Read, HA Chalik, Marhainis Abdul Hay, *Beberapa Segi Hukum Dibidang Perkreditan*, Jakarta, Yayasan Pembinaan Keluarga UPN Veteran, 1982. Compare it to Muhamad Djumhana, *Hukum Perbankan di Indonesia*, Citra Aditya Bakti, Bandung 2014.
[37] Source from Directorate General of Legal Administrative Affairs Ministry of Law and Human Rights, 2017
[38] This view is based on the comparison of guarantee laws to a number of other countries such as the Philippines, New Zealand, Singapore and South Korea.
[39] Compare it with the provision in *Bill of Sale Act (Chapter 24)* Singapore which stated that the registration will only be valid for a period of one calendar year and can be extended.

Comparison between the registration system of fiduciary collateral with other countries cannot always done apple to apple. Apart from the difference between civil law and common law, the background and *ratio legis* of forming the law also differs. The same applies to the legal culture which exist in each individual country. The following results of the comparative study regarding fiduciary collateral is important to be considered.

(1) In the Phillipines, the concept of fiduciary collateral is known as the term 'chattel mortgage'. However, since the enactment of the Republic Act No. 11057, the term 'chattel mortgage' has been replaced with 'security interest' which covers a wider scope as it refers to all types of moveable property. In relation to the registration of fiduciary collateral, the Republic Act No. 11057 has developed an online registration system. However, the position of a fiduciary collateral certificate is not intended as legal product which holds execution power similar to a court decision which holds legal power. The certificate serves as evidence to signify that the fiduciary collateral has been registered[40].

(2) In New Zealand, the provision concerning fiduciary collateral is found in the Personal Property Securities Act 1999 which regulates moveable property. However, unlike Indonesia's Fiduciary Law which does not regulate the online registration system for fiduciary collateral, Section 139 Part 10 of the Personal Property Securities Act 1999 states that an online registration system is the system which applies in New Zealand. Even so, the urgency to register fiduciary collateral deeds does not aim to obtain a fiduciary collateral certificate. This means, the executorial authority over collateral is still attached to the fiduciary collateral deed as the registration is only intended as a notice to the state in order to guarantee legal certainty and protection towards the parties involved.

(3) In Singapore, fiduciary collateral is regulated in the Bill of Sale Act (Chapter 24). Juridically, the Bill of Sale Act is a document which underlies the collateral guarantee between the giver and recipient of the collateral. The concept of fiduciary collateral in the Bill of Sale (Chapter 24) is also acknowledges an online registration system for fiduciary collateral deeds. However, unlike the Indonesian legal system which requires the registration to be done by a notary public within a time period of 30 days since the making of the fiduciary collateral deed[41], Article 4 (1) of the Bill of Sale Act (Chapter 24*)* requires the deed to be registered within the time span of three days since the making of the deed.[42] The mechanism and system of registration used is not specifically regulated. In other words, it is not emphasized which system applies for online registration of fiduciary collateral.

(4) Generally, legal systems in East Asian countries such as Japan, South Korea and Taiwan acknowledge the legal concept which resembles a fiduciary collateral system[43]. At first, the South Korean legal system did not specifically regulate

[40] SyCip Salazar Hernandez & Sailmaitan. "The New Personal Property Security Act and It's Impact on Security Financing." 2018.

[41] Article 4 Government Regulation Number 21 Year 2005 concerning Procedures for Registration of Fiduciary Guarantees and Costs for Making Fiduciary Guarantees Deed.

[42] Read the conditions *Article 4 Bill of Sale Act (Chapter 24).*

[43] See Ying-Chieh Wu, "East Asian Trust at the Crossroads," *National Taiwan University Law Review,* Vol. 10, No. 1, National Taiwan University, 2015, p. 95-108.

fiduciary collateral[44] until it enacted the Act on Security over Moveable Property, Claims, etc on June 10, 2010 (Act No. 10366). Similar to the Indonesian Fiduciary Law, the Korean Act on Security also requires registration of collateral. Article 7 and Article 35 of the Korean Act on Security states that the obligation is a condition in order for the collateral to be legally effective, so the creditor has the right of preference towards the collateral concerned[45]. Moreover, based on Article 39, administrative authority to arrange registration of the fiduciary collateral rests on the Supreme Court. Interestingly, the registration system in South Korea is evidence that registration systems of fiduciary collateral can exist in both a manual form and electronic system.

3.3. The Development of an Ideal Fiduciary Collateral Deed Registration System for Indonesia

(1) Evaluation of Current Registration System

Basically, the obligation to register fiduciary collateral online is not regulated under Indonesian Fiduciary Law. This causes the problem of legality of the registration procedures and legitimacy of the fiduciary collateral certificate issued.[46] The problem being, since the beginning, the government did not have a legal basis to carry out electronic systems to register fiduciary collateral. Moreover, the change in laws concerning the system and procedure of fiduciary collateral registration has gone beyond the authority of the House of Representatives in the process of legislation.[47] Constitutionally, the government along with the House of Representatives must amend the Fiduciary Law first to serve as a legal foundation for fiduciary collateral registration online.[48]

It must be acknowledged that changing the fiduciary collateral registration to an online system does have its benefits as its implementation is really more effective and efficient. However, as it is not regulated under the Indonesian Fiduciary Law, therefore procedures like issuing certificates can potentially have its legality questioned. This means that its legal certainty is not guaranteed. If this policy is contested for a judicial review at the Supreme Court, then there may be a possibility that government regulations and ministerial decrees which have been the foundation for the online registration of fiduciary collateral to be null and void. Therefore, the normative solution must still be thought out thoroughly in order for the online

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[44] Blake Dawson Waldron Lawyers, *Draft Country Report for Singapore Conference Intersection of Secured Transactions and Insolvency Law Regimes*, Asian Development Bank, Manila, without year, p. 25.

[45] Provisions of Article 7 *Act on Security over Movable Property, Claims, etc* reads: *"(1) Any acquisition, loss, or alteration of a security interest in movable property by an agreement shall become effective only when the acquisition, loss, or alteration is registered in the collateral security register. (2) The order of priority of security interests created in one and the same movable property shall be determined by the order of registration. (3) Except as otherwise provided in any Act, if registration in the collateral security register and delivery (including summary delivery, agreement on possession, and assignment of a claim to return subject matter as provided for the Civil Act have been completed with respect to one and the same movable property, the order of priority vis-a-vis the interests and rights in such cases shall be determined by the order of such events."*

[46] A Hamzah dan Senjun Manullang, *Lembaga Fidusia dan Penerapan di Indonesia*, Jakarta, Ind-Hill 10, 1987.

[47] M. Mahmud MD, *Politik Hukum di Indonesia*, Depok, PT. RajaGrafindo Persada, 2018, p. 7

[48] This norm is referred to by Friedman as an element of Legal Substance which also determines the effectiveness of law enforcement. Read Lawrence M Friedman, *Sistem Hukum : Perspektif Ilmu Sosial*, terjemahan. M. Khozim. Bandun, Nusa Media, 2013.

registration system which has been carried out all this time can obtain a clear and legitimate legal foundation as well as guarantee of legal certainty.

(2) Strengthening the Juridical Function of Fiduciary Collateral

The emphasis of the position of fiduciary collateral deeds requires the consideration of other consequences from the nature of an *accesoir* fiduciary collateral deed. This occurs when the principal debt which is guaranteed by fiduciary collateral is transferred to another party by way of *cessie* or subrogation.[49] When the principal/basic debt is transferred, then the status of the recipient of fiduciary collateral is also transferred. For that, a regulation concerning the position of the fiduciary collateral deeds as a mandatory agreement is required to guarantee more safety in credit transactions. That matter is not only important for parties of the bank to guarantee the credit given but also to guarantee a complete economic order, keeping in mind Indonesian Banking's functions is to push for economic growth and for social welfare.[50]

It must be noted that the application of the online registration of fiduciary collateral deeds in Indonesia is behind in comparison to countries such as Phillipines, South Korea and New Zealand.[51] The three countries has clear legal instruments, which are:

a. *Republic Act No. 11057* in the Phillipines Legal System;[52]
b. *Act on Security Over Movable Property, Claims, etc* in the South Korean legal system;[53] and
c. *Personal Property Securities Act 1999* in the New Zealand legal system.

