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LEGAL STANDING OF LAND OWNERSHIP FOR MIXED-MARRIAGES BETWEEN BALINESE WIVES AND FOREIGN HUSBANDS IN BALI

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Abstract

The influx of foreign visitors to Bali has naturally led to increased interaction between foreign nationals and the local Balinese population. With mixed-marriages, there are special provisions for the nationality of the spouse, the nationality of the spouse, the nationality of the children, and property in the marriage. Therefore, awareness is needed, especially for people of mixed-marriages to understand the provisions that apply to mixed-marriage spouses. This study uses normative juridical law which is a normative legal approach. The research emphasises the need for foreign nationals to understand the special provisions and restrictions for land ownership compared to Indonesian citizens. The Basic Agrarian Law of Indonesia (UUPA) governs land ownership regulations for mixed-marriages in Bali. Foreigners in Bali can acquire the right to use land through a Right to Use (*Hak Pakai*) or enter into leasehold agreements with Indonesian citizens or legal entities following to *asas nasionalitas*. However, land ownership rights are reserved exclusively for Indonesian citizens involved in mixed-marriages. The research highlights the influence of *Hukum Adat*, Balinese customary law, on land ownership in Bali. Mixed-marriage spouses should be aware of the regulatory disparities that arise after marriage and necessitate the arrangement of asset division. The customary law in Bali is in line with the existing statutory law in Indonesia.

1. INTRODUCTION

Bali, known as the "Island of The Gods" or also called as *Pulau Dewata*, holds a special place in the hearts of travelers as one of Indonesia's most treasured destinations. This spiritual atmosphere and rich cultural heritage, combined with the island's natural beauty, has captivated visitors from around the world, earning Bali the well-deserved title of "Island of The Gods". Embraced by awe-inspiring natural landscapes, including crystal-clear turquoise waters, soft sandy beaches, majestic waterfalls, and vibrant emerald rice fields, Bali presents a mesmerizing tapestry of nature's marvels combined by rich culture has successfully gained Bali a reputation as paradise on earth.¹ In the year 2022, Bali experienced

¹ Luchman Hakim, Jae-Eun Kim, and Sun-Kee Hong, "Cultural Landscape and Ecotourism in Bali Island, Indonesia," *Journal of Ecology and Environment* 32, no. 1 (January 2009), <https://koreascience.kr/article/JAKO200911440577766.page>.

an astounding influx of visitors, with a remarkable total of 276,659 tourists gracing its shores. Among this impressive number, foreign visitors accounted for a notable 65.64 percent, translating to approximately 181,625 individuals. These figures unequivocally cement Bali's position as a coveted global hotspot, capturing the hearts and imaginations of travelers from around the world. Its irresistible allure and magnetic appeal make it a top choice among international explorers, solidifying Bali's reputation as an unparalleled destination that leaves an indelible mark on the hearts of those who visit.

Table 1. Amount of Monthly Foreign Visitors Entrance to Bali BPS

Foreign Visitor Entrance	Amount of Monthly Foreign Visitors Entrance to Bali BPS							
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
Ngurah Rai Airport	0	1,293	14,717	58,315	115,553	1,811,545	24,642	276,627
Benoa Harbour	3	17	3	20	58	80	62	32
Total	3	1,310	14,620	58,335	115,611	181,625	246,504	276,659

Investment plays a crucial role in fostering economic growth, as the rate of investment growth is directly linked to the overall economic growth rate.² In Bali, investment is concentrated in specific sectors and areas. The tourism sector in particular attracts significant investment and is predominantly driven by foreign investors. The tourism sector in Bali has flourished, drawing a substantial number of visitors each year, with a minimum of four million tourists being attracted to the island. This impressive influx of tourists serves as a testament to the robustness and vibrancy of Bali's tourism industry. Several factors contribute to the thriving tourism in Bali, including a favourable political climate characterized by stability, an abundance of natural resources, ongoing infrastructure development initiatives, and the captivating diversity of its cultural heritage. Consequently, these factors collectively appeal not only to domestic travelers but also to international tourists from various parts of the globe, resulting in Bali's status as a sought-after destination on a global scale.³

According to the Investment Coordinating Board i.e. *Badan Koordinasi Penanaman Modal* (BKPM), as of the latest available data, investment realization in Bali Province reached IDR 9.65 trillion by December 31, 2020. This amount comprises IDR 4.22 trillion of foreign investment i.e. *Penanaman Modal Asing* (PMA) and IDR 5.43 trillion of domestic investment i.e. *Penanaman Modal Dalam Negeri* (PMDN). Foreign investment in Bali's tourism sector, specifically in hotels and restaurants, accounted for approximately 52 percent, with a value

² Jeanne G. Gobalet and Larry J. Diamond, "Effects of Investment Dependence on Economic Growth: The Role of Internal Structural Characteristics and Periods in the World Economy," *International Studies Quarterly* 23, no. 3 (September 1979), <https://www.jstor.org/stable/2600175>.

³ "4 Reasons Why Investment Tourism in Bali Keeps Thriving," Invest Indonesia, accessed June 30, 2023, <https://investindonesia.go.id/en/article-investment/detail/4-reasons-why-investment-tourism-in-bali-keeps-thriving>.

of US\$152.516 million or Rp2.19 trillion. While foreign investors have contributed significantly, it is essential to note that encouraging domestic investment is equally important for a balanced and sustainable economic growth trajectory.⁴

To achieve a populist economy and ensure that the benefits of the thriving tourism sector reach the Balinese people, the government has implemented various measures. One of the measure is by giving incentive, providing ease of investment, and workshop to enable transfer of knowledge to Balinese people. These initiatives aim to create opportunities for locals to actively participate in and benefit from the tourism industry and other industries.⁵ By diversifying investment sources and promoting a favourable investment climate, the government strives to attract both foreign and domestic investments in Bali.

Table 2. Realization of Foreign Investment in Bali Province by Regency/City (Million Rupiah) BPS

Regency/ City	Realization of Foreign Investment in Bali Province by Regency/City (Million Rupiah)			
	2020	2021	2022	Percentage 2022
Jembrana	1722	55661	107299	1.66%
Tabanan	94481	1066835	670349	10.39%
Badung	2783261	2315029	3238136	50.20%
Gianyar	234196	618811	944099	14.64%
Klungkung	273871	123249	164481	2.55%
Bangli	1352	4411	8597	0.13%
Karangasem	120010	49639 (katadata)	55008	0.85%
Buleleng	277252	1108616	126336	1.96%
Denpasar	436687	1256461	1136541	17.62%
Bali Province	4222832	6598711	6450848	

Can be inferred from the data of the table, it is clearly indicative that investment in Bali's tourism sector is currently experiencing high demand from foreign investors. The investment is especially concentrated in Badung with 50.2% of total investment followed by Denpasar with 17.32%. Consequently, it is essential to pay special attention to asset ownership in Bali to safeguard the interests of local communities and ensure they benefit from the thriving tourism industry.⁶

The influx of foreign tourists to Bali has naturally led to increased interaction between foreign nationals and the local Balinese population. This heightened interaction has resulted

⁴ Vika Azkiya Dihni, "Realisasi Investasi Indonesia Naik Terus dalam 5 Tahun Terakhir," *Databoks*, March 31, 2022, <https://databoks.katadata.co.id/datapublish/2022/03/31/realisasi-investasi-indonesia-naik-terus-dalam-5-tahun-terakhir>.

⁵ "Laporan Hasil Pemeriksaan Atas Laporan Keuangan dan Kinerja Pada Pemerintah Provinsi Bali Tahun 2021," Pemerintah Provinsi Bali, accessed June 30, 2023, <https://www.baliprov.go.id/web/wp-content/uploads/2022/06/BUKU-I-LHP-LKPD-PROVINSI-BALI-TA-2021.pdf>.

⁶ Ni Putu Eka Wiratmini, "Asing Dominasi Investasi Pariwisata di Bali," *Bisnis.com*, March 22, 2021, <https://bali.bisnis.com/read/20210322/561/1370829/asing-dominasi-investasi-pariwisata-di-bali>.

in a significant number of mixed-marriages in Bali. According to the head Immigration Ministry of Law and Human Rights (*Kemenkumham*) Bali, the number of mixed-marriage in Bali is considered substantial in Indonesia.⁷ Given the prevalence of mixed-marriages, particularly with foreign nationals in Bali, it becomes crucial to address these unions with careful attention, ensuring that they are legally binding and that the rights and conditions of both parties are appropriately protected. This necessitates the establishment of clear and binding rights and conditions for mixed-marriages, allowing for a harmonious and mutually beneficial partnership between Indonesian citizens and foreign spouses.⁸

In the Indonesian Law context, marriage is regarded as a sacred bond, both physically and spiritually, between a man and a woman. Marriage bond is aimed to form an eternal household based on Indonesia's Pancasila, Belief in One Almighty God (*Ketuhanan yang Maha Esa*).⁹ Marriage is considered as an important event for human beings that is sacred. Additionally, mixed-marriages, which involve individuals subject to different laws in Indonesia due to differences in nationality, religion, or population groups, have a unique significance in fostering cultural exchange and societal dynamics.¹⁰

Marriage regulations in Indonesia are governed by the 1945 Constitution, which upholds the Pancasila principles and emphasizes the sanctity and importance of marriage. It is important to note that there are different perspectives on marriage, including those outlined in the Marriage Law and the Civil Code. In the Civil Code, it is stated that "*Undang-undang memandang soal perkawinan hanya dalam hubungan perdata*". In which the above law can be literally interpreted as "The law views the issue of marriage only in civil relations". In civil relations, it means that a valid marriage is a marriage that fulfils the requirements set out in the Civil Code.¹¹ The Civil Code focuses solely on the civil relations aspect of marriage, defining a valid marriage as one that fulfils the requirements specified in the code.

Marriages with foreign nationals are referred to as mixed-marriages which can be defined as "the mixed marriages as unions between individuals who fall under distinct legal frameworks in Indonesia". This encompasses marriages between individuals of different faiths, nationalities, and ethnic backgrounds.¹² To put it differently, within this context, mixed-marriage can be defined according to this Law, as a marital union between two individuals who are governed by distinct legal systems in Indonesia due to disparities in nationality, where one of the parties is an Indonesian citizen.

2. METHOD

This research aims to delve into the complexities of land ownership regulations for mixed-marriage spouses in Bali, exploring the legal frameworks, rights, and limitations surrounding their acquisition of land in this coveted destination. By examining the

⁷ Berita Bali, "Bali Disebut Wilayah Paling Banyak Perkawinan Campuran," *Berita Bali*, May 20, 2021, <https://www.beritabali.com/news/read/bali-disebut-wilayah-paling-banyak-perkawinan-campuran>.

⁸ Mamahit Laurensius, "Hak dan Kewajiban Suami Istri Akibat Perkawinan Campuran Ditinjau Dari Hukum Positif Indonesia," *Lex Privatum* 1, no. 1 (2013), <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/1011>.

⁹ Pasal 1 *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.

¹⁰ Eka Sabrina Nuraudya, "Negosiasi Nilai Budaya Pada Pasangan Kawin Campur (Studi Deskriptif Kualitatif Negosiasi Nilai Budaya Pasangan Kawin Campur Antara Orang Indonesia Dengan Orang Barat)" (Undergraduate thesis, Universitas Muhammadiyah Surakarta, 2017), 16, UMSLibrary, <https://eprints.ums.ac.id/54303/>.

¹¹ Pasal 26 *Kitab Undang-Undang Hukum Perdata*.

¹² Pasal 57 *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.

implementations of laws and their practical implications, we will shed light on the measures in place to safeguard the interests of mixed-marriages spouses. Additionally, we will explore the challenges faced in striking a harmonious balance between Bali's thriving tourism industry and the need for responsible land ownership practices especially for mixed-marriages spouses. Through this analysis, we seek to provide a comprehensive understanding of the legal landscape surrounding land ownership for mixed-marriage spouses in Bali. As we delve into the multifaceted aspects of land ownership regulations in Bali, it becomes evident that addressing these complexities requires a nuanced approach that upholds the principles of fairness, cultural preservation, and economic growth. By unravelling the intricacies of this topic, we hope to contribute to the ongoing dialogue aimed at shaping policies that strike the delicate balance between tourism appeal and safeguarding Bali's invaluable heritage and also discussing with the interest of mixed marriage spouses unique rights that bind them.

3. RESULTS AND DISCUSSION

3.1 Legal Standing of Mixed-Marriage Land Ownership in Bali

Bali is widely recognized as one of Indonesia's premier tourist destinations on a global scale. Consequently, the island experiences a substantial influx of foreign visitors. The presence of these foreign tourists significantly impacts Bali's tourism industry and overall economy.¹³ Despite the challenges faced by Bali in recent years, it remains a cherished destination for both Indonesian and international travelers alike. Its unique combination of cultural richness and natural beauty entices foreigners not only to visit for leisure but also to contemplate residing in Bali. It is commonplace to observe interactions between foreigners and the local Balinese community. For foreigners choosing to stay in Bali, careful consideration must be given to the decision of acquiring a house or place of residence in Indonesia.¹⁴

With the escalating influx of foreigners to Bali, it is inevitable that interactions between these individuals and local citizens will occur, potentially resulting in social relationships. Some of these relationships may evolve into special bonds that lead to marriage. In Indonesia, marriage is regarded as a sacred union grounded in Pancasila principles, with the aim of establishing a lifelong household. Marriage carries various social and legal implications for both spouses. Furthermore, the regulations surrounding marriages between foreigners and local partners are more intricate, as such mixed-marriages involve individuals subject to differing laws based on nationality, religion, or population groups. These unions hold significant importance in fostering cultural exchange and influencing societal dynamics between the mixed-marriage spouse in Bali.¹⁵

¹³ Muhammad Eko Atmojo and Helen Dian Fridayani, "An Assessment of Covid-19 Pandemic Impact on Indonesian Tourism Sector," *Journal of Governance and Public Policy* 8, no. 1 (2021): 1–9, <https://doi.org/10.18196/jgpp.811338>.

¹⁴ Handy Samot, "Rangkuman Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional No. 5 Tahun 1998 Tentang Perubahan Hak Guna Bangunan Atau Hak Pakai Atas Tanah Untuk Rumah Tinggal yang Dibebani Hak Tanggungan Menjadi Hak Milik," *HukumProperti.com*, March 10, 2010, <https://hukumproperti.com/summary-peraturan-menteri-negara-agrariakepala-badan-pertanahan-nasional-no-5-tahun-1998-tentang-perubahan-hak-guna-bangunan-atau-hak-pakai-atas-tanah-untuk-rumah-tinggal-yang-dibebani-hak-tanggung/>.

¹⁵ Valensia Tedjanegara and Suzy Azeharie, "Case Study of Mixed Marriages Between Foreigners Married to Balinese Ethnic and Converted to Hinduism" (Proceedings of the International Conference on Economics,

When embarking on the establishment of a new family unit through marriage, the choice of a place of residence becomes a critical decision. For spouses in mixed-marriages, this decision presents a complex issue, as the Indonesian government has specific provisions governing the land rights and residence of foreigners. It is imperative that both the foreign and local spouses possess a comprehensive understanding of these rights to prevent potential problems from arising in the future.

3.2 Understanding Marriage in Legal Perspective

People, as social creatures, are inherently designed to live in proximity to others. Humans, being a *zoon politicon*, cannot thrive in isolation but rather require social interaction and communal living. Consequently, this inherent social nature necessitates harmonious coexistence with fellow individuals, as individuals themselves are interdependent on one another. Additionally, marriage serves to fulfill the natural and biological urge for procreation. It represents a fundamental biological imperative to propagate one's lineage to future generations, involving the union of two individuals of opposite sexes who share a common objective.

Marriage in Indonesian legal perspective is governed by the 1974 Marriage Law (*Undang-Undang Perkawinan*) as amended by Law No. 16 of 2019. For Indonesian citizen individuals seeking to enter into matrimonial bond, are obliged to follow the requirements set by the Marriage Law. This statement is in accordance with what is attached to the law i.e., in accordance with the Pancasila philosophy and ideals for the construction of national law, it is necessary to have a Law on Marriage that applies to all citizens.¹⁶

Marriage in Indonesia, known as "*Perkawinan*" in etymology, derives its name from the Javanese word "*kawin*". The term "*kawin*" derived from Javanese means of *dibawa*, *dipikul*, *diboyong*, has the connotation of being carried, borne, or accompanied. On the other hand, in Balinese culture, marriage is referred to as "*Pawiwahan*," which originates from the term "*wiwahan*" and signifies the celebration and ceremonial aspects of a wedding. Thus, marriage itself in Indonesia emphasize the wedding ceremony as to be "carried" by the two individuals who are bind into the marriage bond.

Marriage in Indonesia is considered as a social institution, which involving a woman and man agreeing to form a bond of marriage that is inseparable with the cultural and religion aspect. Seen from a sociological point of view, Kartasapoetra argues that marriage is a form of life cooperation between men and women in the life of a society under a specific set of rules that has certain characteristics, who involve, men act as husbands, and women act as wives, and both of whom are in a bond which is valid. Marriage according to the law, is defined as i.e. "Marriage is an inner bond between a man and a woman as husband and wife with the aim of forming a happy and permanent family (household) based on Almighty God."¹⁷ If the elements of marriage are analysed from the meaning, it is found that:¹⁸

1. Existence of Born and Inner Bonds; Born and Inner Bonds are interpreted as the existence of compatibility between the heart (inner) and outer (physical) to agree to make a bond in a marriage. So it is not enough to be inner or outer only, but both

Business, Social, and Humanities (ICEBSH 2021), August 8, 2021).
<https://doi.org/10.2991/assehr.k.210805.121>.

¹⁶ *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.

¹⁷ Pasal 1 *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.

¹⁸ Wienarsih Imam Subekti and Sri Soesilowati Mahdi, *Hukum Perorangan dan Kekeluargaan Perdata Barat* (Jakarta: Gitama Jaya, 2005), 47.

must be tightly integrated. An inner bond is an informal relationship which is a bond that is not visible but can be felt by both parties. While the birth bond is a bond that can be seen with the naked eye that reveals the existence of a relationship between a man and a woman to live together as husband and wife.

2. Marriage is between a man and a woman. It means that marriage can only be performed between one man and one woman, not more than that and not of the same sex. This marriage in principle adheres to the principle of monogamy, that is, at the same time a man is only tied to one woman, and vice versa a woman is only tied to one man at the same time.
3. The bond formed is the Bond of Husband and Wife. The inner and outer bond developed by both parties between a man and a woman is the bond of husband and wife through a marriage performed based on the applicable laws and regulations.
4. The purpose of marriage is to form a happy and permanent family. What is meant by family is father, mother and children. Happy and eternal means a harmonious relationship in the family and occurs forever.
5. Based on the One Almighty God i.e. *Ketuhanan Yang Maha Esa* which is one of Pancasila principles. The relationship that occurs is not only based on legal regulations but must also be based on the One and Only God, therefore the validity of marriage is based on religion and belief.

Marriage is inherently intertwined with the religious beliefs of the spouses, thereby making religion a crucial aspect to be taken into account. In accordance with the Indonesian Marriage Law, religion also plays a decisive role in determining the legitimacy of the marriage itself. The precise explication derived from the Indonesian law can be formally elucidated in the following manner: "(1) Marriage is valid, when it is done according to the laws of each religion and belief; (2) Every marriage is recorded in accordance with applicable laws and regulations".

Article 10 paragraph (2) Government Regulation of the Republic of Indonesia Number 9 of 1975 on the Implementation of Law Number 1 of 1974 on Marriage, also states that: "Marriage procedures are performed according to the laws of each religion and belief". Hence, it can be inferred that for a marriage to be recognized as valid in legal terms, both parties must mutually consent to solemnize the marriage within the religious framework they adhere to, while adhering to the prescribed rules and regulations.¹⁹

Based on the relevant article of the Indonesian Marriage Law, it can be deduced that within a marriage, each spouse has the capacity to have one husband and one wife. However, the pursuit of polygamy, wherein a husband may have more than one wife, necessitates the desire for such an arrangement and the consent of the existing wife or wives or in other words by the parties concerned (approved by the previous wife) with the permission of the Court. However, many husbands are misusing the arrangement of having more than one wife by not understanding the main principle of marriage is to build a long lasting family unit. According to Zaitunah, many individuals are making their excused to achieve their wants to polygamy.²⁰

¹⁹ Pasal 10 ayat (2) Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

²⁰ Zaitunah Subhan, *Al-Qur'an dan Perempuan: Menuju Kesenjangan Gender Dalam Penafsiran* (Jakarta: Prenada Media, 2015), 153.

The regulations governing this matter are outlined in Article 4 of the Indonesian Marriage Law Number 1 of 1974, which stipulates the following rules: "a. The wife cannot fulfill her obligations as a wife; b. The wife has a physical disability or an incurable disease; and c. a wife cannot give birth to children". In order to register the practice of polygamy or the act of having more than one wife, the husband is obligated to fulfil certain requirements and submit them for approval by the Court, as specified in Article 5 of the Indonesian Marriage Law Number 1 of 1974 written in which: consent from the wife/wives; there is certainty that the husband is able to guarantee the necessities of life for their wives and children; and there is a guarantee that husbands will be fair to their wives and children".²¹

Considering that marriage is regarded as an embodiment of Pancasila's principle of *Ketuhanan Maha Esa* (Belief in the One Supreme God), the Ministry of Religion, also known as *Kemenag*, underscores the significance of individual readiness when entering into marriage.²² Given the substantial and enduring obligations associated with marriage, individuals are expected to adequately prepare themselves and demonstrate emotional maturity to fulfil their respective roles as husband and wife. This assertion is further supported by the requirements imposed by the state for marriage, as delineated in the following rules written: "1. Marriage is based on the consent of both prospective bridegrooms (Article 6 paragraph (1)); 2. For people who are not yet 21 (twenty-one) years old who want to marry, they must get permission from both parents (Article 6 paragraph (2)); and 3. Marriage is only permitted both sides have reached the age of 19 (nineteen) years (Article 7 paragraph (1)). This provision can be circumvented by requesting a dispensation from the Court or other Office requested by both the male or female parents (Article 7 paragraph (2))".²³

The significance of marriage as a pivotal life event is reinforced by its legal recognition and administration by the Civil Registry Office, also known as *Kantor Catatan Sipil*. This institution is responsible for managing Population Administration affairs, including the registration of Population Events and recording of Important Events, as stipulated in Article 8 paragraph (1) letter a of Law No. 24 of 2013. The recognition of marriage as an important life event is further emphasized in Law No. 24 of 2013, specifically in Article 1 number 17 which stipulates that "Important events are events experienced by a person including birth, death, stillbirth, marriage, divorce, acknowledgment of children, confirmation of children, adoption of children, change of name and change of citizenship status".

Marriage is deemed a significant life event, particularly within Indonesian society, where it is widely regarded as a manifestation of Pancasila's principle of *Ketuhanan Maha Esa* (Belief in the One Supreme God). It symbolizes the pursuit of a lasting and blissful marital union. In line with the relevant laws and regulations governing marriage in Indonesia, spouses are obligated to formally register their marriage. The obligation to register a marriage in Indonesian marriage law is regulated in Article 3 of the Law of the Republic of Indonesia Number 23 of 2006 on Population Administration, which is written as follows: "Each Resident is obliged to report Population Events and Important Events he has experienced to the Implementing Agency by fulfilling the requirements required in Population Registration and Civil Registration".

²¹ Pasal 5 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

²² NH. Kurniawan and Sigit, "Kemenag Ingatkan Pentingnya Menikah di Usia Matang," *Kementerian Agama Republik Indonesia*, December 11, 2018, <https://kemenag.go.id/nasional/kemenag-ingatkan-pentingnya-menikah-di-usia-matang-4db01m>.

²³ Pasal 6-7 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan jo. Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

Additionally, based on such reports, the Civil Registration Office is responsible for documenting the marriages in the Register of Marriage Deeds and publishing the Collection of Marriage Deeds, as stipulated in Article 34 paragraph (2) of Law No. 23 of 2006. Failure to timely report important events such as marriages may result in administrative penalties, including fines, as specified in Article 90 paragraph (1) letter b of Law No. 23 of 2006. The fine is administered to ensure the timely manner of every spouse in marriage registration. The existence of the Marriage Act serves as official documentation of marriage, as outlined in Article 11 paragraph (3) of Government Regulation No. 9 of 1975.

3.3 Mixed-Marriages in Indonesia

Marriage is a significant life event that holds both cultural and legal significance. It serves as a framework for individuals to establish a shared life with a partner, fulfilling their respective marital duties. While individuals form connections through various daily activities, they may unknowingly enter a marital union with someone from a different cultural, religious, or background. These unions, known as mixed-marriages, give rise to unique dynamics within the spousal relationship due to the differences in background and cultural heritage. As social beings, humans as *zoon politicon* rely on companionship and the company of others to lead fulfilling lives. *Zoon politicon* can be defined as the man by nature as political animal, in which is one of Aristotle's most influential and lasting assertions in the fields of medieval thought on politics, political human nature, its language and respective horizons.²⁴ Marriage acts as a vessel through which individuals forge deep bonds, sharing their lives and assuming marital responsibilities.

The decision to marry is often influenced by personal experiences, social interactions, and chance encounters. However, some of Indonesians are pressed to be married at a young age, due to marriage as vessel to as in resolving disputes; and in inequality roles of woman and men pushing women to marry early, economic issue, to protecting family honor, tradition and culture might influence of an expedited marriage in Indonesi.²⁵ Consequently, individuals may find themselves connected to partners whose background, culture, and religion differ from their own. This interconnectedness transcends societal boundaries, giving rise to the formation of mixed-marriages.

Mixed-marriages in Indonesia bring together individuals with diverse backgrounds, resulting in a fusion of cultures, traditions, and belief systems within the marital relationship. These unions introduce unique dynamics that both enrich and challenge the involved spouses. Cultural differences provide opportunities for mutual learning, growth, and the appreciation of each other's heritage. Such marriages foster an environment of cultural exchange and create space for the exploration and acceptance of diverse perspectives.²⁶

Mixed-marriages also present challenges that necessitate effective communication, understanding, and compromise. Cross cultural aspect of mixed marriages may influence the communication pattern in the family and require balancing to emphasize between

²⁴ António Rocha Martins, "The Zoon Politikon: Medieval Aristotelian Interpretations," *Revista Portuguesa de Filosofia* 75, no. 3 (2019): 1539–1574, <https://www.jstor.org/stable/26796764>.

²⁵ Riskia Nabila, Roswiyani, and Heryanti Satyadi, "A Literature Review of Factors Influencing Early Marriage Decisions in Indonesia" (Proceedings of the 3rd Tarumanagara International Conference on the Applications of Social Sciences and Humanities), <https://doi.org/10.2991/assehr.k.220404.223>, 2.

²⁶ Judith N. Martin and Thomas K. Nakayama, "Intercultural Communication and Dialectics Revisited," in *The Handbook of Critical Intercultural Communication*, ed. Thomas K. Nakayama and Rona Tamiko Halualani (Blackwell Publishing Ltd, 2010), <https://doi.org/10.1002/9781444390681.ch5>.

situations. Differences in customs, traditions, and religious practices require spouses to navigate and harmonize their beliefs and values. This process of adaptation and negotiation contributes to the development of a resilient and inclusive marital bond, founded on mutual respect and understanding.²⁷ In legal perspective, Soetojo Prawirohamidjojo also discuss the challenges found in mixed marriages are that he concludes that colonial regulation provides a more varied than the one stipulated in the current law article 57. As in GHR according to his research, the current law is excessive in which already more fully regulated than the GHR. The GHR, if examined from his research, refers to marriages between persons subject to different laws within Indonesia.²⁸

Mixed-marriages in Indonesia are not only characterized by cultural diversity but also involve legal considerations governed by the Indonesian Marriage Law No. 1 of 1974. This law governs every valid marriage in the country, providing a legal framework for the rights and obligations of married couples. It recognizes marriages conducted in accordance with both religious customs and civil registration. As stipulated by the Indonesian Marriage Law No. 1 of 1974, "What is meant by mixed-marriage in this Law is a marriage between two people who in Indonesia are subject to different laws, due to differences in nationality and one of the parties having Indonesian nationality".²⁹

From the definition described above from Article 57 of the Marriage Law, the elements of a mixed-marriage can be described as follows: marriage between a man and a woman; in Indonesia is subject to different laws; due to differences in citizenship; and one of the parties has Indonesian citizenship. In Indonesia there are mainly two types of mixed-marriage that exist: 1) Mixed-marriage between Indonesian nationality wife and foreign nationality husband; and 2) Mixed-marriage between Indonesian nationality husband and foreign nationality wife. The Indonesian Marriage Law acknowledges the concept of mixed-marriages, defined as the union between two individuals who are subject to different laws in Indonesia due to differences in nationality, with one party being an Indonesian citizen. As such, the law addresses the legal implications and requirements specific to mixed-marriages, including matters related to property ownership, inheritance, child custody, and divorce. This research will focus on marriages involving spouses from Indonesia and a foreign national.

3.4 Mixed-Marriages of Balinese Women and Foreign Husband: Factors Influencing Their Occurrence in Bali

Bali, with its captivating natural allure and diverse attractions, has garnered substantial attention from global visitors. The Indonesian Ministry of Tourism and Creative Economy has reported a consistent growth in the number of international visitors to Bali over the years. Several factors contribute to the island's popularity, including its picturesque beaches, rich traditional arts and crafts, distinctive cultural ceremonies, and renowned hospitality. These qualities have drawn visitors from various countries such as Australia, China, India, Japan, and several European nations. Australian tourists in particular have

²⁷ Ani, Aisha Nadya, and Arum Setiowati, "Cross-Cultural Marriage Family Resilience and Implications for Family Guidance and Counseling" (Proceedings of the International Seminar on Innovative and Creative Guidance and Counseling Service (ICGCS 2021), 2021), <https://doi.org/10.2991/assehr.k.220405.006>, 33.

²⁸ Soetojo Prawirohamidjojo and R. Soebijono Tjitrowinoto, *Pluralisme dalam Perundang-undangan Perkawinan di Indonesia* (Surabaya: Airlangga University Press, 1986), 77-78.

²⁹ Pasal 57 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

historically comprised a significant portion of Bali's visitors, primarily due to the island's proximity to Australia.

It is important to recognize that tourism patterns and visitor numbers are subject to fluctuations influenced by global economic conditions, natural disasters, political situations, and pandemics. Notably, the COVID-19 pandemic significantly impacted Bali's tourism industry in 2021, resulting in a sharp decline in visitor numbers. The Ministry of Tourism of the Republic of Indonesia reported only 43 visitors in 2021. However, through strategic pandemic mitigation efforts implemented by the government and local communities, Bali's tourism sector has made a remarkable recovery. Emphasized, after the Covid-19 pandemic, Bali's reputation as a destination worth visiting is quite high. This is evident in the substantial increase observed in 2022, with a total of 2,154,045 direct foreign tourist arrivals recorded via Ngurah Rai Airport. The data highlights the resurgent appeal of Bali as a premier tourist destination, exhibiting a remarkable 5,009,036.98 percent increase in visitor numbers from 2021 until December 2022. The number of tourist visits that opened since March 2022 gradually increased, and in January 2023 the number of foreign tourist visits reached 331,912 people, or an average of 10,707 people/day.

These figures reflect the enduring allure of Bali as a destination of choice for travelers seeking natural beauty, cultural richness, and warm hospitality. It signifies the successful revitalization of the tourism sector following the challenges faced during the pandemic. While the specific figures may vary in subsequent years, the overall trend underscores the enduring popularity of Bali and its ability to bounce back from adversity.

Marriage, as a social institution, is deeply rooted in both statutory and customary laws, reflecting the cultural and legal norms of a given society. In the enchanting island of Bali, Indonesia, the interplay between statutory and customary marriage laws creates a unique legal landscape that shapes the marital relationships of its inhabitants. Marriage is an important life event that highly impact the people who are bind into the marriage. Furthermore, it is a fundamental institution that shapes society, establishes familial relationships, and governs the rights and obligations of individuals. In the context of Indonesia, a diverse and culturally rich nation, marriage holds immense significance as it brings together individuals from different backgrounds, religions, and nationalities.

World-wide visitors engage in interactions with the local citizens of Bali. Initially acquaintances in their capacity as travelers, many tourists develop profound connections as they immerse themselves in the Balinese community. Some of these relationships even progress to the point of fulfilling the innate biological urge for procreation. Marriage as social institution, creates a which is a valid relationship between a man and a woman for a long time.³⁰ The phenomenon of mixed-marriages between foreign visitors and local Balinese individuals has become increasingly prevalent in recent times. This occurrence can be attributed to a combination of external and internal factors. External factors encompass religious, educational, economic, financial, social, cultural, and environmental influences. These factors may play a role in facilitating the connection between individuals from different backgrounds and fostering a sense of compatibility.

Religious factors can serve as a motivation for mixed-marriages, as individuals with diverse religious beliefs may seek common ground in their pursuit of a harmonious marital bond. Educational opportunities in Bali, such as attending renowned institutions or participating in cultural exchange programs, can bring foreign visitors into contact with local Balinese individuals, creating opportunities for meaningful connections to develop.

³⁰ Ronald Saija and Roger F.X.V. Letsoin, *Buku Ajar Hukum Perdata* (Yogyakarta: Deepublish, 2016), 12.

Economic and financial considerations also play a role, as individuals may be attracted to Bali's economic prospects and seek to establish stable relationships with local residents. The desire for a better quality of life and improved socio-economic conditions can act as a driving force for individuals to enter into mixed-marriages. The economic driven mixed-marriage is due to marriage may provide integration of two different culture. For Balinese woman, most woman better consider financial security as their one driving factors.

Cultural factors contribute significantly to the occurrence of mixed-marriages in Bali. The rich and vibrant Balinese culture, with its unique traditions, arts, and customs, can captivate foreign visitors and foster a deep appreciation for the local way of life. The desire to immerse oneself in this cultural environment and forge connections with the Balinese community can lead to the formation of marital bonds. Environmental factors, such as the natural beauty and serene atmosphere of Bali, can serve as a catalyst for the development of romantic relationships between foreign visitors and local residents. The allure of the island's landscapes, including its picturesque beaches and lush tropical surroundings, can create a conducive environment for fostering emotional connections.