The set of rules mentioned above explicitly states that the system of registration for collateral is a system that is acknowledged and officially used. In this regard, the Republic Act No. 11057 as well as Personal Property Securities Act 1999 states that an online registration sytem is one the systems applied for collateral registration in its respective country. On the other hand, Act on Security Over Movable Property, Claims, etc still applies a dualist system of registration, both offline and online. Therefore, in a juridically normative view, the South Korean government did not confront any obstacles concerning the legality and legal certainty aspect of the registered deeds.

From the aspect of purposiveness, efficiency and effectivity, the government have responded properly to the global changes and needs of society by implementing an electronic registration system.[54] The seriousness of the Indonesian Government can also be seen through various advancements and developments in online deed registration systems since its

[49] Article of Indonesian Civil Code,

[50] Iskandar Simorangkir, *Pusat Riset dan Edukasi Bank Sentral Indonesia, Pengantar Kebank Sentralan: Teori dan Praktek di Indonesia*, Jakarta, PT. Raja Grafindo Persada, 2014, p.5.

[51] This comparative study is purposively made based on consideration of similarity under the Civil Law system like Indonesia, (Filipina dan Korea Selatan) and Common Law System represented by Selandia Baru. Further reading, Peter de Cruz, *Perbandingan Sistem Hukum*, translated by Narulita Yusoon, Bandung Nasamedia & Diadit Media 2014

[52] Sylip Salazar Hernandez & Sailmaitan, *The New Personal Property Security Act and Its Impact on Security Financing*, Manila, 2018.

[53] Yully Kang, *Introduction to Act on Security Over Moveable Assets and Receivable*, Seoul, Jipyong Jisung, 2012.

[54] Windy Permata Anggun, *Kepastian Hukum dalam Pemberlakuan Sistem Administrasi Pendaftaran Jaminan Fidusia secara Elektronik terkait dengan Larangan Fidusia Ulang*. Artikel Ilmiah, Faculty of Law Universitas Brawijaya Malang, 2014.

enactment in 2013. Many changes have been made from only handling the registration of deeds to handling changes for fiduciary collateral certificates as well as removal of fiduciary collateral from the recordation book. Moreover, there is a plan to strengthen the system by integrating data with the Police institution as the issuing document of property ownership. Even so, the prevailing laws clearly does not explain the problem of the legal foundation of the registration system. Harmonisation between the Fiducary Law and the laws beneath it is still needed, especially in order to emphasize the legality and legitimacy of the existing system of online registration.

On the other hand, in regard to credit loans with banks, there are provisions which must be fulfilled relating to collateral in the form of money or property[55], which must be stipulated in a fiduciary collateral deed. In accordance with Article 13 of the Fiduciary Law, fiduciary collateral deeds must be registered by the recipient of fiduciary collateral, or someone authorized by a power of attorney or a competent representative. This shows that the registering subject is of optional nature which means that it does not strictly apply only to the fiduciary recipient, such as a bank or a creditor, but also someone appointed. This signifies that the Fiduciary Law does not explicitly state a notary public as one of the parties that may apply for registration of a fiduciary collateral deed. For the purpose of administrative order and for data accuracy, the deed is done by a notary. The reason being notaries are considered to be more knowledgeable and understanding towards what has to be properly done. All are right in accordance with the fiduciary law and law on the notary public.

(3) An Ideal System for Fiduciary Collateral Registration

a. The Developments System of Information Technology for Registration of Fiduciary Collateral Deeds

Up until this point, the legal basis concerning the online registration of fiduciary collateral deeds have not been legitimized adequately. Due to the fiduciary law, being a legal reference, was not prepared for an online registration model. From a regulatory standpoint, there is an inconsistency between Article 3 of the Ministerial Decree No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral and the elucidation of Article 11 of the Fiduciary Law. The Fiduciary Law does not delegate authority to the Minister to formulate regulations concerning the administrative procedures of fiduciary collateral deed registration electronically. The policy makes fiduciary collateral certificates issued by the Fiduciary Registration Office becomes weak in its legality. It also poses a serious problem it relates to the binding force of the deed towards the third party. Although, so far in its practice it has not been questioned. However, a critical academic study has found legal flaws that must be fixed and strengthened.

In general, the regulations regarding the online registration system of fiduciary collateral deeds have changed in terms of format and mechanism of deed registration as regulated under the Fiduciary Law. From the form of the regulation itself, the change can be seen as a step to simplify the procedure and increase effectivity and efficiency to the public.

[55] If the credit guarantee is in the form of goods, the law regulates it by requiring the debtor to make a fiduciary guarantee agreement. Such an agreement must be legally registered with a special institution, the Fiduciary Registration Office. The problem is, after the fiduciary agreement was made, who should register it with the Fiduciary Registration Office. This problem needs to get a clear and firm arrangement.

Such policy is reflected in laws regulating fiduciary collateral registration procedure, including provisions of the fiduciary collateral deed fees. In relation to this, principles of this law is not very different to the provisions of the Fiduciary Law, except for the online registration system of fiduciary collateral deeds, which is only based on Government Regulation No. 21 of 2015. From the perspective of purposiveness, the concept of fiduciary collateral deed online registration clearly helps the society provide ease in registering their deeds. However, for its legal certainty, the online system still needs the support of a strong legal foundation.

Furthermore, taking into account that the scale and coverage of the regulations on fiduciary collateral registration deeds covers all of Indonesia, then there are steps to be taken to strengthen the reliability and accuracy of information techonology systems. It means that from a technical angle, it must be formulated with a system that is modern and supported with advanced technology. Moreover, also taking into account the online registration system of deeds requires accuracy and reliability, therefore this system must be designed and developed in order to avoid the system broken or experiencing any unnecessary technical difficulties. Besides that, notaries should also be educated to fully understand and to carry out the online system properly. This means the Fiduciary Registration Office as the online system operator as well as the fiduciary recipient, including the person authorized by a power of attorney, specifically a notary should all posses expertise and ability to make use of the system.

b. The Development of the National Record of Fiduciary Collateral

Pursuant to the publicity principle which means to disseminate information to a wide society, the implementation of the publicity principle in deed registration[56], revision of fiduciary collateral certificate[57], change in certificate, and removal of fiduciary collateral are essentially actualization of the principle of transparency in a credit agreement. This statement is not without basis. Transparency and accountability are principles of every administrative system. In fact, without these principles, the administrative system cannot be reliable. In many cases, the society needs access to information quickly and accurately. Therefore, the state's initiative to formulate a database of fiduciary collateral deeds on a national scale became important and urgent. The implementation of the publicity principle shows the role of the state in guaranteeing the validity of a deed as well as acknowledging the rights of the creditor towards the debtor. Apart from that, the principle of publicity also gives ease to accessibility to data and information of credit loans to third parties concerned. Surely, such information is important if the third party decided to make a credit agreement with the debtor. Easily accessed data and information will ensure that the future debtor is bound to the credit agreement with the creditor and using his property as a collateral. Furthermore, the legible data about the size of credit and time span for the obligation to repay. Valid and complete information and data will be a consideration for the third party to decide plans for business with the future creditor concerned.

[56] The application appears in the obligation to register for fiduciary guarantee in order to contain several things such as: indentity of the fiduciary giver and recipient; as well as date, fiduciary collateral number, name and domicile of the notary who made the fiduciary collateral certificate.

[57] The application appears in the obligation to repair the certificate to contain at least several things such as: (1) number and date of the fiduciary guarantee certificate to be repaired; (2) improvement data; and (3) remedial information.

From the perspective of administration, the Fiduciary Law should has avoided the practice of fraud by minimizing the potential of multiple registrations. The Fiduciary Law also has to clearly regulate the norms to avoid practices that may threaten the interests of the creditor, especially in order to guarantee the repayment of credit given. It must be noted that the position of a fiduciary collateral deed which is considered to be a formal requirement to obtain a fiduciary collateral certificate[58], has made it possible for multiple registrations. Moreover, according to the Fiduciary Law[59], the Fiduciary Registration Office is not obliged to carry out an assessment towards the correctness of the information included in the deed of fiduciary collateral. The Fiducary Registration Office only checks the data[60]. This means that the Fiduciary Collateral Office only carries out the function of registration, but it cannot prevent the occurrence of multiple registrations of property as previous fiduciary collateral. In this issue, the phrase "not doing an evaluation towards the validity" is not continued with an explanation about the meaning of "validity" (of data) indicates that the Fiduciary Registration Office can easily not carry out complete and thorough validity checking.

The Fiduciary Registration Office can easily record a plea without evaluating the possibility of the collateral being fluidized to previous creditor. The Fiduciary Registration Office can make records as a part of its administrative job, considering the recording process solely as a requirement for the fiduciary recipient to obtain a fiduciary collateral certificate. Such circumstances clearly do not align with the publicity principle in Fiduciary Law, which is expected to be able to guarantee legal certainty in the fiduciary collateral registration system. One of the steps that needs to be taken by the government is to develop a national database, which contains, in particular, information relating to fiduciary collateral from all fiduciary registration offices which operates online and in real time. This is not a difficult to do due to the support of advanced information technology. Learning from experiences of building a database in the field of trademark and patents, which can even be connected to a database abroad, presumably the design and development of such data should not be difficult to be realized. Data base on Patent and Trademark could be used as a benchmark.

4. CONCLUSION

Considering the above discourse analysis, it can be drawn some conclusions as follows:

4.1. Substantially, there is legal disharmony and inconsistency between the Decree of Ministry of Law and Human Rights No. 9 of 2013 concerning The Enactment of Electronic Registration of Fiduciary Collateral as that regulation does not have a basis neither is it mandated under the Fiduciary Law to establish online registration system.

4.2. There is a vagueness regarding who, by law, is obliged to register the fiduciary collateral deed. Article 13 (1) of the Fiduciary Law states that the obligation to register fiduciary collateral is attached to the fiduciary recipient. In its implementation, the registration can be authorized to a third party. As there exists no obligation for a notary public to create a fiduciary deed, the provision has potential to cause legal uncertainty, especially if such registration is done by a third party, besides the notary who made the

[58] Read Explanation Article 13 paragraph (3) Fiduciary Law.
[59] Explanation Article 13 paragraph (3) Fiduciary Law.
[60] Checking Data is regulated in Article 13 paragraph (2) Fiduciary Law.

deed. In such a case, such provisions will increasingly open up more potential problem due to weak of legal certainty.

4.3.Revision of Fiduciary Law is an urgent necessity that must done. Because, although there is no judicial review of the Fiduciary Law or its regulations on implementation, the Fiduciary Law has several weaknesses and shortcomings. Among them, is the absence of a legal basis for the implementation of an online registration system for fiduciary collateral deeds. Similarly, there is a weakness in the legal aspect of issuing fiduciary collateral certificates. Along with that, revisions are also needed to eliminate potential problems such as the registration of multiple fiduciary deeds, and the negligence of a fiduciary recipient's obligation to register a fiduciary deed.

In connection to the aforementioned conclusion, it is advisable to do as follows:

4.4.Prepare a draft bill of amending Fiduciary Law, in accordance to global needs and needs of the business world. The main points of substance that need to be refined, among others are:

(1) to establish that registration of a fiduciary collateral deed is mandatory and carried out with a nationally integrated online system (electronic);
(2) to emphasize the provisions regarding role of Notary to register the fiduciary collateral deed at the Fiduciary Registration Office.
(3) to affirm the legal status of a fiduciary collateral deed certificate as a document which hold full executorial power.

4.5.Strengthen and develop a national fiduciary collateral deed database administered by the Fiduciary Registration Office, Ministry of Law and Human Rights, and to integrate the database system with the police force, as it often requires proof of ownership of property used as collateral.

4.6.Conducting socialization and educating the society after the amendment of the Fiduciary Law to business actors, banks and notaries as parties who play an important role in the implementation of Indonesian Fiduciary Law, particularly in making deeds and processing online registration of fiduciary collateral deeds to the Fiduciary Registration Office.

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CORPORATE SOCIAL RESPONSIBILITY (CSR) EFFICIENCY APPROACH WITH THE ESTABLISHMENT OF A STATE INSTITUTION MANAGING FUNDING AND CSR PROGRAMS

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Abstract

CSR is an activity that provides broader benefits in various social aspects such as education, health, community empowerment or environmental preservation. CSR actions applied as a strategy will only cause irregularities in the use of funds owned by the company which can trigger to damage to the company's financial performance. This is thought to be due to the fact that there are quite a lot of funds budgeted with the CSR implementation, which is not supervised, which causes inefficiency. This study aims to determine and analyze the provisions of the laws and regulations that govern CSR related to the obligations of Limited Liability Companies in the Indonesian legal system and to find out and analyze the implementation of company obligations to implement CSR in Indonesia and find solutions to corporate liability arrangements such as Limited Liability Companies (PT), Enterprises. Micro, Small and Medium Enterprises (UMKM) and other businesses carry out CSR to be useful in accordance with that CSR. The approach used is the Legislative Law approach and the case approach. From the research results it is known that 1). CSR regulations concerning the obligation of PT to implement it in the Indonesian legal framework are regulated in several laws but there are 2 (two) laws that specifically regulate CSR but the two laws are inconsistent with regard to sanctions if these obligations are violated, 2) Implementation of PT obligations implementing CSR in Indonesia is a program carried out by the company that is not in accordance with the community needs, is carried out individually, is moving and it's not sustainable, there is no provision that regulates the amount of funds and there is no supervision from the local government in managing CSR. The occurrence of overlapping laws and regulations so that the implementation of the CSR program does not match the policies issued by the local government. CSR funds are misused and even corrupted by local officials and there is no evaluation by the company because it is more concerned with profit in carrying out CSR. 3). Regulating company obligations such as Limited Liability Companies (PT), Micro, Small and Medium Enterprises (MSMEs) and other businesses implementing CSR so that it is useful, it is necessary to establish a state institution that manages CSR and accommodates the companies', governments and society interests so that the CSR program can run efficiently, precisely targeted and continuously.

Keywords: *Efficiency, Social Responsibility, State Institution*

1. INTRODUCTION

The CSR concept or social and environmental responsibility is a form of corporate responsibility with the government to address social problems that occur in society. CSR is a commitment from the business community to contribute to community development both in social, economic and environmental aspects. In the past, the responsibility for overcoming social problems was entirely the responsibility of the government, because the business world has contributed to the community in the form of providing labor, meeting community needs through products produced by companies and paying taxes to the state[1].

CSR actions applied as a strategy will only cause irregularities in the funds usage owned by a company which can trigger to damage to the company's financial performance. This is presumably because the budgeted funds are quite a lot with the CSR implementation which is not supervised, which causes inefficiency. The CSR implementation that is not supervised has resulted in the misuse of funds used for opportunistic behavior by the implementers of the CSR[2].

The potential for corporate social responsibility (CSR) funds to reduce the poverty rate per year reaches IDR 20 trillion. With this potential, Indonesia actually does not need to borrow from abroad. However, CSR funds are still not fully managed in a directed manner. The potential comes from CSR State-Owned Enterprises and around 700 private companies. The amount of CRD funds from BUMN is set at the amount of CSR at 5 percent of profits, while for the private sector the percentage is not determined but it is required to set aside a portion of the profit for CSR[3]. Apart from the central government budget and CSR funds, there is actually another potential, namely the local government role. The role of funds from local governments is only around 12 percent.