Additionally, hereditary customs, the prospect of changing citizenship, and the aspiration for personal growth and improvement can further motivate individuals to pursue mixed-marriages. The desire to embrace and carry forward cultural traditions, as well as the opportunity for personal development and advancement in a new cultural context, can contribute to the attractiveness of such unions. In summary, the increasing prevalence of mixed-marriages between foreign visitors and local Balinese individuals in Bali can be attributed to a combination of external and internal factors. These factors encompass religious, educational, economic, financial, social, cultural, and environmental influences. By recognizing and understanding these factors, we gain insight into the motivations behind mixed-marriages and the diverse dynamics that shape these marital bonds.

3.5 Customary Law and Norms of Marriage in Bali

Bali, renowned for its rich cultural heritage and steadfast adherence to customs, stands out as a unique region characterized by its distinct cultural practices. The majority of Balinese residents embrace Hinduism as their religion, which serves as a fundamental aspect of their identity. The significance of culture and local Hindu influenced values in Bali is deeply rooted in the Balinese people's adherence to the principle of *Tri Hita Karana*, which influences their daily activities and interactions. *Tri Hita Karana* encompasses the harmonious relationship between humans, nature, and the spiritual realm. It emphasizes the need for balance and harmony in all aspects of life, including social, ecological, and spiritual dimensions.³¹

This assertion of the significant of Hinduism value in Bali is substantiated by statistical data provided by the Directorate General of Population and Civil Registration (*Dukcapil*) under the Ministry of Home Affairs (*Kemendagri*), indicating that the Hindu population in Bali amounts to 3.71 million individuals, accounting for 86.8% of the total population of 4.27

³¹ I Made Budiastika, "Implementasi Ajaran Tri Hita Karana Dalam Kehidupan," *Kementerian Agama Republik Indonesia*, January 17, 2022, <https://www.kemenag.go.id/hindu/implentasi-ajaran-tri-hita-karana-dalam-kehidupan-4s9s1u>.

million people. In a national context, Bali boasts the highest proportion of Hindus.³² The prevalence of Hinduism in Bali shapes the social fabric, cultural practices, and religious customs of its inhabitants. The deeply ingrained influence of Hinduism is evident in various aspects of Balinese life, including rituals, ceremonies, arts, and governance. Balinese individuals embrace Hinduism not only as a personal faith but also as a collective identity that binds communities together. The religion provides a framework for social cohesion, moral guidance, and spiritual fulfilment, serving as a guiding force for Balinese traditions and practices.

Marriage is considered as part of religion practice for Balinese. In the Hindu, marriage is defined as *grahasta asrama* or in other words, to build a household.³³ Additionally, the *grahasta asrama* serves as the primary space for the implementation of the *panca maha yadnya* and other essential rituals. Considering these multifaceted roles and responsibilities, it becomes evident that Balinese as community especially the adolescents and young individuals, particularly those who have yet to experience the *grahasta asrama* period, should possess a deep and steadfast understanding of its significance. Thus, this marks an importance role of marriage for Balinese in general.³⁴

With its role as a customary law in Bali, *awig awig* and *pararem* is not only as a unwritten norms in the Balinese society, but it is stipulated in Bali Provincial Regulation Number 3 of 2003. As stipulated on the regulations, specifically on Bali Provincial Regulation Number 3 of 2003 Article 1 Paragraph 1, *awig awig* is defined as: "a rule made by *krama desa pakraman* and/or *krama banjar pakraman* which is used as a guide in the implementation of *Tri Hita Karana* in accordance with the *mawacara* village and *dharma agama* in the respective *pakraman/banjar pakraman* villages".

The enactment of Bali Provincial Regulation Number 3 of 2003 holds the potential to enhance the customary village system, known as *desa pakraman*, in Bali. It is recommended that the *awig awig*, the customary law of the village, be codified and documented not merely as a customary norm but as a comprehensive legal framework. This codification would facilitate uniformity and coherence among the various elements of the *awig awig*, including the object, subject, material, and system governed by it. The substance of the *awig awig* may vary based on the mutual joint agreement of the *desa pakraman* as a whole governing the norms and sanctions that governs the *desa pakraman* area. The formulation of the *awig awig* is started by the drafting process of the *pararem* which are analyzed by the *prajuru desa*. The written *pararem* should follow with the *catur dresta* which are in line with values of Bali, Hinduism, Pancasila and UUD 1945. The drafts will be later on discussed on the customary meeting which may involve *Prajuru Desa Pakraman* i.e. the customary village officials, the family heads, village chief, *pecalang*, and *pemangku* to agree on the *pararem* to be followed by the whole community.³⁵

Inter-caste marriages were not allowed in the Hindu-Bali society during the time of the kingdom due to the importance of the caste system in Bali. Inter-caste marriages are no

³² Viva Budy Kusnandar, "Persentase Pemeluk Agama Hindu di Bali Tertinggi Nasional pada Juni 2021," *Databoks*, October 28, 2021, <https://databoks.katadata.co.id/datapublish/2021/10/28/persentase-pemeluk-agama-hindu-di-bali-tertinggi-nasional-pada-juni-2021>.

³³ Warta Hindu Dharma No. 530 Februari 2011.

³⁴ I Putu Agus Adi Suarhawan, I Dewa Putu Merta, and Tjok. Udiana NP, "Values Of Grhasta Asrama In The Creation Of Sculpture," *Cita Kara: Jurnal Penciptaan dan Pengkajian Seni Murni* 1, no. 2 (November 2021): 15–20, <https://jurnal2.isi-dps.ac.id/index.php/citrakara/article/view/1530>.

³⁵ I Putu Ari Putra Maulana and Ida Bagus Gede Dharma Putra, "Metafora Konseptual Kasta Dalam Masyarakat Bali: Kajian Linguistik Kognitif," *Prasi* 16, no. 2 (2021): 94, <http://dx.doi.org/10.23887/prasi.v16i02.37578>.

longer regarded as illegal since 1951, according to the DPRD Decision No. 11/Year 1951, which was issued on the 12th day of that year. Despite the legal changes, certain aspects of the inter-caste marriage landscape continue to present challenges within the Hindu-Bali community. The *patiwangi* ceremony, commonly referred to as *nyerod*, remains in practice. This ceremonial tradition involves the purification of the non-*Brahmin* spouse to enable their inclusion into the *Brahmin* caste, allowing the marriage to proceed. While some individuals perceive the *patiwangi* ceremony as an essential cultural practice, others view it as discriminatory and a violation of human rights. While this legislative change represents progress, it has not fully addressed the issues that still exist in the community. Some Hindu-Bali community leaders are particularly concerned about the continued use of the *patiwangi* ceremony, also known as the *nyerod*. They consider it to be discrimination, a violation of human rights, and a contributing element to gender disparity in families, both before and after divorce.³⁶

Other form of marriage in the Balinese customary perspective is *Nyentana* which are a form a deviation from the usual patrilineal kinship system in Balinese society. *Nyentana* involves the male spouse to be adopted to be part of the wife family in order to continue the wife's family line.³⁷ *Nyentana* usually chosen by the female spouse considering that she is an only child and only descendant to continue the family line and taking care of the family, following more to the matrilineal line instead. This arrangement is usually avoided by male spouses as it is uncommon and may provide difficulties in the future as in parental blessings, marriage property, inheritance issue and the adaptation of the male spouse into the wife's family household. This difficulties mainly stems from the strong belief of Indonesian in the patrilineal line which state that the male position in the society is more prominent than female. Thus, the *Nyentana* marriage may cause some to raise their eyebrows.³⁸

4. CONCLUSION

Conclusion in this research are: First, mixed marriages in Indonesia are legally recognized. However, the regulations regarding land ownership rights after the marriage differ. Unless a specific agreement is made regarding the division of assets, the acquisition of land rights may be subject to alteration. Second, the implementation of mixed marriages, particularly between foreign grooms and Balinese brides, typically aligns with state laws. Nevertheless, in accordance with customary practices, such unions often face obstacles due to considerations of land ownership, the transfer of land rights, and the limited availability of customary land on the island of Bali.

³⁶ Made Pasek Diantha and I Gede Pasek Eka Wisanjaya, *Kasta dalam Perspektif Hukum dan HAM* (Denpasar: Udayana University Press, 2010), 56–58.

³⁷ I Gusti Ag Ayu Putu Cahyania Tamara Buana, Rachma Fitriyani Nasri, Rizka Wulan Pravitasari, and Moza Fausta. "Hak Anak Laki Laki yang Melangsungkan Perkawinan Nyentana," *Kanun Jurnal Ilmu Hukum* 21, no. 2 (August 2019): 297, <https://jurnal.usk.ac.id/kanun/article/download/13220/10781>.

³⁸ I Wayan Bhayu Eka Pratama, Ni Nengah Dhea Riska Putri Nandita, and Ni Nyoman Indah Ratnasari, "Perkawinan Nyentana Di Bali: Urgensi, Tata Cara, Dan Prospeknya Di Era Modern," *Jurnal Hukum Lex Generalis* 2, no. 6 (June 2021): 462, <https://ojs.rewangrencang.com/index.php/JHLG/article/view/78>.

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THE ROLE OF ROAD TRAFFIC LAWS IN INCREASING COMPETITIVENESS AND OVERCOMING VIOLATIONS

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Abstract

This research analyzes the role of the Road Traffic and Transportation Law in increasing the competitiveness of trucking companies and also addressing violations committed. Transport companies are part of another company's supply chain. Not all trucking companies deal with the goods owner directly, some are through third-party intermediaries (brokers). Tiered transactions are the structure of this industry because there are several levels of parties between the carrier company and the owner of the goods. Field phenomena show that this condition has not yet been achieved. This research aims to discover existing problems with existing laws for future improvements. This research uses normative juridical methods by studying existing laws and conducting comparative studies. Secondary data is also used to obtain the desired results. The results show that current laws cannot increase competitiveness and optimally prevent violations committed by trucking companies. Therefore, future legislation must be able to solve this problem.

1. INTRODUCTION

Goods transportation in Indonesia is dominated by trucks. 91 percent of goods deliveries is carried out using this mode,¹ so the contribution to the national economy is significant. This industry plays a vital role in strengthening national competitiveness, therefore the Government must pay more attention. Deregulation occurred since the issuance of Law No. 14 of 1992 concerning Road Traffic and Transportation where permits for the transportation of goods were abolished and transportation prices were handed over to market mechanisms.

The Road Traffic and Transportation Law has been updated three times. The first law is Law Number 3 of 1965 concerning Road Traffic and Transportation, the next is Law Number 14 of 1992 concerning Road Traffic and Transportation, and the last is Law Number 22 of 2009 concerning Road Traffic and Transportation. The basis for the issuance of Law Number 3 of 1965 is "Werverkeersordonnantie" (Staatsblad 1933 Number 86), this law was

¹ Kyatmaja Lookman, Nyoman Pujawan, and Reny Nadlifatin, "Innovative Capabilities and Competitive Advantage in the Era of Industry 4.0: A Study of Trucking Industry," *Research in Transportation Business & Management* 47 (March 2023): 100947, <https://scholar.its.ac.id/en/publications/innovative-capabilities-and-competitive-advantage-in-the-era-of-i>.

issued during the Dutch government era which was no longer relevant to the development and advancement of motor vehicle technology.²

Transport companies are part of another company's supply chain. Not all trucking companies deal with the goods owner directly, some are through third-party intermediaries (brokers). Tiered transactions are the structure of this industry because there are several levels of parties between the carrier company and the owner of the goods. These parties take advantage of connecting the company with the owner, thereby causing high prices. This is the cause of low transportation prices and poor service quality.³

The bargaining position of truck companies is lower compared to customers, causing low transportation prices, which results in low company profits, sometimes even below the cost of capital. The practice of overloading and over-dimension is the company's solution to remain in business. Weak supervision from the Government fosters the practice of overloading and over-dimension, making it a problem that is difficult to resolve. Additionally, the country is burdened with traffic jams, high accident rates, damaged roads, and air pollution. This research is new because there has been no previous research that examines the role of the Road Transport Traffic Law relating to goods transportation from the time it was published until now to increase competitiveness and overcome violations committed by trucking companies. Based on the description above, the research questions are as follows: 1) Are existing laws able to increase the competitiveness of trucking companies?; 2) Can existing laws reduce the level of violations committed by trucking companies?

2. METHOD

This research method uses a normative juridical approach.⁴ This research explores the legal regulations regarding traffic and road transportation from the time they were first published until now and their implementation on goods transportation, and studies developments that occur in society. This research uses primary legal materials taken from the first law, Law Number 3 of 1965 concerning Road Traffic and Transportation, Law Number 14 of 1992 concerning Road Traffic and Transportation, and Law Number 22 of 2009 concerning Road Traffic and Transportation. Secondary legal materials are obtained from libraries using journal articles, dissertations, and other references. This research also uses a comparative study method, by comparing laws related to Road Traffic and Transportation from the time they were published until now.

² Undang-undang Nomor 3 Tahun 1965 tentang Lalu Lintas dan Angkutan Jalan Raya.

³ Kyatmaja Lookman, "Kemampuan Berinovasi Perusahaan Truk Agar Tetap Kompetitif Di Era Industri 4.0" (Doctoral Thesis, Institut Teknologi Sepuluh Nopember, 2023), ITS Repository, <https://repository.its.ac.id/95858/>.

⁴ Agus Budianto, "Legal Research Methodology Reposition in Research on Social Science," *International Journal of Criminology and Sociology* 9, (2020): 1339–1346, <https://lifescienceglobal.com/pms/index.php/ijcs/article/view/7848>.

3. RESULTS AND DISCUSSION

3.1 Road Transport Traffic Law

3.1.1 Law Number 3 of 1965

In this law, the development of goods transportation is not yet so complex that there are not many articles regulating goods transportation on the road. There are six articles related to goods transportation in Article 1, Article 15, Article 22, and Articles 24–26. The definition of goods transportation in Chapter One of Article 1 is known as the terminology of vehicle carrying goods (trucks) which are motorized vehicles other than passenger cars and buses and are not two-wheeled vehicles. Motorbikes are excluded from being used for transporting goods.

Chapter VIII explains the role of the Government in the field of road transport which states that the state controls and organizes vital road transport including goods transportation (Article 22). Chapter IX regulates the business of transporting goods by motorized vehicles, and for the public interest and transport coordination, the Minister may require route permits for the business of transporting goods by motorized vehicles.

Chapter IX contains three articles 24–26 which explain the business of goods transportation. Article 24 regulates the responsibilities of operators towards service users. Here it is stated that the operator is responsible for the losses suffered unless it can be proven that the losses were not his/her fault (poor packaging). Article 25 regulates the carrier's obligations at the rates determined by law, as long as good procedures are not violated. Article 26 further regulates that transport rates that have not been regulated by law will be regulated in a Level I Regional Government decision, and prohibitions on transporting goods that do not comply with the rates that have been determined.

3.1.2 Law Number 14 of 1992

In general, this law emphasizes the importance of transportation in supporting the economy, as well as the role of goods transportation to and from nationwide, and even to and from abroad. There are 17 articles (almost three times as many) that regulate the transportation of goods on the road, which in Articles 1, 9, 22, 23, 28, 34, 35, 39, 40–48. Chapter I contains general provisions. Article 1 explains the definition of a public transportation company, which is a company that provides goods transportation services using public vehicles on the road. The definition of service users (individuals and legal entities) is also explained.

In Chapter IV, Article 9 is related to the role of terminals, which is to create a smooth flow of goods and integration with other modes. Chapter VII Article 22 contains procedures for transporting goods, as well as coupling and attachment to other vehicles for safety, security, smoothness, and traffic order. Article 23 regulates the obligations of goods transport drivers to comply with road classes, signs, working and rest times, stopping and parking, and others. Article 28 regulates the driver's responsibility for negligence in driving a motorized vehicle which results in damage to his belongings.

Chapter VIII concerning transportation, the first part of Article 34 requires the use of motorized goods vehicles to transport goods. Article 35 emphasizes that the collection of goods transportation costs can only be carried out by public transportation. In the third part of Article 39, certain goods traffic networks can be established for the sake of safety, security, order and smooth traffic, this will be regulated in Government Regulations. Likewise in

Article 40, the transportation of dangerous goods, special goods, containers and heavy equipment will be specifically regulated by Government Regulation.

In Chapter VIII, the fourth part related to goods transportation operations is in Article 41. Goods transportation businesses can be carried out by legal entities or Indonesian citizens and are obliged to have permits as regulated by Government Regulations. The fifth part of Article 42 discusses freight transport tariffs, here the Government no longer regulates freight rates but rather the structure and categories are determined by the Government.

Chapter VIII in the sixth section discusses the carrier's responsibilities. Article 43 requires public transport operators to transport goods according to the agreement in the letter of carriage agreement after payment has been made by the sender of the goods. If a departure occurs, the public transport operator is obliged to refund the transportation costs (Article 44). Apart from that, Article 45 states that public transportation operators are responsible for losses of the amount suffered by the sender of goods or a third party if they are negligent in carrying out their services, from the time the goods are transported until their destination. For these risks, public transport operators are obliged to insure them following Government Regulations (Article 46). If the goods being transported could endanger security and safety, the driver can drop off the goods at the nearest stopping point (Article 47). In addition, transport operators can charge additional fees for storing goods that are not taken by the recipient and handing over the goods after payment. If the item is not taken within a certain period, it can be declared unclaimed and can be sold at auction under statutory regulations (Article 48).