Currently, CSR distribution lacks synergy with local government programs, so it is necessary to organize the management of CSR funds so that they are right on target. The distribution of CSR funds must be even and sustainable. The fund distribution can be managed by the company itself, but it must be in accordance with the vision and mission of the company's domicile area and the funds are channeled not only in the fields of education, health, economy and the environment. In order for the CSR implementation to run efficiently, a state institution that is capable of realizing the community welfare is needed, so that the issuance of CSR funds does not only carry out company obligations in regulations / laws, but also issues CSR as a tangible manifestation of the Company's contribution to participate in the welfare of the nation and patriotic life.

Based on the description that has been described in the background as stated above, the researchers identified several problems in this study in the following matters:

1. What are the laws and regulations governing CSR related to the obligations of a Limited Liability Company (PT) in the Indonesian legal framework?
2. How is the implementation of the obligations of a Limited Liability Company (PT) to implement CSR in Indonesia?
3. How should the regulation of company obligations such as Limited Liability Companies (PT), Micro, Small and Medium Enterprises (MSMEs) and other businesses carry out CSR so that it is useful in accordance with the CSR?

[1] Yusuf Wibisono, *Membelah Konsep Dan Aplikasi Corporate Social Responsibility* (Gresik: Fascho Publishing, 2007), 4.

[2] Farah Margaretha and Chandra Gunadi Witedjo, "Corporate Social Responsibility, Nilai Perusahaan Dan Kinerja Keuangan Perusahaan," *Media Riset Akuntansi, Auditing dan Informasi* 14, no. 1 (May 3, 2017): 89–114, http://www.trijurnal.lemlit.trisakti.ac.id/index.php/mraai/article/view/1754.

[3] I Made Asdhiana, "Dana CSR Belum Dikelola Optimal," *Kompas*, last modified 2010, https://lifestyle.kompas.com/read/2010/10/20/21513650/dana.csr.belum.dikelola.optimal.

2. RESEARCH METHODS

2.1. Theoretical Framework

a. Theory of Welfare State

In general, Welfare State concept can be classified as follows:

1. Ramesh Mishra, Lawrence M. Friedman and M Boekman, Welfare State is the responsibility and state obligation which includes: (1) Fulfilling basic needs of life (basic needs); (2). Social services, and (3). Market economy intervention.
2. Meanwhile, according to Ross Cranston, Welfare State is more focused on the state responsibility in the welfare of its citizens in meeting basic needs and social services.
3. Wilhelm Aubert gave the definition of Welfare State only as a state obligation in fulfilling citizens' rights related to fulfilling basic needs. New state obligations arise when there are claims from citizens who claim these rights.

In this concept of the Welfare State, the state is required to expand its responsibilities to the socio-economic problems faced by the people at large.

b. Theory of Legal State

Muhammad Yamin uses the same words of law state as *rechtsstaat* or government of law, as quoted from the following opinion: "the police or military state, where the police and soldiers hold the government and justice, is also not the Republic of Indonesia is a state of law (*rechtsstaat*, government of law). where written justice place prevails, it is not a state of power (*machtsstaat*) in which the arms and power of the body perform arbitrarily[4].

Hadjon[5], John divides the laws rule into two terms, i.e. *rechtsstaat* and the rule of law, which are supported by a different legal system background. The term *Rechtsstaat* is a thought to oppose absolutism, which is revolutionary in nature and rests on a continental legal system called civil law. On the other hand, the rule of law develops in an evolutionary manner, which rests on the common law legal system. However, the difference between the two is now no longer questionable, because it leads to the same goal, i.e. the protection of human rights.

Although there is a difference in the understanding background between *rechtsstaat* or *etat de droit* and the rule of law, it cannot be denied that the presence of the term "rule of law" or in terms of the explanation of the 1945 Constitution is called "a state based on law (*rechtsstaat)*", cannot be separated from the influence of these two ideologies. The concept of a rule of law (*rechtsstaat* or the rule of law), which contains the principle of legality, the principle of separation (division) of power, and the principle of independent judicial power, all of which aim to control the state or government from the possibility of acting arbitrarily, tyrannically, or abuse power.

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[4] Margaretha and Witedjo, "Corporate Social Responsibility, Nilai Perusahaan Dan Kinerja Keuangan Perusahaan," 72.

[5] Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Sebuah Studi Tentang Penanganannya Oleh Pengadilan Dalam Lingkungan Peradilan Umum Dan Pembentukan Peradilan Administrasi Negara* (Surabaya: Bina Ilmu, 1982), 72.

2.2. Concepts

a. Concept of Legal Body

The importance of describing the parts of the concept of a legal entity aims to describe every aspect of a legal entity which is a legal subject formed by a group of people authorized by the government through laws and regulations. Legal subjects have a very important position and role in the law field, especially civil law because these legal subjects can have legal authority. The term legal subject comes from the Dutch translation, i.e. *rechtsubject* or law of subject (English). In general, *rechtsubject* is defined as supporting rights and obligations, namely humans and legal entities[6].

The subject of law is anything that basically has rights and obligations in legal traffic. What is included in the legal subjects definition is: human (*naturlijke person*) and legal entity (*rechtpersoon*), such as for example PT (Limited Liability Company), PN (State Company) / BUMN (State-Owned Enterprise), Foundation, Government Agencies and so on[7].

According to Sri Soedewi Masjchoen[8], a legal entity is a group of people who jointly aim to establish an entity, i.e.: (1) in the form of an association, and (2) assets that are isolated for a specific purpose, and are known as foundations. Meanwile Salim H. S.[9] has an the opinion that a legal entity is a group of people who have certain goals (the direction to be achieved), assets, as well as rights and obligations. Based on the description, it can be argued that the elements of a legal entity include: (1) Having an association; (2) Have a specific purpose; (3) Having assets; (4) Have rights and obligations; and (5) Has the right to sue and be sued.

b. Concept of State Institution

State institutions are sometimes referred to as government agencies, non-departmental government agencies, or only state institutions. Some were formed based on or because they were given powers by the Constitution, some were formed and got their powers from the laws, and some were even formed based on a Presidential Decree.

Montesquieu introduced the five functions of state power. The five are (i) the diplomatic function; (ii) indefencie function; (iii) nancie function; (iv) the justicie function; and (v) the policie function[10]. By John Locke at a later date, the conception of state power was divided into four, i.e. (i) legislative function; (ii) executive; (iii) federative functions. For John Locke, the judiciary function was included in the executive function or government, however, by Montesquieu it was separated by itself, while the federative function was considered as part of the executive function.

[6] Titik Triwulan Tutik, *Hukum Perdata Dalam Sistem Hukum Nasional* (Jakarta: Prenada Media Group, 2008), 40.
[7] A. Ridwan Halim, *Hukum Perdata Dalam Tanya Jawab*, 2nd ed. (Jakarta: Ghalia Indonesia, 1985), 29.
[8] H. S. Salim, *Pengantar Hukum Perdata Tertulis (BW)* (Jakarta: Sinar Grafika, 2008), 26.
[9] Ibid.
[10] Lukman Hakim, "Rekonstruksi Peran Negara Dalam Penyelenggaraan Negara Secara Konstitusional," *Masalah-Masalah Hukum* 40, no. 2 (2011): 248, https://ejournal.undip.ac.id/index.php/mmh/article/view/10476.

Therefore, in the trias politica Montesquieu, the three functions of state power consist of (i) legislative functions; (ii) executive functions; and (iii) judicial function yudisial[11].

In accordance with the principle that the Indonesian state adheres to a system of power separation, with this system of powers separation, state institutions become powers that are designated as functions of state institutions that are equal and control one another[12]. So state institutions have separate powers from other state institutions. This is intended so that there is no monopoly of power over the authority of other state institutions, in accordance with the principle of checks and balances.

c. Efficiency Concepts

In general, efficiency can be directed to a concept of achieving an outcome with optimal resources usage. According to Ibnu Syamsi[13], efficiency is the best comparison between a result and its effort. This comparison can be seen from two aspects of results and effort. Adiwarman A. Karim said that "Efficient is doing the things right", which means that doing everything in the right way to get optimal results. Efficiency is a success measurement that is assessed in terms of the amount of resources / costs to achieve the results of the activities carried out.

d. Concept of Corporate Social Responsibility

The CSR concept has been adopted by many companies, both domestic and multinational. However, debates around the corporate paradigm still accompany the application of this concept. The discourse dichotomy that emphasizes market or profit with stakeholder priorities with moral arguments that pay attention to stakeholders, has yet to find a conceptual solution. The group that refuses to argue that the company is a profit-seeking organization and not a person or group of people like social organizations. On the other hand, groups that support CSR argue that companies should not only be thinking about profit for the company. But also, must have concern for the society, especially the people who live around company[14].

The CSR concept is also based on moral arguments. Not a single company lives in a vacuum and lives in isolation. Carrying out social responsibility normatively is a moral obligation for any type of company. When a company as a new community intervenes in local communities, it is imperative to adapt and contribute, because its existence has had both positive and negative impacts.

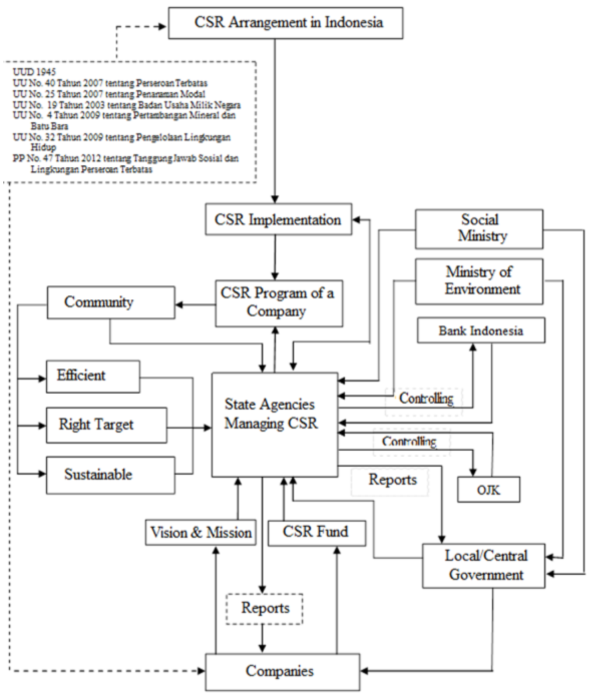
[11] Jimly Asshiddiqie, *Perkembangan & Konsolidasi Lembaga Negara Pasca Amandemen* (Jakarta: Sinar Grafika, 2010), 29.
[12] Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006), 58.
[13] Ibnu Syamsi, *Efisiensi, Sistem, Dan Prosedur Kerja* (Jakarta: PT. Bumi Aksara, 2004), 4.
[14] Ujang Rusdianto, *CSR Communications* (Yogyakarta: Graha Ilmu, 2013), 9.

2.3. Conceptual Framework and Library Review

2.3.1 Conceptual Framework

The conceptual framework in this study is described as follows:

Figure 2.1.
Conceptual Framework



2.3.2 Library Review

2.3.2.1 Corporate Social Responsibility

The presence of CSR in the company's business is in line with the globalization development. This can be seen from the existence of[15]: Risk management; Protecting and enhancing the company's reputation and image; Build trust and a license to operate for companies; Increase the efficiency of existing resources and increase access to capital; Respond to or comply with applicable regulations; Fostering good relationships with stakeholders such as employees, consumers, business partners, socially responsible investors, regulators and the communities in which the company operates; Encourage innovative thinking; and Build opportunities to follow future markets.

Sony Keraf divides the contents of corporate social responsibility into two categories, i.e.[16]:

1. Concerning primary relationships, for example fulfilling contracts that have been made with other companies, fulfilling promises, paying debts, providing satisfactory services to consumers and customers, being responsible for offering goods and services to the community with good quality, paying attention to employee rights, employees' welfare and their families, improve employee skills and education and so on.

[15] Kristina K. Hermann, "Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study," *Indiana Journal of Global Legal Studies* 11, no. 2 (2004): 207, https://www.repository.law.indiana.edu/ijgls/vol11/iss2/6/.

[16] Sony Keraf and Robert Haryono Imam, *Etika Bisnis* (Yogyakarta: Pustaka Filsafat Kanisius, 1993), 97–98.

2. Against secondary relations. Responsible for the operation and impact of the business on society in general, for social problems, such as: employment, education, social infrastructure and taxes.

According to Kotler and Lee in Poerwanto[17], CSR is a commitment to improve community welfare through business policy practices and with engagements from company sources, meanwhile John Elkington issued a bottom line concept, that in CSR it must still pay attention to the 3Ps, i.e.: (1) Profit. Companies must still be oriented to seek economic benefits that allow them to continue to operate and develop (2) People. Companies must have concern for human welfare, especially for residents around the company (3) Planet. The company cares for the environment and sustainable biodiversity. Some other thoughts about CSR were also born from world organizations such as The World Business Council for Sustainable Development, defining CSR as a commitment from the business world to continue to act ethically, operate legally and contribute to economic improvement, along with improving the quality of life of employees and their families at the same time while also enhancing the quality of local communities and society at large[18].

Wibisono[19], there are four stages of CSR, i.e. 1. Planning stage, 2. Implementation stage, 3. Evaluation phase and 4. Reporting. While benefits according to Wibisono are as follows: (1) Influencing and enhancing the company's reputation and brand image (2) Eligible for a social license to operate (3) Reducing the company's business risk (4) Expanding access to resources (5) Expanding access to the market (6) Reducing costs (7) Improving relations with stakeholders (8) Improving relations with regulators (9) Increasing employee morale and productivity (10) Opportunity to get rewards.

2.3.2.2 Establishment of State Institutions

The objective of the establishment of State Institutions in Indonesia is to realize that sovereignty is in the hands of the people and implemented according to the 1945 Constitution. The manifestation is carried out by forming in the 1945 Constitution state institutions that will assist the government to achieve common goals for the benefit of the state. The state institutions function is to assist the government in realizing its goals to build the Unitary State of the Republic of Indonesia to become a developed country and to build welfare in society in providing facilities to the community and to achieve various other goals that the government has.

2.4. Research Methods

This research is empirical-normative legal research. Empirical-normative legal research is legal research on the application of normative legal provisions (codification, law or contract) in action at any particular legal event that occurs in society[20]. The approaches used in legal

[17] Poerwanto, *Corporate Social Responsibilty: Menjinakkan Gejolak Sosial Di Era Pornografi* (Yogyakarta: Pustaka Pelajar, 2010), 18.
[18] Wibisono, *Membelah Konsep Dan Aplikasi Corporate Social Responsibility*, 7.
[19] Ibid., 121–124.
[20] Abdulkadir Muhammad, *Hukum Dan Penelitian Hukum* (Bandung: P.T. Citra Aditya Bakti, 2004), 134.

research are the statute approach, the case approach, the historical approach and the conceptual approach[21].

As for the interviewees as a subject of this study consisted of internal and external parties. Internal parties in this study were taken from the company while external parties were taken from the party where the CSR was carried out. Internal parties are companies that implement CSR, large companies are taken by 2 (two companies), medium companies are taken by 2 (two companies) and 2 (two) small companies, i.e. SMEs and private companies. Internal parties in this study were PT (Persero) Pertamina Tbk, PT Maybank Indonesia Tbk, PT Gunung Sawit Bina Lestari (GSBL), PT Tugu Pratama Indonesia, UKM Batik Pandak and PT Gold Coin Specialties. Meanwhile, the internal government officials in the regions who are deemed authorized to provide an assessment of the CSR implementation taken by each 1 (one) person at the location (where) the CSR is carried out.