3.1.3 Law Number 22 of 2009⁵

This law is the latest concerning road traffic and transport. This law has the largest number of articles regulating goods transportation. There are 63 articles (almost four times as many) that regulate the transportation of goods on the road, namely Articles 1, 4, 15–17, 33, 35, 47, 53, 54, 59, 61, 80–83, 93, 94, 108, 125, 133, 137–139, 160–165, 167–173, 180, 181, 184, 186–197, 234, 262, 265, 288, 301, 303, 305–309. In the general provisions in Chapter I, it is explained the definition of a public motorized vehicle is a vehicle used by a public goods transportation company for price. The traffic space is used for the movement of these vehicles, while the terminal is used to organize arrivals and departures as well as for loading and unloading goods as well as changing modes of transportation. Chapter III, Article 4 explains the scope of the Law, which is to foster and organize safe, secure, orderly and smooth traffic and road transportation, one of which is through the movement of goods on the road.

Chapter IV, the first part, relates to the master plan for road traffic and transportation networks consisting of national (Article 15), provincial (Article 16) and district/city (Article 17) level networks. These articles contain the movement of goods from origin to destination for all modes of transportation, location plans, and node requirements and space requirements. The fourth part of Article 33 explains the function, classification and types of terminals, to support the smooth movement of goods and the integration of intermodal and multimodal in the form of receiving goods. These receiving terminals can be built for their advantage, state/regional-owned enterprises, and the private sector following statutory regulations (Article 35).

⁵ *Undang-undang Nomor 22 Tahun 2009 tentang Lalu Lintas dan Angkutan Jalan.*

Chapter VII explains about vehicles including goods cars and special vehicles (Article 47). These vehicles in the third part of Article 53 which are operated on the road must undergo periodic tests, including goods cars, trailers and attached trains. This includes technical and roadworthiness (Article 54). The use of yellow signal lights without sirens must be used for special goods vehicles (Article 59). For non-motorized vehicles in the sixth part of Article 61, they must also fulfil the requirements for loading procedures which include dimensions and weight.

Chapter VIII discusses drivers, in the first part regarding driving licenses. In paragraph three, the form of driving license is regulated in Article 80, where the license for goods cars is driving license class A for the permitted vehicle weight not exceeding 3,500 kilograms while driving license class B I for permitted vehicle weight more than 3,500 kilograms, and for trailers and trailers can only be driven with driving license class B II. Article 81 regulates the requirements for obtaining a driver's license, including age, administrative, health, exams, and requirements for the length of time you have had a previous driver's license. Article 82 regulates the same things as Article 80 but for public motorized vehicles. Likewise for Article 83 and Article 81.

Traffic management and engineering are explained in Chapter IX, the aim of which is to optimize the road network and traffic movement for security, safety, order, and smoothness (Article 93) which includes planning, regulation, engineering, empowerment, and supervision activities. Planning activities include inventory and analysis of goods transportation needs, availability and capacity of vehicles and roads (Article 94). Paragraph three of Article 108 regulates the use of goods transport lanes on the left lane of the road, while the right lane is only for overtaking. Article 125 emphasizes the obligation for goods transport to use the road network under the determined road classes. Traffic demand management is regulated in the seventh part of Article 133. To increase the efficiency and effectiveness of the use and movement of space, traffic movement is controlled through traffic restrictions, including for goods transport in certain corridors and times and restrictions under the classification of road functions.

Chapter Goods-carrying vehicles are also prohibited from being used to transport people with several exceptions regulated by Government Regulations. The second part of Article 138 contains the Government's obligation to provide safe, secure, comfortable and affordable means of transporting public goods. This obligation is international, national, provincial and district/city and is carried out by state/regional-owned enterprises or legal entities following statutory regulations (Article 139).

The fourth part of Chapter Paragraph 2 of Article 161 explains the requirements for the transportation of goods to always comply with the road class, the availability of logistics centres for loading and unloading goods, and the use of goods-carrying vehicles. Paragraph 3 contains provisions for the transportation of special goods and heavy equipment along with obligations, escort provisions, and competence of drivers and driver assistants (Article 162). The obligation to provide notification regarding special goods for service users to the goods carrier and the carrier is also obliged to store and organize under the provisions on special goods as long as the goods have not been loaded (Article 163), this provision is further regulated through a Ministerial Regulation (Article 164). The fifth part of Article 165 contains the implementation of multimodal transportation by multimodal transportation legal entities following the provisions and obtaining permission from the Government, which will be further regulated in Government Regulations.

The sixth part of the Chapter and the seventh part contain supervision over the loading of goods, in Article 169, public transportation companies carrying goods are obliged to

comply with the provisions on loading procedures, carrying capacity, vehicle dimensions and road class where supervision is carried out at weighing places (fixed or non-fixed). The operation of weighing equipment is still carried out by the implementing unit appointed by the Government. Apart from that, officers are also required to record the type of goods being transported, the weight of the transport and the origin and destination (Article 170). Meanwhile, motor vehicle inspection officers together with the National Police of the Republic of Indonesia (Article 171) carry out motor vehicle inspection officers whose operation is not fixed. Provisions regarding cargo control are regulated in Government Regulations (Article 172).

The eighth part of Chapter X is related to the business of goods transportation. Paragraph 1 contains permits for goods transportation in connection with the operation of special goods or heavy equipment (Article 173) which is explained in more detail in paragraph 4. In Article 180 it is stated that this operation permit is granted by the Minister in the field of traffic and road transportation facilities and infrastructure which will be further regulated in more detail in the Ministerial Regulation. Goods transportation rates are explained in the ninth section of Article 181 which are determined based on an agreement between service users and public transportation companies (Article 184).

The obligations of goods transportation companies are contained in the eleventh part of Article 186 concerning the obligation to transport following the agreement when the transportation costs for sending goods have been paid in full, and returning the transportation costs if the departure is cancelled (Article 187). Apart from that, the goods transport company is responsible for the loss of the goods if it is negligent in carrying out services (Article 188) including those caused by the people they employ (Article 191), so to reduce this risk the goods transport company is obliged to insure its liability (Article 189). The driver-crew must unload goods at the nearest stopping place if the goods being transported could endanger the security and safety of the transport (Article 190). Losses suffered by the owner of the goods are excluded for events that cannot be prevented or avoided or due to the fault of the owner of the goods, such as the inclusion of inappropriate information (Article 193) and also losses belonging to third parties (Article 194). The amount of this loss is according to reality and the transport company's responsibility applies from the time the goods are loaded until they reach the agreed destination and are delivered no later than 30 days after the incident. This provision is further regulated in Government Regulation (Article 192).

Meanwhile, the rights of goods transportation companies contained in Article 195 include, among other things, the right to retain goods if the service user does not fulfil their obligations, the right to charge additional fees for storing goods if they do not comply with the agreement, and can sell by auction under the provisions of the law if the service user does not fulfil their obligations. Freight transport companies also have the right to destroy goods that are dangerous or disturbing in storage if service users do not fulfil their obligations following statutory regulations (Article 196). The Government's responsibilities as a transport operator include guaranteeing services to service users, providing protection to goods transport companies and carrying out monitoring and evaluation (Article 197).

The obligations and responsibilities of the driver, vehicle owner (company or individual) are regulated in Article 234 regarding losses to the owner of the goods or a third party due to the driver's negligence. Not only that, if there is also damage to roads and their equipment, but this does not apply if there are compelling circumstances beyond the driver's ability, due to the behaviour of the victim or a third party, or due to the movement of people or animals even though anticipation has been taken.

Civil servant investigators have authority over goods transportation as regulated in Article 262, including carrying out technical roadworthiness checks, permits, violations of load or dimensions at weighing stations, prohibiting or postponing the operation of motorized vehicles that are not roadworthy, asking for information from drivers, owners, and transportation companies, and confiscate public transportation operation permits and certificates of passing the test by making inspection reports. For the enforcement of traffic and goods transport violations, Article 265 relates to periodic and incidental inspections of motorized vehicles as needed, for this reason, officers of the Republic of Indonesia State Police are given the authority to stop, ask for information and take other actions according to the law with full responsibility.

Criminal provisions related to goods transportation are contained in Article 288 concerning the public's obligation to have periodic test letters and test pass marks for goods cars, trailers and trailers. Article 301 regulates the obligation to pass according to the road class. Prohibition on using goods cars to transport people (Article 303). Provisions for meeting safety requirements, marking goods, parking, loading and unloading, and operating times for special goods vehicles (Article 305). Provisions for carrying complete bills of lading and travel documents (Article 306), complying with loading procedures, carrying capacity, and vehicle dimensions (Article 307). Obligation to have a permit to operate special goods and heavy equipment transportation (Article 308). Obligation to insure its liability against losses caused by the shipper or third parties (309). The criminal threat ranges from 250,000 Rupiah up to 1,500,000 Rupiah with the threat of one to six months in prison.

3.2 Changes to the Road Transport Traffic Law (UULLAJ) in the Field of Goods Transport

3.2.1 Role of Government

The first law explains the role of the Government, which is to control and organise goods transportation. The second law explains this in more detail regarding the regulation of goods terminals, including transportation procedures to ensure the safety, security, smoothness and orderliness of traffic. The driver's obligations and responsibilities are also regulated. The obligation to use special motorized vehicles for transporting goods and provisions regarding the collection of fees can only be carried out by public transportation. The traffic network is starting to be regulated by Government Regulations, especially for the transportation of special goods (dangerous goods, special goods, containers and heavy equipment).

The third law regulates the road network in more detail which was not previously available in the preceding law, including node and space requirements. Terminal types to support the flow of goods are also described, which are aimed at the smooth movement of goods and intermodal integration. The obligation for vehicles to carry out periodic tests and meet technical roadworthiness is also starting to be introduced because previously there were many problems with roadworthiness, including special goods vehicles. Apart from vehicles, procedures for loading goods including dimensions and weight are also regulated.

Driving licenses which were previously not regulated, especially driving licenses for regular and general goods transport, are starting to be regulated with three classifications for the size of singular vehicle types (A, B I) and trailers (B II). Traffic engineering management is needed due to the narrowing of road space is not commensurate with the

increasing number of vehicles is also regulated in this Law. Like the two previous laws, the government still should provide safe, secure, comfortable, and yet affordable goods transportation. Rules relating to special goods began to exist in the second Law, in this Law, this matter began to be regulated in more detail regarding obligations, escort provisions, and competence.

3.2.2 Goods Transportation Business

In the first law, the business of transporting goods is regulated by the Minister and a route permit is required. Here also the provisions for regulating tariffs by the Government for goods transportation depend on its authority. In the second Law, the provisions regarding tariffs are no longer regulated by the Government, but only the structure and categories are determined. Meanwhile, in the third law, goods transportation rates are determined based on an agreement between the service user and the goods transportation provider. This tariff liberalization makes transportation costs even more depressed due to the bargaining position of service users is higher than that of providers. So the level of load violations (over-dimension overloading) increases.⁶

3.2.3 Rights and Obligations

The first law explains the responsibility of employers for the loss of service users unless it can be proven otherwise. The second law requires companies to transport goods if there is an agreement and payment, and if there is a cancellation, the transportation costs must be returned. Losses to service users are also explained, including the value of goods if the transport company is negligent. Provisions regarding additional fees and auctions are also explained in the second Law. The third law covers all of the above and adds the obligation of goods transportation companies to insure their risks, further, goods transportation companies also have a responsibility towards their drivers. The driver's obligations are further explained regarding losses to the owner of the goods and third parties but do not apply if there are compelling circumstances that are beyond his/her capabilities. The government's responsibilities are also explained regarding guaranteeing services to service users and providing protection to goods transport companies, as well as carrying out monitoring and evaluation.

3.2.4 Criminal provisions

Only the third law contains criminal provisions that did not exist in the previous law. Regarding goods transportation, criminal provisions relating to the obligation to carry out periodic tests, the obligation to travel on the appropriate class of road, the prohibition on the use of goods transportation to transport people, the provisions to follow safety regulations for special goods transportation, the obligation to carry a bill of lading and documents, the obligation to comply with regulations. loading methods, dimensions and carrying capacity, the obligation to have a permit for special goods transportation, as well as the obligation to insure liability. This provision emerged due to rapid environmental developments, so more binding regulations are needed to increase compliance by providing sanctions.

⁶ Kyatmaja Lookman, *Op. Cit.*

3.3 Road Freight Traffic Law and Trucking Company Competitiveness

The rules in this law are not only intended not only to regulate but also to increase the competitiveness of trucking companies, but at the practical level, their implementation is still not optimal. The law regulates the existence of goods terminals as infrastructure to optimize goods transportation, but at the practical level goods terminals are mostly used for truck parking, and the number is also minimal.⁷ This has a different function compared to the passenger terminal used by buses. Freight terminals should be used to increase the competitiveness of trucking companies.

Due to the less-than-optimal goods terminal, truck operations are mostly carried out depending on the service user's location. This means that transportation procedures in cargo transportation are not as expected by law and still need further improvement. The government also requires the use of public vehicles to transport third-party goods, but in practice, there are still many private vehicles transporting goods belonging to third parties, this is due to the lack of government supervision.⁸

The road network for the transportation of goods is regulated through Government Regulations and is unable to optimize the competitiveness of transportation companies. Many companies set up their factories on district roads and even village roads because land prices are lower.⁹ This makes it difficult for trucks to access and deliver goods from the loading area. Of course, all this negates the importance of creating a goods terminal for intermodal integration. Nodes are needed to increase the volume of goods to increase competitiveness.

Toll roads, which should be prioritized for logistics purposes, are also not optimal. Some of the problems include the high toll rates for goods vehicles compared to small (private) vehicles.¹⁰ Traffic engineering is often done during long holidays to optimize the movement of private vehicles and always sacrifices vehicles carrying goods.¹¹ The goods transportation rates have now been determined by market mechanisms.¹² Different from when the law was first made. Due to the high power of customers and transportation prices can only rise when fuel prices rise, this causes trucking companies to be unable to cover their costs.¹³ So the practice of over-dimensional and overloading has become widespread.

⁷ Priyambodo, "Pengembangan dan Peningkatan Konektivitas Angkutan Barang di Jawa Timur," *Warta Penelitian Perhubungan* 28, no. 3 (2016): 211–223, <https://doi.org/10.25104/warlit.v28i3.599>.

⁸ Dede Amirudin and Ika Dewi Sartika Saimima, "Analisis Hukum Penggunaan Kendaraan Pribadi Yang Digunakan Sebagai Angkutan Barang," *Jurnal Penelitian Serambi Hukum* 16, no. 2 (May 2023): 125–133, <https://doi.org/10.59582/sh.v16i02.737>.

⁹ Sisca V. Pandey and Lucia Lalamentik, "Kelas Jalan Daerah untuk Angkutan Barang," *Tekno* 12, no. 60 (2014): 27–37, <https://ejournal.unsrat.ac.id/index.php/tekno/article/view/5596>.

¹⁰ Mukarto Siswoyo, "The Impact of Toll Road Development: An Analysis Based on Public Administration Ecology," *Journal of Southwest Jiaotong University* 55, no. 3 (2020): 1–33, <https://doi.org/10.35741/issn.0258-2724.55.3.53>.

¹¹ Indonesia-STTD, Politeknik Transportasi Darat, and Politeknik Transportasi Darat Bali. "Hubungan Manajemen Rekayasa Lalu Lintas dengan Kemacetan, Serta Keselamatan." *Laik Fungsi Jalan*: 17 (2022).

¹² Danang Parikesit, "Daya Saing Angkutan Barang Intermoda Dalam Perspektif Kebijakan Pemerintah," *Jurnal HPJI (Himpunan Pengembangan Jalan Indonesia)* 2, no. 2 (2016): 79–90, <https://journal.unpar.ac.id/index.php/HPJI/article/view/2312>.

¹³ Rizka Yulisda, "Analisis Pengaruh Fluktuasi Harga BBM Terhadap Pendapatan Usaha PT. Terang Bersama Zanesya Cabang Pekanbaru Menurut Perspektif Eekonomi Syariah" (Skripsi Thesis, Universitas Islam Negeri Sultan Syarif Kasim Riau, 2023), Universitas Islam Negeri Sultan Syarif Kasim Riau Repository, <https://repository.uin-suska.ac.id/72952/>.

The government has also regulated the rights and responsibilities of transport companies and service users, including the obligation to carry out insurance.¹⁴ However, at the practical level, the power of service users is always greater than truck operators because of their large number. This obligation to insure is often waived at the customer's request. This causes the carrier's risk to be high so that when there are problems, it is common for transport companies to experience financial difficulties.

3.4 Road Freight Traffic Law and Trucking Company Violations

Transportation procedures are often violated by transportation companies even though they are mandated by law. This is due to the lack of role of goods terminals as a place for supervision. Accidents caused by goods transport occupy the second place after motorbikes, although their number is smallest.¹⁵ The predominance of accidents is often caused by drivers who lack competence, even though the driver's obligations and responsibilities are also regulated by law.¹⁶

The obligation to use special vehicles is also sometimes violated. These obligations include competence, escort provisions, and many others.¹⁷ Using public transportation to transport special goods is sometimes done by service users to save transportation costs. The use of private vehicles to carry goods belonging to third parties is common, even though it is prohibited by law due to lack of supervision.