There are two types of data used in this study, i.e. primary data and secondary data. Primary data is data obtained by researcher from the first source, either individual or individuals, such as the of interview results usually conducted by researcher. In this study, the primary data is data related to promotion, image differentiation and interest. To obtain this data, the researcher conducted interviews with the Company. Secondary Legal Materials, i.e. legal materials that provide instructions and explanations for primary legal materials, consisting of literature books, papers, articles, legal journals containing research results and other scientific works related to this research. Tertiary legal materials, namely legal materials that provide guidance and explanation for primary and secondary legal materials.

Data collection techniques used in this study were library research and field research. The processing procedure in normative juridical legal research is the processing of legal materials, namely primary legal materials, secondary legal materials and tertiary legal materials as well as data from interviews with research sources. The data analysis technique used in this study is to use a qualitative approach, namely a discussion that is carried out by combining library research and field research.

3. ANALYSIS AND DISCUSSION

3.1. CSR Arrangement in Indonesian Legal Order

a. Laws Number 40 Year of 2007 concerning Limited Liability Companies

Article 1 point 3 of Law Number 40 Year 2007 concerning Limited Liability Companies states that CSR is a "corporate commitment". However, Article 74 paragraph (1) and paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies formulates it as an obligation for companies to carry out CSR and is obliged to budget for CSR costs which also creates confusion, because CSR is defined as if it was only an activity which occurs as an expense only. Meanwhile, in practice, there are so many CSR activities that do not always have cost consequences, and can even save costs, such as energy and water saving efforts, community empowerment by involving microfinance institutions and treating employees more humanly[22].

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[21] Peter Mahmud Marzuki, *Penelitian Hukum*, Revisi. (Jakarta: Kencana, 2010), 93.

[22] Mukti Fajar, *Tanggung Jawab Sosial Perusahaan Di Indonesia, Mandatory vs Voluntary, Study about Application of Corporate Social Responsibility Provisions on Multi Nasional Company, Swasta Nasional Dan Badan Usaha Milik Negara* (Yogyakarta: Pustaka Pelajar, 2009), 307.

b. Laws Number 25 Year of 2007 concerning Capital Investment

Investment in the Capital Investment Law No. 25 of 2007, Article 1 point 1 states that "Investment is all forms of investment activities, either by domestic investors or foreign investors to conduct business in the territory of the Republic of Indonesia". The presence of the Investment Law No. 25 of 2007 concerning Investment is expected to be able to provide fresh air to investors and provide an exciting investment climate.

Implementation of CSR obligations as stipulated in Law no. 25 of 2007 concerning Investment, Article 15 letter b states "Every investor is obliged to carry out corporate social responsibility". If this is not done, administrative sanctions in the form of written warnings, restrictions on business activities, suspension, and revocation of business activities and/or investment facilities can be imposed (Article 34 paragraph (1) of Law No. 25 of 2007). Meanwhile, what is meant by "corporate social responsibility" is the responsibility inherent in every investment company to continue to create harmonious, balanced relationships and in accordance with the environment, values, norms and culture of the local community[23].

c. Laws Number 19 year of 2003 concerning State-owned Enterprises

Law No. 19 of 2003 concerning State-Owned Enterprises and Regulation of the Minister of BUMN No. PER-05 / MBU / 2007 concerning the Partnership Program for State-Owned Enterprises with Small Businesses and the Community Development Program regulates the obligation to carry out corporate social responsibility for BUMN. Law No. 19 of 2003 concerning State Owned Enterprises does not explicitly regulate corporate social responsibility, Article 88 paragraph (1) only regulates the provision of profits for the purposes of fostering small businesses / cooperatives as well as fostering communities around BUMN.

d. Laws Number 32 year of 2009 Concerning Protection and Management of the Environment

Article 68 of Law 32/2009, every person conducting a business and/or activity is obliged to include: a. provides information related to environmental protection and management in a true, accurate, open and timely manner; b. maintaining the sustainability of environmental functions; and c. comply with the provisions on environmental quality standards and/or environmental damage standard criteria.

e. Laws Number 22 Year of 2001 concerning Oil and Natural Gas

This is stated clearly in Law No. 22 of 2001 on Oil and Gas. The upstream business activities carried out by a Business Entity or Permanent Establishment based on a Cooperation Contract with the Implementing Body must contain basic provisions, one of which is the provision regarding the development of the surrounding community and the

[23] DJPP, "Tanggung Jawab Sosial Perusahaan Dan Iklim Penanaman Modal," *Departemen Hukum Dan HAM Republik Indonesia*, accessed May 18, 2020, http://www.djpp.depkumham.go.id/hukum-bisnis/84-tanggung-jawab-sosial-perusahaan-corporate-social-responsibility-dan-iklim-penanaman-modal.html.

right guarantee of indigenous peoples (Article 11 paragraph (3) letter p Law 22/2001). In addition, Article 40 paragraph (5) of Law 22/2001 also states that business entities or permanent establishments that carry out Oil and Gas business activities (upstream business activities and downstream business activities) are also responsible for developing environment and local communities. The community development program for oil and gas industrial area by State-Owned Enterprises (BUMN) and Private-Owned Enterprises (BUMS) is more voluntary, now the community development program is legally mandatory.

f. Laws Number 4 year of 2009 concerning Pertambangan Mineral and Coal Mining

Law No. 4 of 2009 concerning Mineral and Coal Mining uses term "community empowerment". "Community empowerment is an effort to improve the capacity of the community, both individually and collectively so that their life level will be better"[24]. This community empowerment seems to only emphasize increasing community capacity (social aspect). Added later in Article 8 paragraph (1) letter g: "The authority of the Regency / City government in the management of mineral and coal mining includes: (g) development and empowerment of local communities in mining businesses with due regard to environmental sustainability". So community empowerment does not only emphasize social aspects but also environmental aspects. Mining business licenses consist of two stages: (a) IUP Exploration includes general investigation, exploration and feasibility studies; (b) A Production Operation IUP includes construction, mining, processing and refining activities, as well as transportation and sales.[25]

g. Legislation Problems and Constraints in the Implementation of CSR

Analysis of a number of laws and regulations that include the issue of corporate social responsibility, there is a mismatch in the concept and mechanism of implementing corporate social responsibility. These laws and regulations seem to complement each other, but there are different concepts that occur. The variety of CSR arrangements in positive law in Indonesia as stated above raises problems including the following: a. Legal uncertainty regarding the CSR implementation patterns, b. Legal uncertainty regarding the pattern of CSR fund allocation, c. Overlapping CSR obligations, d. Certainty of CSR obligations for companies that are not legal entities (not PT), and e. CSR implementation obligations are not predictable.

3.2. Implementation of Obligations of Limited Liability Companies Implementing CSR

Several forms of CSR implementation from companies in Indonesia, both large, small and medium companies.

a. PT (Persero) Pertamina Tbk

Pertamina manages Environmental Social Responsibility (TJSL) activities which include the Corporate Social Responsibility (CSR) program, Community Development program (BL) and the Partnership Program (PK). Strategic objective of Pertamina's CSR

[24] Article 1 number 28. Indonesia, *Law Number 4 Year 2009 Concerning Mineral and Coal Mining,* 2009.
[25] Article 36 paragraph (1) Law Number 4 Year 2009 concerning Mineral and Coal Mining.

program is to increase Pertamina's reputation and credibility through CSR activities that are integrated with business strategies. To achieve this goal, Pertamina implements major strategies, such as[26]: a. Provide mutual benefits (fair shared value), b. Continuous, and c. Priority of operating areas and affected areas and Green energy development as responsibility for the impact of operations.