The road network regulation is also often violated. The large number of factories set up on district and even village roads is the main problem, due to the irregular spatial layout of the area.¹⁸ The obligation to carry out periodic tests and fulfil technical roadworthiness is also not carried out routinely.¹⁹ This is because many trucks are old and complying with regulations often takes a lot of money and time. Vehicle dimensions are a problem due to the pressure to provide low costs, so truck companies often get around by increasing the volume of the vehicle so that it can transport larger quantities.²⁰

¹⁴ Mia Paramitha, "Analisis Strategi Bisnis Jasa Angkutan Barang PT XYZ" (Master Thesis, Institut Pertanian Bogor, 2023), IPB Repository, <http://repository.ipb.ac.id/handle/123456789/124263>.

¹⁵ Gito Sugiyanto and Mina Yumei Santi, "Karakteristik Kecelakaan Lalu Lintas dan Pendidikan Keselamatan Berjalan Lintas Sejak Usia Dini: Studi Kasus di Kabupaten Purbalingga," *Semesta Teknika* 18, no. 1 (2015): 65–75, <https://doi.org/10.18196/st.v18i1.707>.

¹⁶ Budi Dwi Hartanto, "Analisis Perilaku Pengemudi Truk Serta Kontribusinya Pada Kecelakaan," *Jurnal Penelitian Transportasi Darat* 23, no. 1 (2021): 79–87, <https://doi.org/10.25104/jptd.v23i1.1749>.

¹⁷ Rizki Alya Harahap and Susilawati, "Pengaruh Waktu Kerja Pada Kelelahan Kerja Terhadap Supir Transportasi Darat B3," *Zahra: Journal of Health and Medical Research* 3, no. 4 (October 2023): 380–387, <https://adisampublisher.org/index.php/aisha/article/view/403>.

¹⁸ Faezal Aji, "Prototype Alat Pendeteksi Pelanggar Kelas Jalan III Berdasarkan Muatan Sumbu Terberat dan Tinggi Kendaraan" (Diploma Thesis, Politeknik Keselamatan Transportasi Jalan, 2023), PKTJ Repository, <http://eprints.pktj.ac.id/1709/>.

¹⁹ Adi Wahyu Saputra, "Tinjauan Hukum Terhadap Pelaku Pelanggaran Kelaikan Kendaraan Angkutan Umum di Kabupaten Donggala Menurut Undang-Undang Nomor 22 Tahun 2009 tentang Lalu Lintas dan Angkutan Jalan," *Jurnal Ilmu Hukum Legal Opinion* 2, no. 2 (2014), <http://jurnal.untad.ac.id/jurnal/index.php/LO/article/view/5705>.

²⁰ Syairur Rozi, "Sanksi Terhadap Pelanggaran Transportasi Darat Odol (Overdimension Overloading) Ditinjau dari Undang-Undang Nomor 2 Tahun 2009 Tentang Lalu Lintas Angkutan Jalan," *Glosains: Jurnal Sains Global Indonesia* 2, no. 1 (January 2021): 13–21, <https://doi.org/10.59784/glosains.v2i1.11>.

There are still truck drivers who do not have a driver's license.²¹ The lack of public interest in becoming one is the problem. Truck drivers are still dominated by senior drivers aged 40 years and above. Many people prefer online motorcycle taxi driver jobs. Long working hours due to traffic jams and the rigours of work reduce job seekers' interest in becoming truck drivers.²² Low criminal provisions foster violations of overloading. Whatever the level of overloading violation, the fine remains the same, 500,000 rupiahs. Therefore, service users and transportation companies favour violation.²³

4. CONCLUSION

Goods transportation plays a vital role in increasing the prosperity of a nation. The dynamics of the freight transportation environment are developing rapidly due to technological advances. Traffic and road transport laws in Indonesia are still not optimal in increasing competitiveness and reducing the level of violations by trucking companies. In terms of competitiveness, the role of goods terminals as nodes is still not yet optimal, many users still use private vehicles to transport goods, furthermore, traffic engineering still favours private vehicles. Tariff liberalization worsens the competitiveness of transport companies due to the higher bargaining position of service users. This high bargaining position also shifts the risk responsibility from the owner of the goods to the trucking provider.

This law is not optimal in reducing violations. Good transportation practices are not followed, the use of general transportation to transport special goods, and violations of the road network and also class. Periodic tests and roadworthiness technical requirements were also not followed. There are still truck drivers who do not have the appropriate driving license or even do not have any. This is exacerbated by the low criminal threat for transportation violations. Future legislation must be able to overcome the problems mentioned above so that competitiveness can be increased and the level of violations can be reduced.

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²¹ Andini Rahma Purwasih, "Analisis Pola Kecenderungan Jenis Pelanggaran Lalu Lintas Kendaraan Bermotor Angkutan Barang Di UPT LLAJ Surabaya dan Bangkalan" (Diploma thesis, Institut Teknologi Sepuluh Nopember, 2018), ITS Repository, <https://repository.its.ac.id/58979/>.

²² Astri Sofia Marselina Simamora, "Hubungan Faktor Individu dan Faktor Pekerjaan dengan Tingkat Kelelahan Kerja pada Pengemudi Truk Tangki BBM di PT X Tahun 2019" (Bachelor Thesis, Universitas Binawan, 2019), Binawan University Repository, <https://repository.binawan.ac.id/773/>.

²³ Sintia Putri Febriani and Mimin Mintarsih, "Penegakan Hukum dalam Kebijakan Zero Overdimension dan Overloading Terhadap Pengangkutan Barang," *Reformasi Hukum* 27, no. 1 (April 2023): 50–59, <https://doi.org/10.46257/jrh.v27i1.603>.

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PROTECTION OF MINORITY SHAREHOLDERS FROM FRAUD IN LIMITED LIABILITY COMPANY DIVIDEND DISTRIBUTION

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Abstract

This research investigates the potential fraudulent actions carried out by majority shareholders and other corporate organs in the context of stock distribution. The primary focus is on the continuity of practices that may disadvantage minority shareholders and undermine the legal protections they should receive. Majority shareholders, often wielding significant influence in the General Meeting of Shareholders (RUPS), may exploit their power to manipulate decisions related to stock distribution. The presence of a quorum that can be achieved without the participation of minority shareholders increases the risk of fraud in this process. The aim of this research is to identify various fraudulent actions that may occur in stock distribution by majority shareholders and related corporate organs. Using a legal analysis approach and case studies, this research also explores ways in which minority shareholders might prevent or respond to fraudulent actions. Furthermore, the research examines the extent to which Law No. 40 of 2007 concerning Limited Liability Companies (UU PT) provides a legal basis to prevent and respond to fraudulent actions in stock distribution. Practical implications of potential fraud are analyzed to provide recommendations that can strengthen legal protections for minority shareholders. This research is expected to contribute to a deeper understanding of the dynamics of fraud in stock distribution, outline the legal challenges faced by minority shareholders, and formulate concrete steps to prevent and respond to such fraud in companies.

1. INTRODUCTION

The company as a legal entity which is an alliance of capital is never free from problems. Problems in companies often arise from within the company and cause certain parties to feel disadvantaged or cheated. Parties who often feel aggrieved are minority shareholders,¹ this is because minority shareholders are one of the weak parties in the

¹ Dwi Tatak Subagiyo, "Perlindungan Hukum Pemegang Saham Minoritas Akibat Perbuatan Melawan Hukum Direksi Menurut Undang-Undang Perseroan Terbatas," *Perspektif* 20, no. 1 (January 2015): 52, <https://doi.org/10.30742/perspektif.v20i1.122>.

company. Share ownership in a company is a proof of one's ownership in the company.² This indicates that a person's ownership in a company can be measured by the number of shares owned. The greater the shares owned by a person, the greater his influence in a company will also be.

Majority shareholders in the implementation of the company's business activities will always receive protection within the General Meeting of Shareholders (GMS).³ This is because although the resolution resolved within the GMS is not unanimous, the decision to be taken is the majority decision. Even so, the decision does not necessarily always follow the decision of the majority shareholders, but must also fulfil the quorum determined by Law No. 40 of 2007 concerning Limited Liability Company (hereinafter referred to as "UU PT"). This protection from the UU PT aims to provide balance and protection for minority shareholders. This protection in the form of a quorum within its implementation still contain flaws, this is because this quorum protection can only be implemented in the event that minority shareholders do not own shares exceeding the quorum that has been regulated in the UU PT.

Minority shareholders as the weaker party in the company also still have rights that are comparable to other shareholders. As explained in Article 52 paragraph (1) of the UU PT, shares authorize their owners to attend and vote in the GMS, receive dividend payments and the remaining assets from liquidation, and exercise other powers granted by the UU PT. It is very clear that a shareholder is authorized to receive dividends distributed by the company without exception and does not distinguish between minority shareholders and majority holders. The authority of each shareholder should be obtained with justice and without any interference from other parties, but in the implementation of dividend distribution there are limited liability company organs that are also involved. This is because within a limited liability company there are 3 main organs, namely, members of the Board of Directors, members of the Board of Commissioners, and GMS, all of which play an important role in dividend distribution.

The distribution of dividends in Article 71 of the UU PT can be carried out after the obtainment of GMS approval in relation to the annual report prepared by the Board of Directors which have been reviewed by the Board of Commissioners. Therefore, the distribution of dividends is based on the approval of the GMS, but the GMS will always be dominated by the majority shareholders. The quorum required for the annual GMS is as set out in Article 86 paragraph (1) of the UU PT where the required quorum is more than $\frac{1}{2}$ of the total number of shares. The implementation of this GMS can take place in the absence of minority shareholders, which can lead to fraud in dividend distribution. The majority shareholder as the controller in the GMS can cooperate with the Board of Directors and also the Board of Commissioners in the implementation of dividends. Although the Board of Directors has the authority and responsibility to carry out the GMS preceded by the invitation of the GMS as stipulated in Article 79 of the UU PT, if the Board of Directors commits an unlawful act and does not make a real invitation, it will be difficult for minority shareholders to prove it. This is because the majority shareholder can easily state that the invitation has been delivered and state that the minority shareholder is negligent in

² Ni Luh Dwik Suryacahyani Gunadi and Jose Widyatama, "Perhitungan Sebagai Seorang Investor Saham Atas Besaran Pajak Yang Harus Dibayarkan Kepada Negara," *Jurnal Locus Delicti* 2, no. 1 (April 2021): 15, <https://doi.org/10.23887/jld.v2i1.455>.

³ Hendy Martin Butar-Butar, Budiman N.D.P Sinaga, and Tulus Siambaton, "Perlindungan Hukum Terhadap Pemegang Saham Minoritas Pada Perusahaan Terbuka," *Patik: Jurnal Hukum* 7, no. 2 (August 2018): 139, <https://ejournal.uhn.ac.id/index.php/patik/article/view/290>.

responding to the GMS invitation. This cooperative action by the majority shareholders, members of the Board of Directors and members of the Board of Commissioners has covered all organs of a limited liability company which makes minority shareholders need to be given special protection to obtain their rights.

The possibility of fraud committed by limited liability company organs in collaboration with majority shareholders inspires the author to conduct deeper research. This research aims to find out about what actions and options are owned by minority shareholders to provide a balance in the differences of power and authority that exist in a company. The author intends to examine whether the existing law in the form of the UU PT is sufficient to provide legal protection for minority shareholders or the protection provided actually backfires and cannot be used by minority shareholders and also to examine how minority shareholders should act to avoid actions that harm them in terms of dividend distribution.

2. METHOD

The type of research used is normative legal research or doctrinal legal research. It is called doctrinal legal research because this research is only aimed at written regulations, therefore, this research is closely related to the literature because it will require secondary data obtained from the library. The primary legal material which will be used within this research is Law No. 40 year 2007 regarding Limited Liability Companies. The secondary legal material which will be used within this research is extracted from books, national and international journals, thesis, dissertation and bachelor thesis. The tertiary legal material which will be used is from sites.

3. RESULTS AND DISCUSSION

3.1 Protection of Minority Shareholders based on UU PT

The distribution of dividends is based on the preparation of the Annual Report by the Board of Directors of the company to be submitted to the GMS, the preparation of the Annual Report is necessary to fulfil the requirements for the distribution of Dividends⁴ among others: has net profit; has a positive profit balance; has a mandatory reserve; and decided by the GMS. To ensure that the company has a net profit and a positive profit balance, the company through the GMS shall approve and ratify the Annual Report. In providing approval and ratification, shareholders can find out about the contents of the Annual Report, including the Financial Statements. That way in the context of distribution of dividends, all organs of a limited liability company have their respective roles, starting with the preparation of the annual report by the Board of Directors, review by the Board of Commissioners, and approval and ratification by the GMS. However, the GMS as a limited liability company organ tasked with providing approval and ratification will be the most important organ in the distribution of dividends, in other words, the majority shareholder in the company as the controller of the company has greater power and dominates the running of the GMS and the decisions that will be taken.

Within the annual GMS which is clearly regulated in Article 86 of UU PT, it is clear that the attendance quorum required is only more than ½ and based on Article 87 of the UU

⁴ Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2009), 291.

PT it is explained that decisions can be taken if approved by more than ½ of the shares issued by the company. Minority shareholders in this case do not need to be present or vote, if the majority shareholder already owns more than 50% of the shares in the company. Minority shareholders in this case are often the ones who are cheated on and also have no power to take part in decisions made by the company. This can surely result in fraudulent actions that may be carried out by the organs of a limited liability company whereas the Board of Directors, Board of Commissioners, and majority shareholders can work together to make it appear as if no dividend distribution has ever occurred.

Minority shareholders who are vulnerable to such fraudulent actions must understand what authority they have in the event of fraud committed by the organs of the limited liability company simultaneously. Minority shareholders in this case have several rights, one of which is the right to file a lawsuit against the company to the district court if they are disadvantaged due to the actions of the company which are considered unfair and without reasonable grounds as a result of the decisions of the GMS, Board of Directors, and/or Board of Commissioners as explained in Article 61 of the UU PT. This can be one of the solutions owned by minority shareholders, where minority shareholders can file a lawsuit for criminal acts of forgery of letters or embezzlement that have been committed by the organs of a limited liability company.⁵ Surely this lawsuit requires proof that can ensnare all individuals committing fraud. The Board of Directors as the drafter of the annual report can certainly be charged if it is proven that he did not do what was his duty and did not carry out his official duties in accordance with the UU PT. The distribution made is not possible if there is no annual report made by the Board of Directors, so the Board of Directors must be responsible for the drafting of the annual report. The Board of Commissioners who participate in reviewing and ensuring the correctness in the preparation of the Annual Report must also be responsible for the preparation of the annual report to be reported within the GMS, so that in making the Annual Report the Board of Directors and the Board of Commissioners have full responsibility.

The lawsuit that can be carried out by minority shareholders can be one of the options that can be carried out by minority shareholders, but in practice it is less efficient. Minority shareholders, in addition to being able to sue, have other powers, namely, the right to request that the company purchase their shares at a fair price if they do not approve of the company's actions that are detrimental to shareholders or the company, as explained in Article 62 of the UU PT. The provision of the request for repurchase of shares at a fair price can be done if the shareholders do not approve the Company's actions concerning, amendments to the articles of association; transfer or pledge of the Company's assets which have a value of more than 50% of the company's net assets; and merger, consolidation, acquisition, or spin off. In the event that the distribution of dividends is carried out by fraud accompanied by an amendment to the Articles of Association in advance, minority shareholders have the right to request the repurchase of their shares.

The buyback of minority shareholders' shares is not necessarily just an entire buyback by the company, instead, there are provisions which have been regulated within the UU PT. This provision has been explained in Article 37 of the UU PT which states that the repurchase of shares does not cause the Company's net assets to become smaller than the amount of issued capital plus mandatory reserves that have been set aside; and the total nominal value of all shares repurchased by the Company and pledge of shares or fiduciary guarantee of shares held by the Company itself and/or other companies whose shares are

⁵ Munir Fuady, *Hukum Tentang Akuisisi: Take Over dan LBO* (Bandung: PT Citra Aditya Bakti, 2014), 127-128.

directly or indirectly owned by the Company, does not exceed 10% (ten percent) of the total issued capital of the Company. These certain conditions shall still be considered when conducting repurchase, in addition, we shall also pay attention regarding the decrease of capital which will occur in the company.

Minority shareholders to request repurchase may not exceed 10% of the total issued capital in the Company. If the minority shareholder owns more than 10%, then the shares owned cannot be entirely repurchased by the Company, but an offer can be made to a third party to replace the minority shareholder's position. This can also only be done if the actions taken by the Board of Directors, Board of Commissioners, and majority shareholders are to conceal the truth that dividend distribution has occurred and to commit fraud by increasing the company's operating capital, so that it seems that dividend distribution has not occurred and there is only an increase in authorized and paid-up capital by the company. The implementation of the buyback by the company must also be approved in advance within the GMS, which is very burdensome for minority shareholders.