Effective socialization and publication In 2016, Pertamina focused on implementing CSR to support the PROPER achievement by prioritizing environmental aspects, both nature and society according to the requirements set by the Proper Council (Indonesian Ministry of Environment and Forestry). Pertamina's CSR focuses on four issues that become its pillars, i.e.: Pertamina Cerdas, Pertamina Sehati, Pertamina Hijau and Pertamina Berdikari. Arya Yusa Dwicandra[27] as Acting Unit Manager Communication, Relations, & CSR MOR VI Pertamina obtained information that legal provisions requiring companies to carry out CSR programs and activities are based on Law Number 40 of 2007 concerning Limited Liability Companies, Article 1 paragraph (3) of social and environmental responsibility is the company's commitment to participate in sustainable economic development in order to improve the quality of life and a beneficial environment, both for the company itself, the local community, and society in general.

b. PT Maybank Indonesia Tbk

Maybank Indonesia is committed to actively contributing to the socio-economic development of the community and the environment through various Corporate Responsibility (CR) programs. This commitment is a reflection of company’s awareness as a business entity that has a concern for sustainable development.

Maybank Indonesia Tbk designed a social responsibility program based on the four guiding principles of CR, i.e. Community, Environment, Workplace and Marketplace. We build Maybank Indonesia's commitment to community empowerment and welfare based on the five pillars that guide the planning and implementation of Corporate Social Responsibility (CSR), i.e.: education, community empowerment, activities to support healthy living, preservation of arts and culture, and conservation of environment while still having sensitivity to situations that occur in the homeland such as in the event of a natural disaster[28].

c. PT Gunung Sawit Bina Lestari

PT Gunung Sawit Bina Lestari feels obliged to carry out the planned program after they get the benefits which can then be set aside for carrying out the CSR programs that have been made. Based on an interview with Ramli Sutanegara, based on Article 74 paragraph (1) of Company Law, there are 2 (two) criteria for the activity sector which obliges the Company to implement the CSR, i.e.: a. Companies that run their business in the field of natural resources, b. Companies that carry out their business

[26] Pertamina, “Tanggung Jawab Sosial Perusahaan,” accessed October 1, 2019, https://www.pertamina.com/id/tanggung-jawab-sosial-perusahaan.

[27] Arya Yusa Dwicandra, interview by author, Cilacap, October 29, 2019.

[28] Maybank Indonesia, “Corporate Responsibility,” accessed November 15, 2019, https://www.maybank.co.id/corporateinformation/csr.

activities related to natural resources. The provisions of Article 74 of the Company Law are intended to continue to create Company relationships that are harmonious, balanced and in accordance with the environment, values, norms and culture of the local community.

Ramli Sutanegara[29] said that the CSR Program run by Gunung Sawit is GSBL-Peduli Bersama Masyarakat to Support Village Development. The basis for implementing CSR activities in addition to the laws regulation which are the company's obligations are also related to the concept of sustainable development, due to the absence of standard rules and the same understanding of community empowerment, most corporations in Indonesia have not implemented true CSR principles.

d. PT Tugu Pratama Indonesia

In order to integrate CSR programs into corporate business activities, TPI is committed to: 1). Provide benefits of educational scholarships 2). Contributing to the improvement, especially in the areas of community economic empowerment, environmental conservation and greening (green environment), natural disaster emergency-response, health, religion, social culture, youth and sports, as well as nationalism / patriotism (development of moral values, fighting values or nationality values). 3). Prioritizing beneficiaries or contributions around the area closest to the company's operations and Shareholders, or those directly related to the impact of company activities. 4). Increase the Company's positive reputation, efficiency and business growth.

TPI is committed to realizing optimal financial performance and company growth, by consistently minimizing the company's negative impact on the environment and making a positive contribution to sustainable community development.

e. UKM Batik Pandak

MCMEs Batik in Pandak Bantul mostly have regular customers, they supply to several painting galleries and batik shops in Yogyakarta city. Based on the results of the author's interview with Supriyono [30] it is known that the mission of the Company (MKB) in implementing CSR is to transmit positive things and help provide alternative solutions to social problems to the community, especially people from pre-prosperous families and in the neighborhood where the company (MCB) is located, operated. The management of CSR activities carried out by companies (MCB) aims to improve the life quality of workers and their families, as well as local communities and society at large in managing CSR funds, it depends on the programs or activities created by these MCB.

[29] Ramli Sutanegara, interview by author, Jakarta, November 15, 2019.
[30] Supriyono, interview by author, Yogyakarta, November 21, 2019.

f. PT Gold Coin Specialities

Based on the interview with Heriyana[31], a company cannot be separated from the social responsibility of the power holders in a company. This responsibility is a contribution from the company for the surrounding environment or the general public. The CSR program also aims to raise awareness of its employees to share with each other and have a sense of care and empathy for those in need. Employee concern for sharing is still very low. The purpose of the company's CSR program is to raise this awareness. This is in line with the opinion of Lia Erlina who in the interview said that the program was a strategy that many companies had taken in resolving, depoliticizing, and hiding conflicts. A CSR program that is properly implemented for the benefit of local residents will be able to minimize disputes, conflicts, or potential conflicts between the company and the community.

3.3. Some Cases in Implementing CSR Program

Some cases in the implementation of the CSR program include the following:

a. PT Hutama Karya[32] has been included in the list of the Supreme Audit Agency regarding the management of funds for the Community Development Program which has caused a number of problems. Program Bina Lingkungan of state-owned enterprises (BUMN) which has covered eight activity sectors since 2012, has largely failed to achieve its objectives. The program was then transferred to the paddy field printing program, sorghum development, and cow breeding.

b. PT Ophir Medco Energy Company's CSR program[33] took place in Sumenep, which resulted in an action taking the road in front of the Sumenep DPRD building. The community considers that the CSR from the oil and gas company is considered to be of no benefit to the welfare of the local community.

c. The case of misuse of PT Vale's CSR funds was revealed by a report from the Central Sulawesi Regional Youth Care Front (FPPD) which reported Central Sulawesi Governor Longki Djanggola to the Corruption Eradication Commission. Longki was reportedly related to the alleged corruption of PT Vale Indonesia's Corporate Social Responsibility (CSR) funds worth Rp 11.7 billion and dozens of other project cases.

d. Misuse of CSR funds occurs in PT Sang Hyang's CSR funds, the Majalengka District Prosecutor's Office has named Ras a suspect in the alleged corruption of PT Sang Hyang Seri's 2014 CSR funds, around Rp. 2.6 billion.

3.4. Obstacles of CSR Giver (Company)

a. lack of company commitment to social responsibility
b. there is no division involved in implementing CSR management

[31] Heriyana, interview by author, Bekasi, November 8, 2019.

[32] Singgih Soares, "Dugaan CSR Salah Sasaran, BPK Periksa Hutama Karya," *Tempo*, last modified 2019, accessed November 12, 2019, https://bisnis.tempo.co/read/670518/dugaan-csr-salah-sasaran-bpk-periksa-hutama-karya/full &view=ok.

[33] Ara, "CSR KKS PT Ophir Dinilai Salah Sasaran, Warga Giligenting Demo," *Kabar Madura*, last modified 2019, accessed November 12, 2019, https://kabarmadura.id/csr-kks-pt-ophir-dinilai-salah-sasaran-warga-giligenting-demo/.

c. lack of budget
d. the implementation time is not in accordance with the budget disbursement process
e. understanding of social responsibility is not optimal
f. is not considered a responsibility, but rather to promote and promote corporate identity in society
g. many are charitable so they are not productive

3.5. Obstacles from region (Regional Government)

a. The local government with the company's target in the CSR program is sometimes not in line.
b. Many companies are established in a certain area but divert their CSR programs to other areas.
c. Local governments have difficulty or do not have the ability to communicate with companies, so that in every activity, there is no community participation and the business world in the program success.

3.6. Obstacles from CSR Users (Community)

a. The community in general prefers instant assistance and is in the form of materials or goods.
b. less disciplined community responsibility

3.7. Solution

a. CSR funds must be properly organized according to regional needs. If in the area there are no signals that make it difficult for the community to communicate, that is the duty of the CSR funds to be used for communication procurement.
b. In order for the implementation of CSR programs to run more efficiently, on target and sustainably, SMEs that carry out CSR must always be open to collaborating with similar SMEs or those that become business partners to jointly build a joint CSR program.
c. In order for the CSR Program to run well, there are several stages that must be carried out by the company, i.e.: from the planning stage and the implementation stage,
d. Collaboration through the construction of a board containing stakeholders and CSR launched by an MCB with other MCB CSR programs in other areas where perhaps the people of the two areas are connected to each other.
e. In order for the implementation of CSR programs to run more efficiently, on target and sustainably, it is integrated with the company's strategy, through mentoring for micro, small and medium enterprises (MSMEs).
f. The government may direct the CSR program to synergize with government programs. The use of CSR funds other than for programs and operations can be categorized as a criminal act, if managed by or for government officials it is categorized as corruption.