Minority shareholders, who are the disadvantaged party in all aspects, in the exercise of authority to defend their rights also still require a GMS decision, making it difficult for all possibilities that can be done. Another protection that minority shareholders have is in Article 97 paragraph (6) of the UU PT which states that "On behalf of the Company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may file a lawsuit through the district court against members of the Board of Directors who, through their fault or negligence, have caused losses to the Company." Minority shareholders have this authority, but there is still a minimum share ownership limit that must be met, this is not much different from Article 61 of the UU PT where shareholders have the authority to file a lawsuit in court in the event of fraud, only in Article 97 paragraph (6) of the UU PT focuses more on violations committed by the Board of Directors of the company. Article 97 paragraph (6) of the UU PT is a complement to Article 61 of the Company Law where there is negligence or error committed by the Board of Directors of the company, then shareholders with a minimum share ownership limit of 1/10 can file a lawsuit for examination and demand responsibility for losses caused by the Board of Directors.

Article 97 paragraph (6) of the UU PT has provided legal certainty and protection from negligence or error conducted, while Article 114 paragraph (6) of the UU PT which states "On behalf of the Company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may sue members of the Board of Commissioners whose errors or negligence have caused losses to the Company to the district court"⁶ aims to provide legal certainty to shareholders for acts of negligence or misconduct of members of the Board of Commissioners. Article 114 paragraph (6) is similar to Article 97 paragraph (6) of the UU PT which purpose is to complete the entirety of legal protection held by the shareholders. It is unfortunate that all of these articles still have a minimum limit for implementation, namely a 1/10 shareholding, which is less meaningful protection for minority shareholders who have less than that shareholding. Minority shareholders will still be disadvantaged, in the event that the majority shareholder deliberately adds to the authorized capital of the company, the shareholding of minority shareholders will be diluted easily so that the implementation of the articles provided by the UU PT can be considered less protective of minority shareholders.

⁶ Gunawan Widjaja, *Hak Individu dan Kolektif Para Pemegang Saham* (Jakarta: Praninta Offset, 2008), 78.

Not only Article 114 paragraph (6) of the UU PT, there are two more articles which provide legal protection to shareholders, among others Article 138 paragraph (3) of the UU PT. This article explains regarding the examination conducted towards the company which allegedly conducts tort. In contrast to Article 97 paragraph (6) dan Article 114 paragraph (6) of the UU PT, Article 138 paragraph (3) UU PT within its implementation requires the requestor to first collect data or statement to the Company within the GMS and the Company does not provide such data or statement. In addition to being questioned within the GMS, to conduct an examination request towards the company, the following qualifications apply, among others,

- a. 1 (one) shareholder or more represents at least 1/10 (one tenth) of the entire shares with voting rights;
- b. other parties which based on laws, the Company's articles of association or agreement with the Company is granted authority to submit an examination request; or
- c. prosecutor for public interest

the same thing that happened within previous articles is repeated where this protection is provided with burdensome requirements for minority shareholders. It is unfortunate that even for the examination of actions that are indicated to be unlawful, minority shareholders cannot do much.

The last legal protection which can be offered to shareholders is to propose dissolution of the company as explained within Article 144 paragraph (1) of the UU PT. The article states that "The Board of Directors, the Board of Commissioners or 1 (one) shareholder or more representing at least 1/10 (one tenth) of the total number of shares with voting rights, may propose the dissolution of the Company to the GMS." Shareholders here have the right to propose the dissolution of the company, but by doing so, the purpose of the desired protection of minority shareholders will not be fulfilled and in the implementation of this dissolution, surely, there are provisions to obtain GMS approval and must fulfil the quorum determined by UU PT. Therefore, this last legal protection is also ineffective to provide protection to minority shareholders because everything must be based on the GMS resolution which cannot be achieved by minority shareholders alone.

The problems that arise in this company are indeed difficult to be handled by shareholders alone because the strength of the company lies in the 3 main organs of the company, namely, the Board of Directors, the Board of Commissioners, and the GMS. The three organs of the company are unlikely to be controlled by minority shareholders, therefore, promoting the interests of minority shareholders will be difficult. GMS which is one of the organs of the company with authority that is not given to the Board of Directors or the Board of Commissioners, is an organ of a limited liability company formed to fulfil the needs of shareholders, which also cannot be used by minority shareholders because the authority of minority shareholders is less than that of majority shareholders. The protections discussed above are neither effective nor flexible enough to provide protection for minority shareholders with less than 10% of shares. It has been discussed above that the legal protection provided by the UU PT is often constrained by the 10% share ownership requirement, where there are many cases where minority shareholders do not own that much shares and also several articles that require GMS approval which surely will also be difficult to fulfill.

3.2 Legal Measures to Prevent Fraud by Minority Shareholders

Legal protection can be done in 2 ways, including preventive and repressive, legal protection that has been discussed previously is a legal protection measure taken after the occurrence of fraud/negligence/errors committed by unscrupulous organs of the company. In other words, the protection provided by the UU PT is more directed towards repressive legal protection. We can see in the articles discussed above that there are a lot of minority shareholder authorities that direct shareholders to file a lawsuit in court.⁷ To file a lawsuit in court, of course, we must first have sufficient evidence or at least meet the minimum threshold of evidence to report it to the authorities. This is what makes the protection of the UU PT to minority shareholders still classified as repressive legal protection. This kind of legal protection has not been able to accommodate all the needs of minority shareholders as discussed earlier that this protection is difficult to implement for one reason or another, especially related to the minimum reporting limit of 10% share ownership or having to request approval from the GMS. Where both of these things will be difficult to achieve by minority shareholders. Then this leaves the question as to what preventive legal protection can be done by minority shareholders in order to maintain honesty and justice in the company?

If we go back to the basics, we can actually see that basically all shareholders already have the authority to carry out preventive legal protection for themselves. As a shareholder, it is clear that the person controls the shares and the shares give the holder various powers. One of them is explained in Article 52 paragraph (1) which authorizes shareholders to, among others,

- a. attend and vote in the GMS;
- b. receive dividend payments and the remaining assets of the liquidation proceeds;
- c. exercise other rights based on this law.

All three of these are important to minority shareholders, but the most important is to carry out other matters under the law. Exercising other rights is important because shares, which are securities and have an economic value surely have a sale value and can be transferred. This transfer of right over shares can be a solution for minority shareholders to minimize fraud, in the event that majority shareholders are often in conflict with majority shareholders and other company organs, one option that can be done is to sell their share ownership in order to avoid fraud committed by unscrupulous parties.

Transfer of right over shares cannot be a permanent solution for minority shareholders, in the event where a company can still generate profit surely minority shareholders will not opt to sell the said shares. Within Article 57 of UU PT, a company's articles of association can regulate regarding the requirements of transfer of rights over shares:

- a. the requirement to offer in advance to shareholders with a certain classifications or other shareholders;
- b. must obtain prior approval from the company's organs; and/or
- c. must obtain prior approval from the authorized agency authorities in accordance with the provisions of laws and regulations.

This can be one of the options that minority shareholders have, which in the event that there are other shareholders who want to sell their shares, then minority shareholders can

⁷ Shofia Shobah, "Perbedaan Penerapan Derivative Action Di Indonesia Sebagai Negara Civil Law Dibandingkan Dengan Negara-Negara Penganut Sistem Hukum Common Law (Studi Putusan Perdata Nomor 02/Pdt.G/2010/PN.Jkt.Sel)," *Jurnal Hukum & Pembangunan* 48, no. 4 (October-December 2018): 793-795, <https://scholarhub.ui.ac.id/jhp/vol48/iss4/6/>.

buy these shares to offset share ownership, so that at least minority shareholders have 10% of the issued and paid-up shares of all shareholders.

Another option that can be offered is to increase the company's capital with the hope that other shareholders will not add to the capital they have paid up, so that the majority shareholder's share ownership will be diluted. With the dilution of the majority shareholder's shareholding, minority shareholders can increase their shareholding to balance the majority shareholder or at least own 10% of the issued and paid up shares of all shareholders. The three things above that have been explained by the researcher aim to provide minority shareholders with preventive legal protection to avoid unlawful actions including negligence, fraud, and mistakes from company organs with majority shareholders. Minority shareholders with these options are provided with the possibility to protect themselves by increasing their share ownership or selling their share rights over shares to third parties because by increasing share ownership in these ways, with a minimum limit of 10% share ownership by minority shareholders can open up several repressive legal protection options described earlier, while by transferring the rights to these shares is also a good option with the consideration that the dividends to which the minority shareholders are entitled to but cannot receive, they can receive them by becoming shareholders of other companies. These options provide an opportunity for minority shareholders to safeguard themselves and provide preventive legal protection for themselves.

4. CONCLUSION

The legal protection which can be provided by the UU PT to minority shareholders have been provided within several articles. Among others Article 61, Article 62, Article 97 paragraph (6), Article 114 paragraph (6), Article 138 paragraph (3) dan Article 144 paragraph (1) of the UU PT. The whole is a legal protection to minority shareholders based on derivative rights⁸ from the relevant shareholder, namely to file a lawsuit to the court for actions which are suspected to violate the law and rights of the minority shareholders to receive dividends. This is very possible, but in practice it will be difficult to do because there are several obstacles, especially in the minimum limit of share ownership and also certain situations where the implementation of this legal protection requires approval from the GMS in advance, which is very unlikely in the event that the majority shareholder is involved in unlawful acts of not giving dividend rights to minority shareholders. Only Article 62 of UU PT differs and provide authority to minority shareholders to request the company to buyback their shares, however unfortunately in order to trigger this article, the actions conducted by the other company organs shall amend the articles of association; transfer or encumbrance of more than 50% of the company's asset; or merger, consolidation, acquisition, or spin off. This also needs to be considered because there are limitations that have been regulated in Article 37 of the UU PT to maintain the company's own finances, where the shares repurchased must not cause the company's net assets to become smaller than the amount of issued capital plus mandatory reserves that have been set aside; and the nominal of all shares which are repurchased by the Company and pledge of shares or fiduciary security over shares which is held by the company itself and/or other company which shares are directly or indirectly owned by the Company, does not exceed 10% (ten percent) of the shares issued within the Company. For the execution of legal protection in

⁸ Munir Fuady, *Perseroan Terbatas Paradigma Terbaru* (Bandung: PT Citra Aditya Bakti, 2003), 174.

entirety. The overall implementation of these legal protections is inherently difficult and requires a number of situations and conditions where not all minority shareholders are able to execute them. In this case, the PT Law is considered to only provide repressive protection which is less effective in providing protection to minority shareholders.

In the protection of minority shareholders, it is not always necessary to use repressive protection where shareholders try to use their derivative rights to sue to the court for fraud, negligence, or misconduct of the company organs and majority shareholders who conspire with each other. Minority shareholders in this case can protect themselves before adverse actions occur. Several options which can be exercised by minority shareholders have been regulated within among others Article 41, Article 52 paragraph (1) and Article 57 of the UU PT. Article 41 of the UU PT provides opportunities for the minority shareholders to increase the company's authorized capital in hopes that the shareholding ownership of the majority shareholder can be diluted, therefore creating a balance of shareholding ownership. This option can be difficult to execute if the majority shareholder still want to increase the authorized capital of the company, hence, the option offered by Article 57 of the UU PT where the articles of association can regulate regarding shareholders which intends to conduct transfer of shares is obliged to offer in advance to other shareholders, in order for minority shareholders to buy such shares with a minimum threshold of 10% from the entire shares paid up and issued by the company. By owning 10% shares, the minority shareholder can exercise other legal protection which have been explained above. The last option which can be exercised is sale of shares owned by the minority shareholders to a third party to avoid fraudulent activities from any party.

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THE APPLICATION OF JOINT CUSTODY CONCEPT IN RELATION TO THE CUSTODY OF THE CHILD

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Abstract

In Indonesia, the execution of court decisions regarding child custody is still a matter of debate among legal experts because the object is a person (human), not an inanimate object. This research will focus on discussing how regulations and execution of court decisions regarding child custody are carried out as well as how the concept of joint custody can be applied to minimize disputes related to child custody. This research is normative juridical research with a statutory and conceptual approach. Even though there are no regulations in Indonesia that comprehensively regulate child custody or its execution, the execution related to child custody can still be carried out guided by generally applicable procedures regarding execution of court decisions. The execution of child custody rights carried out in this way has a low level of success and is prone to causing problems where children's rights which should be protected are violated. For this reason, it is hoped that the concept of joint custody can be applied to minimize the emergence of disputes related to child custody.

1. INTRODUCTION

Humans as *zoon politicon* contain the meaning that humans in living their lives are always in need of other humans to meet their needs. The interaction between humans will continue until it reaches a complex order called society. The smallest part of a society is a family consisting of a father, mother, and their offspring as a result of a marriage. Marriage according to Law Number 1 of 1974 concerning Marriage is a bond of birth and mind between husband and wife held in order to form a happy and eternal family based on the belief in the one and only God.

Although the Marriage Law mandates that every marriage to be held for the achievement of an eternal and happy family, but in reality, *das sein* does not always reflect what is aspired in *das sollen*. Every marriage contains the potential for conflict between married couples that could fracture family relationships between them. There are times when the conflict between husband and wife are so complicated and great that there is not

a way out or an alternative solution other than severing the marriage through divorce based on a court decision.¹

One of the legal problems arising from the breakup of marriage due to divorce is related to who has the right to take care of underage children. In divorce, often the child is the most disadvantaged party. This is because through divorce, children have the potential to lose the love that should be obtained from both parents.² Children as parties who receive the effects of domestic disputes between their parents, are often also treated like objects that can be freely contested and shared by both parents.³

Husbands and wives in conducting a divorce must determine to whom the right to child custody is granted. But in this process, it is not uncommon for disputes between husband and wife to occur so that eventually child custody must be decided by the court. A judge in considering to whom custody of the child should be granted must be based on the best interests of the child. However, the problem does not stop at the court decision. In practice, often the losing parent does not carry out the court decision voluntarily, therefore the execution of child custody must be enforced by the court.

In Indonesia, the process of enforcing court decisions regarding child custody is still an enigma among legal experts because the lack of regulations that regulate comprehensively concerning child custody after divorce and the dichotomy between legal experts regarding whether or not the execution of court decisions concerning child custody is permissible. There are legal experts who argue that the execution of child custody cannot be carried out on the basis that so far the practice of an execution of court decisions has only been applied to inanimate objects, not humans. While on the other hand there are legal experts who argue that the execution of court decisions regarding child custody can be carried out on the grounds that the decision regarding child custody is a punitive decision (condemnatoir).

Based on what described above, the author felt compelled to conduct research about the execution of court decisions and application of joint custody within the scope of child custody by trying to answer the following questions: how are the regulations regarding child custody in Indonesian positive law; how does the execution of court decisions regarding child custody carried out; and how are the application of joint custody as an alternative resolution to child custody disputes.

2. METHOD

This research is a normative juridical research, which is research conducted to examine and review law as norms, rules, legal principles, legal doctrines, legal theories, and other literature to answer the legal problems studied.⁴ This research uses a statutory approach and a conceptual approach. The statutory approach is carried out by reviewing applicable legal provisions and relating them to the problems studied. The conceptual approach is

¹ Chandra Darusman S, M. Ikhwan Adabi, Apri Rotin Djusfi, Phoenia Ath Thariq, Eza Aulia, Rahmat Jhowanda, and Liza Agnesta Krisna, "Eksekusi Putusan Pengadilan Agama Yang Belum Inkracht Berkenaan Dengan Hak Asuh Anak," *Arena Hukum: Jurnal Ilmu Hukum* 16, no. 1 (April 2023): 174, <https://doi.org/10.21776/ub.arenahukum.2023.01601.9>.

² Titania Britney Angela Mandey, Karel Yossi Umboh, and Deine R. Ringkuangan, "Hak Pengasuhan Anak Akibat Terjadinya Perceraian Menurut Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan," *Lex Privatum* 9, no. 9 (August 2021): 63, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/36568>.

³ Chandra Darusman S, *Op. Cit.*, 174.

⁴ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 48.

carried out when researcher does not build arguments based on existing legal provisions due to the lack of regulations related to the topic concerned or the problem studied. The data collection method used in this study is library research by studying various reading sources on the problem under study such as books, journals, articles, and other materials all of which are analyzed qualitatively.

3. RESULTS AND DISCUSSION

3.1 Regulations Related to Child Custody in Indonesian Positive Law

Marriages according to Article 199 of the Civil Code can be dissolved due to death, absence of husband or wife, separation of table and bed, and divorce. The same thing is also stipulated in Article 38 of the Marriage Law where it is stated that marriage can be broken up due to death, divorce and by court decision. Divorce can be interpreted as a break in the bond of birth and mind between husband and wife, resulting in the breaking of the bond or family relationship between husband and wife.⁵ If the husband and wife who will carry out the divorce have an offspring, then one of the legal problems that will arise is related to the right to care for the child. What is meant by a child in the context of parenting is an underage child whose age limit differs depending on the provisions of the regulations that govern it. Regulations related to child custody in Indonesia's positive law can be found in the Marriage Law, the Compilation of Islamic Law (KHI) and Act Number 35 of 2014 concerning Amendments on Act Number 23 of 2002 concerning Child Protection, the explanation of which will be described as follows:

3.1.1 According to Act Number 1 of 1974 concerning Marriage

In the Marriage Law, provisions that allude to child custody rights are contained in Article 41 related to the legal consequences of the breakup of marriage due to divorce. According to the article, the legal consequences of the breakup of marriage due to divorce are: 1) The mother and father are still obliged to provide education and care for their children based on the interests of the child. However, if there is a dispute regarding the possession of the child, the court has the right to give the final decision; 2) The father bears responsibility for all costs of the child's care and education. However, if it is found that the father is unable to fulfill the obligation, the court may determine that the mother also participated in fulfilling the obligation; 3) The court has the right to impose the obligation to provide living expenses and/or other obligations to both the former husband and the former wife.

Based on the description of the Article mentioned above, it can be concluded that the relationship between parents and children is not broken even though the husband and wife are divorced.⁶ Article 41 jo. Article 45 of the Marriage Law affirms that both parents are still obliged to provide the best education and care for their underage children even though the marriage between husband and wife has been broken. In the Marriage Law, what is meant by an underage child is a child who has not reached the age of 18 (eighteen) years or has never been married as stipulated in Article 50 of the Marriage Law. Although the Marriage Law has provided some form of protection for the needs of children after the divorce of their parents, but unfortunately the Marriage Law is not clearly regulated regarding the provision

⁵ Titania Britney Angela Mandey, *Op. Cit.*, 65.

⁶ *Ibid.*, 67.

of child custody rights. The granting of child custody rights in the Marriage Law is only mentioned in Article 41 paragraph (1) where it is stated that disputes between fathers and mothers related to the rights of child custody are resolved through a court decision.

3.1.2 According to the Compilation of Islamic Law (KHI)

In Islamic Law, there is a terminology known as *hadhanah*. *Hadhanah* is Arabic for "child rearing", which means to care, nurture and educate children who have not been able to take care of themselves.⁷ M. Yahya Harahap stated that child rearing includes two things, namely: 1) The responsibility of parents to supervise and provide proper services and meet the needs of children's lives; 2) Responsibility in the form of continuous sustenance until the child reaches adulthood and can take care of themselves.⁸ While the encyclopedia of Islamic Law explains that *hadhanah* is the care of children who have not or cannot live independently by meeting their needs, keeping them away from danger, providing physical and psychological education, and developing their intellectual abilities to prepare them to assume the responsibilities of life.⁹

The right to custody of children in the Compilation of Islamic Law is contained in Article 105 which stipulates that in the event of divorce, then: 1) The custody of children who are not yet *mumayyiz* (able to determine good and bad) or haven't reach the age of 12 (twelve) years old is the right of the mother; 2) The custody of a *mumayyiz* child is left to the child to decide between his father or mother as the holder of the right of custody; 3) custody fees are charged to the father.

According to Article 105 of the Compilation of Islamic Law mentioned above, if a child is not yet 12 (twelve) years old, then the right of custody automatically falls to the mother. This is because women are believed to be more worthy to care for children for there is an assumption that women are more gentle, patient and more capable to show affection in caring for and educating children.¹⁰ However, the primacy of a mother's rights is only determined if she meets the conditions for carrying out the *hadhanah* namely being reasonable, mature, trustworthy and virtuous, having the will and ability to care for children, being Muslim, and not marrying or having a husband for the second time. If these conditions are not met, the custody rights will pass to the father.¹¹ If the father is not available, then the one who has the right to care for and educate the child is the mother's sister.¹² In the event that the court grants custody to the mother, then the father must give up custody voluntarily and must not take custody forcibly. In the event of a dispute related to child custody arise, the party who gets the right of custody can apply for the execution of child custody to the court.¹³

⁷ Zulfan Efendi, "Pelaksanaan Eksekusi Hak Asuh Anak (Hadhanah) Terhadap Isteri Yang Murtad dalam Perkara Nomor: 398/P.dt.G/2013/PA.Pbr di Pengadilan Agama Pekanbaru)," *TERAJU: Jurnal Syariah dan Hukum* 2, no. 1 (March 2020): 6, <http://dx.doi.org/10.35961/teraju.v2i01.62>.

⁸ *Ibid.*, 7-8.

⁹ M. Yahya Harahap, *Hukum Perkawinan Nasional* (Medan: CV Zahir Trading, 1975), 6-7.

¹⁰ Titania Britney Angela Mandey, *Op. Cit.*, 68.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Nelly Layaliyal Fitri, "Eksekusi Hak Asuh Anak di Dua Wilayah Yurisdiksi Perspektif Undang-Undang Perlindungan Anak No 35 Tahun 2014 (Studi Putusan Nomor 1813/Pdt.G/PA. Kab. Kediri)," *SAKINA: Journal of Family Studies* 3, no. 1 (December 2019): 7, <http://urj.uin-malang.ac.id/index.php/jfs/article/view/350>.

Based on the descriptions above, it can be concluded that in Islamic Law, the mother is preferred to be given the right to care for the child if the child is under the age of 12 (twelve) years. However, this does not apply absolutely, meaning it must be seen first whether the mother has fulfilled the conditions to perform *hadhanah*. This shows that just like the Marriage Law, the provisions regarding child custody rights stipulated in the Compilation of Islamic Law also emphasize such parenting in the best interests of the child. Only after a child has been considered as *mumayyiz* or is 12 (twelve) years old is he/she allowed to choose whether to follow his/her father or mother.

3.1.3 According to Law Number 35 of 2014 concerning Amendments on Law Number 23 of 2002 concerning Child Protection

Law Number 35 of 2014 as a result of adaptation of the Convention on the Rights of the Child both contain the basic principles of protection of children's rights, namely: non-discrimination, best interests for children, respect for children's opinions, the right to live, grow and develop.¹⁴ Just like the provisions in the Marriage Law that require parents to properly care and educate their children, the same is also regulated in Article 26 paragraph (1) of Act Number 35 of 2014 concerning the obligations and responsibilities of parents to: 1) care, nurse, educate and protect their children; 2) develop their children in accordance with their abilities, talents and interests; 3) prevent child marriage; 4) provide character education and ethics education to their children.

Although Law Number 35 of 2014 has provided protection for children's rights that must be fulfilled by their parents, Law Number 35 of 2014 does not have clear a regulations regarding child custody rights. The only article that concerns the right to custody for children after divorce in Law Number 35 of 2014 is in Article 14 which paragraph (1) stipulates that every child has the right to be cared for by his own parents, unless there are valid reasons and/or rules that show that separation is the best way for the interests of the child and is the last consideration. Meanwhile, Article 14 paragraph (2) of Act Number 35 of 2014 regulates the rights of children after divorce, namely: 1) a child still have the right to meet and bond with both parents; 2) a child has the right to receive care and education from both parents in accordance with the child's abilities, interests, and talents; 3) a child is entitled to living expenses from both parents; 4) a child has the right to obtain any other rights of child according to existing law.

3.2 Execution of Court Decisions Regarding Child Custody

Divorce is the termination of marital relations based on a divorce lawsuit filed by one party to the court provided that there are sufficient reasons to prove that the husband and wife can no longer live harmoniously as a family. As according to Article 39 paragraph (1) of the Marriage Law, divorce can only be carried out before a court hearing after the court concerned fails to reconcile both parties.

The end process of examining a case in court according to the provisions of Article 178 HIR/189 RBg is by the imposition of a decision by the Panel of Judges. With the passing of the decision, it is hoped that problems or disputes can be resolved. The decision handed

¹⁴ Titania Britney Angela Mandey, *Op. Cit.*, 69.

down by the court must certainly be enforceable for if it is not executable, then the decision of the court is meaningless.¹⁵

In general, court decisions that can be enforced or executed are court decisions that have legally binding status (*inkracht van gewijsde*). According to M. Yahya Harahap in his book, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, a court decision that can be executed must be a decision that has obtained a legally binding status because only in a decision that has legally binding status are there still a form of a permanent and definite legal relationship between the litigants.¹⁶

In judicial practice in Indonesia, there are two ways to carry out court decisions, namely voluntarily or by force. Execution is basically a coercive act to carry out or implement a court decision that has legally binding status. In practice, often the losing party is dissatisfied with the judgment handed down by the court that they are reluctant to carry out the decision voluntarily. For this reason, the party won by the court may apply for execution either in writing or orally to the court so that the decision will be implemented forcibly.¹⁷

In Indonesia, although there is no law that regulates the execution of court decisions relating to child custody rights, this does not mean that such rulings cannot be enforced. Instead, its enforcement must be carried out in accordance with generally applicable law.¹⁸ The process of execution of a court decision regarding child custody can generally be described as follows: 1) The prevailing party in the court's decision submits an application for an execution to the court where the case is examined, tried and decided; 2) The Chief Justice summons the respondent of the execution to be reprimanded (*aanmaning*) to carry out the judge's decision within a period of eight days as stipulated in Article 207 RBg and if the respondent of the execution still has not carry out the judge's decision after the expiration period aforementioned, then; 3) The Chief Justice shall issue an execution warrant whereby the court decision shall be enforced by the bailiff assisted by two witnesses as provided in Article 210 paragraph (2) RBg; 4) The bailiff will take the child in a courteous manner and in accordance with the prevailing customs and if the child is not handed over by the respondent, then the taking may be forcibly made; 5) The bailiff shall produce a Minutes of Execution signed by the bailiff and two witnesses.¹⁹

The execution of court decisions relating to child custody right is an execution that is classified as a real form of execution, namely execution that requires concrete actions to be taken. However, execution related to child custody in practice often experiences obstacles due to the object being in the form of a person, therefore the success rate of the execution is still relatively low compared to an execution in which the object is an inanimate object.²⁰ Until now, there is still a dichotomy among legal experts regarding the execution of court decisions related to child custody. There are legal experts who argue that child custody decisions cannot be executed on the grounds that the practice of execution so far has only

¹⁵ Rai Mantili, "Kajian Hukum Terhadap Pelaksanaan Eksekusi Anak Oleh Pengadilan Agama Dalam Suatu Putusan Perceraian," *KEADILAN: Jurnal Fakultas Hukum Universitas Tulang Bawang* 2, no. 2 (August 2022): 100-101, <https://doi.org/10.37090/keadilan.v20i2.725>.

¹⁶ M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* (Jakarta: Sinar Grafika, 2005), 99.

¹⁷ Rai Mantili, *Op. Cit.*, 101.

¹⁸ Salsabillah Nilam Zahra, I Nyoman Sujana, and Ni Made Puspasutari Ujianti, "Implikasi Yuridis Perceraian Terhadap Hak-Hak Anak Dalam Perspektif Hukum Islam (Studi Kasus Pengadilan Agama Denpasar)," *Jurnal Konstruksi Hukum* 4, no. 3 (September 2023): 257, <https://doi.org/10.55637/jkh.4.3.8032.253-260>.

¹⁹ Chandra Darusman S, *Op. Cit.*, 184.

²⁰ Rai Mantili, *Op. Cit.*, 103.

been applied to inanimate objects, not people. Therefore, decisions related to child custody are often inexecutable especially if the decisions are "declaratoir".²¹ On the other hand, there are also legal experts who argue that the execution of court decisions related to child custody can be carried out on the basis that the decisions are "condemnatoir" (punitive) in the sense that there is something that can be done in real terms by the losing party. So that if the decision is legally binding then it can be executed.²²

In the execution of a court decisions related to child custody, there are several things that can hinder the smooth running of the execution process, for example: 1) The child is reluctant to be handed over or hidden by the execution respondent, causing the child's whereabouts to be unknown and difficult to find his/her whereabouts; 2) The child prefers to follow the execution respondent which means the court cannot force the execution for it would contravene Article 3 paragraph (1) of the Convention on the Rights of the Child which affirms that any action related to the child carried out by the institution of the court must put the best interests of the child as the primary consideration; 3) The cost of execution is expensive because in order for the execution to be carried out, the execution applicant is required to pay costs such as the cost of registering the execution, the fees of witnesses, security costs, and other costs deemed necessary for the execution;²³ 4) The legal instrument governing the execution of child custody is unclear which means there is still a legal vacuum in this regard.

In addition, in the execution of the court decision, the bailiff must also consider the psychological factors of the child. This is because children are individuals who possess self-awareness and rights that must be protected, not lifeless objects that can be executed carelessly. Therefore, the execution of child custody requires careful planning and a more sensitive approach, so that the execution itself does not leave a bad and frightening impression which could left a traumatic impact on the child.²⁴

3.3 Joint Custody as an Alternative Resolution to Custody Child Disputes

The right to child custody by parents has changed a lot along with time and mindset of society. In the early nineteenth century, the right of custody was believed to be more appropriately fall to the father as the party who had the financial capacity to care for the child. But this eventually shifted to the mother on the basis that the mother is the one who has the emotional capacity to care for children who are still in tender years. This certainly does not apply absolutely, for instance in the event that the mother is proven to be incompetent and unable to provide nurturing and fulfillment of the rights of the child as it should.²⁵

In the 1970s, mental health experts argued that the right course of action to take in sole custody was to give the right of custody to the parent who psychologically has a closer emotional bond with the child as a primary consideration. However, along with the

²¹ Salsabillah Nilam Zahra, *Op. Cit.*, 257.

²² Rai Mantili, *Op. Cit.*, 103.

²³ Laily Lukita Nilam Sari, Wasis Suprayitna, and Kukuh Dwi Kurniawan, "Pelaksanaan Eksekusi Hak Asuh Anak Dalam Perkara Perceraian (Studi Kasus Putusan No 1618/PDT.G/2020/PA.SMP)," *ILREJ: Indonesia Law Reform Journal* 2, no. 2 (July 2022): 177, <https://doi.org/10.22219/ilrej.v2i2.22075>.

²⁴ Salsabillah Nilam Zahra, *Op. Cit.*, 258.

²⁵ Rika Saraswati, Emanuel Boputra, and Yuni Kusniati, "Pemenuhan Hak Anak di Indonesia Melalui Perencanaan Pengasuhan, Pengasuhan Tunggal dan Pengasuhan Bersama," *Veritas et Justitia* 7, no. 1 (2021): 190-191, <https://doi.org/10.25123/vej.v7i1.4066>.

development of the era where many women began to be busy working and many fathers began to fight for the custody of their children encouraged the emergence of a custody concept that involves the active participation of both parents commonly called joint custody.²⁶

Legal psychology distinguishes child custody needs into two, namely legal custody and physical custody. Legal custody is a right related to decision making that will have a major impact on the development of a child, for example where the child will get his/her education, where the child will get medical treatment, and so on. Whereas physical custody today refers more to which parent's place will the child live or spend more of their time.

Edwark Kurk in his book, *Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard*, specifies four pillars in the implementation of joint custody, namely:

1. Harm Reduction: Legal Presumption of Joint Parental Responsibility

This first pillar establishes the legal understanding that the relationship or bond that already exists between parents and children will remain and continue even after divorce. This pillar is aimed at maximizing the participation of both parents in the lives of their children after divorce. Child custody that is carried out by both parents will provide a balanced division of parenting time and effort and give each parent a respite from full-time childcare. It is also aimed at maximizing cooperation and reducing conflicts between parents after divorce, and most importantly, to prevent child poverty after the divorce of their parents.²⁷

2. Treatment: Parenting Plans, Mediation, and Support/Intervention in High Conflict Cases

This second pillar talks about the implementation of parenting planning before divorce cases are examined by the court.²⁸ In Indonesia, every civil lawsuit that goes to the district court must first be preceded by mediation efforts. Which is given more emphasis, especially on divorce lawsuits. Today, the existing pre-divorce mediation still focuses on the will of the parties to divorce or not. Given that the function of judges as mediators according to Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court is to inventorize existing problems and discuss them based on priority scales, the judge as a mediator must remind the fulfillment of the needs and interests of the children of the husband and wife who are about to divorce. Therefore, a judge when assigned as a mediator in divorce cases, should require the parties to make a joint parenting plan. Making a mutual agreement related to parenting planning in the event of unsuccessful mediation is necessary for the parenting plan that has been made will be brought into the court process and will get a legal force that is expected to be able to provide protection for children's rights, especially related to care and education.²⁹

The parenting plan includes parenting schedules and all legal issues related to parents' obligations to the rights of their children. This plan lays down the responsibility of each parent for meeting the needs of their children and also

²⁶ Rika Saraswati, *Op. Cit.*, 191.

²⁷ Edward Kurk, *Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard* (Vancouver: University of British Columbia Press, 2008), 60.

²⁸ *Ibid.*, 62.

²⁹ Rika Saraswati, *Op. Cit.*, 206.

contains matters related to resolution in the event of disputes between parents arise in the future.