3.8. Inefficient implementation of CSR

Inefficient implementation of CSR are as follows:

a. The program carried out by the company is not in accordance with the community's need and is only to fulfill the company's obligations as mandated by the law which requires companies to carry out CSR programs.

b. CSR programs are carried out individually with limited funds hence CSR is also limited so that it cannot improve the welfare of the community.

c. CSR programs carried out by the company are always moving and not sustainable so that they have not been able to change the social and economic conditions of the local community.

d. The absence of the same statutory provisions in regulating the amount of funds that must be spent by companies to carry out CSR activities so that the company itself will determine the amount of funds spent for CSR implementation.

e. The CSS funds issued by the company are directly distributed to the community so that there is no supervision from the regional government, so it is difficult to control their use.

f. The occurrence of overlapping laws and regulations so that CSR in its implementation does not have the same provisions so that the results achieved have different standards.

g. The incompatibility of the CSR program with the policies issued by the local government in improving the welfare of the community so that the CSR program does not help local government programs that have a priority scale in alleviating poverty.

h. Lack of supervision from either companies or independent institutions so that the allocation of CSR funds is often misused and even corrupted by local officials.

i. CSR is not carried out on target and its utilization is overlapping due to a lack of understanding of community conditions and a lack of coordination with local governments.

j. Lack of supervision from both local governments and corporations on CSR programs and funds so that the expected CSR goals are not achieved.

k. There is no evaluation of the CSR program that has been implemented considering the limited resources the company has.

l. Many companies prioritize profit, so they do not want to run CSR programs because this CSR program certainly costs a lot of money, and is often considered to be an excessive cost to the company.

3.9. Establisment of CSR - State Institution

Efforts to form state institutions having a strong position in regulating and carrying out programs in accordance with the mandate to build the Nation and the State, practice and implement social justice for all Indonesian people, this is in line with the awareness of National and Multinational Private Companies to implement regulations. CSR, to manage and coordinate and distribute CSR funds in a transparent and accountable manner.

The existence of a state institution that was formed to manage CSR and act as a liaison body between the state and the community so that fund management and supervision can run efficiently. The institution is expected to encourage all companies to maximize CSR programs so that the target set by the government through the regional medium-term program plan (RPJMD) makes the prosperous community.

There are supporting factors for the establishment of a CSR management institution including:

1. The government's commitment to reducing poverty and unemployment is supported by the company. Companies benefit from cooperation with the government, where the CSR program is more targeted, image is also obtained, besides that the company feels helped in implementing its CSR.
2. Contribution of each party is the driving force for the running of the organization and CSR programs. For this reason, the government must be committed to financing the operations of CSR institutions, by budgeting through the APBN / APBD, while companies finance CSR programs that are synergized.
3. Partnership patterns in CSR institutions lead to productive partnerships, where the company has high social and environmental concerns, while the government provides a conducive climate for cooperation.

While the inhibiting factors for the establishment of a CSR management institution among others:

1. Establishment status of a CSR management institution that does not yet have a legal position for it, therefore it is necessary to establish laws and regulations so that they have binding legal force, become the basis for other companies to become members of CSR, and CSR institutions remain sustainable.
2. Laws and regulations governing CSR are currently independent and divided based on the business sector such as the company law, the investment law, the State-Owned Enterprise Law, the Environmental Protection and Management Law, Law No. 22 of 2001 concerning Oil and Natural Gas, according to Mineral and Coal Mining, there are still inconsistencies between these laws.
3. Whereas the obstacle according to the viewpoint of companies that are not yet a member of CSR is due to the company's assumption that the responsibility for development and increasing welfare is the responsibility of the government, not the company. In addition, the company also feels that it has contributed to the regions through taxes and levies.

The benefits of this institution existence include 1) It makes it easier for companies to channel CSR funds so that they are on target 2). Helping corporations to focus more on playing their business, 3) Increasing the CSR program quality to be efficient, effective and sustainable 4). Helping good relations between corporate and the social environment; 5). Help improve the company's image in accordance with the company's mission and vision and 6). Helping government programs for the welfare of society

Funds obtained from companies received by institutions are managed in accordance with the institutional vision and mission of CSR and the management of funds are supervised by Bank Indonesia and OJK. The program results are then reported to the company and to the local/central government. Before the CSR program is implemented, it is discussed with the company to make it fit with the planning of CSR program.

4. CONCLUSION

From the discussion above, the following conclusions can be drawn, *first* CSR regulations regarding the obligations of Limited Liability Companies (PT) to implement them in the Indonesian legal system are regulated in several laws but there are 2 (two) laws that specifically regulate CSR, but the two laws are inconsistent with regard to sanctions if the obligation the consequences are violated, acting like volunteerism and compliance with legal norms becomes dependent on company. Although in Law no. 25 of 2007 concerning Investment and Law no. 4 of 2009 concerning Mineral and Coal Mining has regulated administrative sanctions against companies that do not implement them, but there is no strong force for companies to carry out corporate social responsibility. Sanctions that should also be regulated in laws and regulations if corporate social responsibility has become legal obligations, are criminal sanctions. *Second*, the obligations implementation of Limited Liability Companies (PT) to implement CSR in Indonesia are as follows the obligations implementation of a Limited Liability Company (PT) to implement CSR in Indonesia is as follows: a. Programs carried out by the company are not in accordance with the community's needs and only to fulfill company obligations; CSR programs are implemented individually with limited funds so that they cannot improve community welfare; and CSR programs carried out by companies are always moving and not sustainable so that they have not been able to change the social and economic conditions of the local community. *Third*, the absence of the same statutory provisions in regulating the amount of funds that must be spent by the company; CSR funds issued by the company are not supervised by the regional government so that it is difficult to control their use; the occurrence of overlapping laws and regulations; the incompatibility of the CSR program with policies issued by local governments; the allocation of CSR funds is misused and even corrupted by local officials; CSR is not carried out on target and its utilization is overlapping; there is no evaluation of the CSR program that has been implemented; many companies are more concerned with profit, so they do not want to carry out CSR programs; and lack of supervision from both local governments and corporations on CSR programs and funds so that the expected CSR goals are not achieved. *Last*, the establishment of a state institution that manages CSR is needed to accommodate the companies', government and society's interests so that the CSR program can run efficiently, on target and sustainably. These state institutions will surely have targeted CSR programs, and have access to local governments so that the implementation of the CSR program can run smoothly and with minimal obstacles so that the community welfare, which is the task of the state can be realized more quickly. Besides that, the advantage that the company gets is that the company does not need to spend energy and human resources to carry out the program.

Subsequently, the suggestions in this study are that social responsibility the company has to the community should not only be carried out by the corporate in the sense that the company is a large-scale legal entity. It does not rule out the possibility that individual companies that are not yet legally incorporated will also have significant social and environmental impacts on the surrounding community. If we use the term corporate social responsibility, it means corporate social responsibility regardless of how big the company is.

It is necessary to establish statutory regulations in the form of laws to accommodate the state institutions establishment to carry out CSR programs to be more efficient, right on target and sustainable considering that CSR funds are a great potential to improve the life quality and the environment that is beneficial, both for the company, the local community, and the community in a sustainable manner. With the CSR law, state CSR institutions will have a legal position so that the company submits to the CSR agency.

Companies with medium and small scale can be embraced by state CSR agencies in order to maintain the environment and help the surrounding community prosper so that they can focus more on running their business without being too burdened with obligations in carrying out CSR.

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