Regarding the parenting time contained in parenting plans, it means that there is a certain period of time where the children will live or under the supervision and care of each parent. Through the parenting plan, it is hoped that children's rights can be guaranteed where periodically children will get meaningful contact with each parent.³⁰

3. Prevention: Joint Parenting Education

This third pillar emphasizes the importance of education or counseling related to joint parenting/joint custody. Counseling related to this matter can be applied or carried out both in the educational curriculum, before marriage, and in divorce.³¹ Joint parenting education is a program aimed primarily at parents with the hope that after divorce, parents can find and agree on their respective roles in the parenting planning scheme. In this case, the focus of the matter is not "who" is more entitled to the right of custody, but "how" the best parenting can be done.³²

4. Execution: Judicial Determination in Cases of Established Abuse; Execution of Joint Parental Responsibility Orders

In relation to disputes between parents regarding child custody and parenting plan, the last pillar talks about the imposition of sanctions in the event of non-compliance or violation of parenting plan that has been made and agreed. When a parenting plan has a legally binding force in which a child must spend time with one parent for a certain period of time and the other parent refuses to comply with the plan and thus interferes with the first parent's time, then in this case, enforcement efforts must be taken. When enforcement efforts are required, the results may be in the form of reduction or elimination of time or parenting rights, or it may also be: 1) The obligation for the offending parent to give more parenting time to the parent whose parenting time is interrupted or reduced; 2) the right to charge payment against costs incurred in violations of parenting plan; 3) Imposition of court case costs on the offending party; 4) Discretion to impose sanctions for any violation of parenting plan.³³

4. CONCLUSION

The absence of a definitive legal regulation related to the granting of child custody right and execution procedures related to this matter has the potential to cause various problems considering that the object in the context of a custody right is a child who possess consciousness and feelings, not just an inanimate object that can be executed freely and carelessly. To avoid this from happening, the concept of joint custody can be applied to safeguard the interests of children. In joint custody, both parents can still actively provide care and education even though they are no longer bound by marriage. On the other hand, the child can still receive affection while simultaneously maintaining harmonious family relationships with both parents.

³⁰ *Ibid.*, 204.

³¹ Edward Kurk, *Op. Cit.*, 68.

³² Maghfirah and Gushairi, "Konsep Shared Parenting Dalam Hadhanah Pasca Perceraian: Kajian Perundang-Undangan Perkawinan Islam Kontemporer," *Hukum Islam* 20, no. 2 (December 2020): 198-199, <http://dx.doi.org/10.24014/jhi.v20i2.12169>.

³³ Edward Kurk, *Op. Cit.*, 69-71.

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The United Nations Convention on the Rights of the Child.

PROBLEMA KEWAJIBAN PELAKU USAHA UNTUK MEMBUAT PEMBERITAHUAN PELAKSANAAN AKSI KORPORASI KE KOMISI PENGAWAS PERSAINGAN USAHA

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Abstract

There are regulations that require business entities to notify the implementation of corporate actions such as mergers, consolidations and takeovers to the KPPU. Violations of these regulations tend to dominate cases tried by the KPPU recently. Even though this regulation has good intentions to prevent monopolistic practices and unfair business competition, in practice it is very detrimental to the position of business entities and has the potential to cancel corporate actions that have previously been approved by the Minister. The aim of this research is to find a format for regulating the obligations of business actors in making corporate actions to the KPPU. The method used in this research is normative juridical, using secondary data. The research results show that corporate actions are accompanied by prohibited agreements, prohibited activities, and/or abuse of dominant positions. This regulation uses a rule of reason approach, where it is necessary to carry out prior proof/assessment regarding the impact on business competition carried out by the KPPU using various analyses. In addition, there are regulations that require business actors who carry out corporate actions to notify the KPPU a maximum of 30 (thirty) days from the effective date. This notification obligation is only required for transactions that cause the asset value to exceed 2 trillion rupiah (20 trillion for the banking business sector) and/or a transaction value of 5 trillion rupiah. In this case, there is ineffectiveness in regulating notification obligations for business actors because such notifications are very detrimental to business actors and only make tasks easier which should be the responsibility of the KPPU.

Abstrak

Terdapat pengaturan yang mewajibkan badan usaha untuk melakukan pemberitahuan pelaksanaan aksi korporasi seperti penggabungan, peleburan, dan pengambilalihan ke KPPU. Pelanggaran atas aturan tersebut cenderung mendominasi kasus yang diadili oleh KPPU belakangan ini. Walaupun aturan ini bertujuan baik untuk mencegah terjadinya praktek monopoli dan persaingan usaha tidak sehat tetapi dalam prakteknya sangat merugikan posisi badan usaha hingga potensi pembatalan aksi korporasi yang sebelumnya telah disetujui oleh Menteri. Tujuan dari penelitian ini untuk mencari format tentang pengaturan kewajiban pelaku usaha dalam membuat aksi korporasi ke KPPU. Metode yang digunakan dalam penelitian ini adalah normatif yuridis, dengan menggunakan data sekunder. Hasil penelitian menunjukkan bahwa aksi korporasi yang disertai dengan adanya

perjanjian yang dilarang, kegiatan yang dilarang, dan/atau penyalahgunaan posisi dominan. Pengaturan ini menggunakan pendekatan *rule of reason*, di mana perlu dilakukannya pembuktian/penilaian terlebih dahulu mengenai dampaknya terhadap persaingan usaha yang dilakukan oleh KPPU dengan menggunakan berbagai analisis. Selain itu, terdapat pengaturan yang mewajibkan pelaku usaha yang melakukan aksi korporasi untuk memberitahunya kepada KPPU maksimal 30 (tiga puluh) hari sejak tanggal berlaku efektifnya. Kewajiban pemberitahuan tersebut hanya diwajibkan untuk transaksi yang menyebabkan nilai aset melebihi 2 triliun rupiah (20 triliun untuk bidang usaha perbankan) dan/atau nilai transaksi 5 triliun rupiah. Dalam hal ini, terjadi ketidakefektifan dari pengaturan kewajiban pemberitahuan bagi pelaku usaha karena pemberitahuan tersebut sangat merugikan pelaku usaha dan hanya mempermudah tugas yang seharusnya menjadi tanggung jawab KPPU.

1. PENDAHULUAN

Dalam ilmu ekonomi dan bisnis dikenal suatu teori yang menjadi inti perekonomian itu sendiri yaitu teori permintaan dan penawaran. Teori ini berkaitan dengan pembentukan harga, di mana dinyatakan bahwa semakin tinggi permintaan dibandingkan dengan penawaran maka harga akan cenderung naik. Sedangkan sebaliknya, semakin rendah permintaan dibandingkan penawaran maka harga akan cenderung turun.¹ Sehingga berdasarkan teori tersebut, maka suatu harga akan terbentuk pada titik ekuilibrium antara permintaan dan penawaran.

Apabila penawaran akan suatu barang atau jasa termasuk substitusinya hanya dikuasai oleh segelintir atau bahkan satu pelaku usaha, maka keadaan ini dapat menimbulkan praktek monopoli. Hal ini dikarenakan jumlah pedagang/penjual merupakan salah satu faktor yang menentukan penawaran.² Tanpa adanya pelaku usaha lain yang menjual barang atau jasa yang sejenis, maka pelaku usaha bebas untuk menentukan harga jual dari barang atau jasa yang ditawarkan sehingga konsumen dipaksa untuk membeli barang atau jasa tersebut. Kondisi ini tentu bukan kondisi yang diharapkan untuk mencapai pertumbuhan ekonomi yang efisien karena tidak adanya sebuah persaingan usaha yang sehat antara pelaku usaha yang ada.

Agar kondisi-kondisi yang dapat merugikan konsumen dan kepentingan umum tersebut dapat dihindari, maka dibentuklah Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat. Salah satu pengaturan yang terdapat dalam UU tersebut adalah mengenai praktek aksi korporasi berupa penggabungan, peleburan dan pengambilalihan tepatnya dalam Bagian Keempat Pasal 28 dan 29 UU 5/1999. Bunyi dari pasal-pasal tersebut adalah sebagai berikut:

¹ Mika Debora Br Barus and An Suci Azzahra, "Analisis Aplikasi dan Penerapan Matematika pada Ilmu Ekonomi Fungsi Permintaan Penawaran," *Jurnal Akuntansi Bisnis dan Publik* 11, no. 1 (August 2020): 2, <https://jurnal.pancabudi.ac.id/index.php/akuntansibisnisdanpublik/article/view/961>.

² Andi Fahmi Lubis, Anna Maria Tri Anggraini, Kurnia Toha, L. Budi Kagramanto, M. Hawin, Ningrum Natasya Sirait, Paramita Prananingtyas, Sukarmi, Syamsul Maarif, and Udin Silalahi, *Hukum Persaingan Usaha Edisi Kedua* (Jakarta: Komisi Pengawasan Persaingan Usaha, 2017), 43.

Pasal 28

- (1) Pelaku usaha dilarang melakukan penggabungan atau peleburan badan usaha yang dapat mengakibatkan terjadinya praktek monopoli dan atau persaingan usaha tidak sehat.
- (2) Pelaku usaha dilarang melakukan pengambilalihan saham perusahaan lain apabila tindakan tersebut dapat mengakibatkan terjadinya praktek monopoli dan atau persaingan usaha tidak sehat.
- (3) Ketentuan lebih lanjut mengenai penggabungan atau peleburan badan usaha yang dilarang sebagaimana dimaksud dalam ayat (1), dan ketentuan mengenai pengambilalihan saham perusahaan sebagaimana dimaksud ayat dalam (2) pasal ini, diatur dalam Peraturan Pemerintah.

Pasal 29

- (1) Penggabungan atau peleburan badan usaha, atau pengambilalihan saham sebagaimana dimaksud dalam Pasal 28 yang berakibat nilai aset dan atau nilai penjualannya melebihi jumlah tertentu, wajib diberitahukan kepada Komisi, selambat-lambatnya 30 (tiga puluh) hari sejak tanggal penggabungan, peleburan atau pengambilalihan tersebut.
- (2) Ketentuan tentang penetapan nilai aset dan atau nilai penjualan serta tata cara pemberitahuan sebagaimana dimaksud dalam ayat (1) diatur dalam Peraturan Pemerintah.

Sesuai dengan kedua pasal tersebut, dibuatlah pengaturan lebih lanjut yang tertuang melalui Peraturan Pemerintah Nomor 57 Tahun 2010 tentang Penggabungan atau Peleburan Badan Usaha dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktik Monopoli dan Persaingan Usaha Tidak Sehat.

Pada dasarnya penggabungan, peleburan dan pengambilalihan memberikan dampak positif terjadinya sinergi dan konsolidasi usaha yang mendorong pertumbuhan dan diversifikasi usaha. Pertumbuhan perusahaan tersebut termasuk dalam upaya pertumbuhan perusahaan secara eksternal, yaitu perusahaan yang mengembangkan usahanya dengan melakukan merger atau mengakuisisi saham perusahaan lain. Tetapi di sisi lain, dengan pertumbuhan yang terjadi melalui aksi korporasi tersebut dapat meningkatkan konsentrasi dalam pasar bersangkutan yang dapat merugikan pelaku usaha pesaingnya, pelaku usaha pada sektor hulu, pelaku usaha pada sektor hilir, konsumen, dan/atau masyarakat.

Dari keberadaan pasal-pasal tersebut, hal yang menarik bagi penulis adalah adanya kewajiban bagi badan usaha untuk melakukan pemberitahuan atas pelaksanaan aksi korporasi penggabungan, peleburan dan pengambilalihan kepada Komisi Pengawas Persaingan Usaha. Jika melihat secara data pada *website* Komisi Pengawas Persaingan Usaha (KPPU) sejak awal tahun 2022 hingga hasil putusan terbaru, dari 15 putusan yang telah diputuskan 7 di antaranya berkaitan dengan dugaan keterlambatan pemberitahuan sebagaimana yang dimaksud pada Pasal 29 UU No. 5 Tahun 1999. Putusan-putusan tersebut antara lain dapat dilihat pada tabel berikut.

Tabel 1. Beberapa Putusan tentang Dugaan Keterlambatan Pemberitahuan

No.	Kasus	Tanggal Putusan
1	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Pulau Bintang Djaya, PT Sumber Djantin, Dan PT Sumber Alam Oleh PT Hok Tong	08 November 2022
2	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Bina Husada Gemilang Oleh PT Mitra Keluarga Karyasehat Tbk	24 Oktober 2022
3	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Bakti Gemilang Anak Sejahtera Oleh PT Rumah Kasih Indonesia	20 Oktober 2022
4	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Ladang Sawit Mas, PT Agriplus, Dan PT Hungarindo Persada Oleh PT Bumitama Gunajaya Agro	17 Juni 2022
5	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Nabati Agro Subur Oleh PT Lestari Gemilang Intisawit	31 Mei 2022
6	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Kusumasentral Kencana Oleh PT Inter Sarana Prabawa	14 Maret 2022
7	Dugaan Keterlambatan Pemberitahuan Pengambilalihan Saham PT Perindustrian Sawit Synergi Dan PT Bumi Makmur Sejahtera Jaya Oleh KI - Kepong Plantation Holdings Sdn. Bhd.	24 Februari 2022

Sumber: <https://putusan.kppu.go.id/simper/menu/>

Berdasarkan data tersebut dapat dilihat bahwa kegiatan kasus berkaitan dengan anti monopoli dan persaingan usaha yang diproses oleh Komisi Pengawas Persaingan Usaha cenderung didominasi kasus pemberitahuan pelaksanaan aksi korporasi penggabungan, peleburan dan pengambilalihan sebesar 46,6%.

Dari uraian latar belakang di atas, maka timbul permasalahan yang penulis anggap patut untuk dibahas di dalam karya tulis ilmiah ini, antara lain: Pertama, perihal pengaturan mengenai aksi korporasi dalam kaitannya dengan praktik monopoli dan persaingan usaha tidak sehat; dan kedua, bagaimana kewajiban pemberitahuan aksi korporasi tersebut?

2. METODE

Penelitian ini ditulis dengan metode penelitian pustaka, dengan menggunakan data sekunder, yang terdiri dari peraturan perundang-undangan, jurnal atau hasil penelitian lainnya. Analisis yang digunakan adalah kualitatif dengan membuktikan kualitas bunyi peraturan, khususnya dalam Pasal 28 dan 29 UU No. 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha.

3. HASIL DAN PEMBAHASAN

3.1 Pengaturan Mengenai Penggabungan, Peleburan dan Pengambilalihan

Sebagaimana yang sudah diuraikan pada latar belakang, di mana aksi korporasi seperti penggabungan, peleburan dan pengambilalihan merupakan hal yang lumrah dilakukan oleh perusahaan sebagai pelaku usaha. Aksi korporasi tersebut dilakukan dalam rangka menciptakan nilai lebih bagi pemegang saham. Nilai lebih yang dimaksud adalah

sebuah sinergitas.³ Sinergitas tersebut terbentuk dari konsentrasi kekuatan pelaku usaha yang ada menjadi satu sehingga dari sinergitas menghasilkan efisiensi dalam kegiatan yang dilakukan oleh pelaku usaha. Tetapi dari konsentrasi kekuatan pelaku usaha tersebut juga dapat memberikan dampak negatif khususnya bagi pelaku usaha lain dan juga masyarakat sebagai konsumen. Semakin tingginya konsentrasi, maka semakin tinggi juga potensi terjadinya monopoli dan semakin rendahnya tingkat persaingan yang ada.⁴

Sebelum membahas lebih jauh, ada baiknya kita mendefinisikan terlebih dahulu apa yang dimaksud dengan aksi korporasi penggabungan, peleburan dan pengambilalihan. Definisi dari ketiga aksi korporasi tersebut dapat kita temui dalam berbagai peraturan perundang-undangan seperti Undang-Undang No. 40 Tahun 2007 tentang Perseroan Terbatas, Peraturan Pemerintah No. 57 Tahun 2010 tentang Penggabungan atau Peleburan Badan Usaha dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktik Monopoli dan Persaingan Usaha Tidak Sehat, serta Peraturan Komisi Pengawas Persaingan Usaha Nomor 3 Tahun 2019 tentang Penilaian Terhadap Penggabungan atau Peleburan Badan Usaha, atau Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktik Monopoli dan/atau Persaingan Usaha Tidak Sehat yang antara lain didefinisikan sebagai berikut:

- a. Penggabungan. Perbuatan hukum yang dilakukan oleh satu Badan Usaha atau lebih untuk menggabungkan diri dengan Badan Usaha lain yang telah ada yang mengakibatkan aktiva dan pasiva dari Badan Usaha yang menggabungkan diri beralih karena hukum kepada Badan Usaha yang menerima penggabungan dan selanjutnya status Badan Usaha yang menggabungkan diri berakhir karena hukum.
- b. Peleburan. Perbuatan hukum yang dilakukan oleh dua Badan Usaha atau lebih untuk meleburkan diri dengan cara mendirikan satu Badan Usaha baru yang karena hukum memperoleh aktiva dan pasiva dari Badan Usaha yang meleburkan diri dan status Badan Usaha yang meleburkan diri berakhir karena hukum.
- c. Pengambilalihan. Perbuatan hukum yang dilakukan oleh Pelaku Usaha untuk mengambilalih saham Badan Usaha yang mengakibatkan beralihnya pengendalian atas Badan Usaha tersebut.

Dari definisi-definisi di atas dapat dilihat bahwa ketiga aksi korporasi tersebut menciptakan sebuah pemusatan kekuatan ekonomi, di mana perusahaan-perusahaan yang sebelumnya berdiri sendiri-sendiri menjadi di bawah satu pengendalian. Hal ini dapat mencerminkan arti dari praktik monopoli itu sendiri yang adalah pemusatan kekuatan ekonomi oleh satu atau lebih pelaku usaha yang mengakibatkan dikuasainya produksi dan/atau pemasaran atas barang dan/atau jasa tertentu sehingga menimbulkan persaingan usaha tidak sehat dan dapat merugikan kepentingan umum.

Melalui pertimbangan tersebut, maka sudah sewajarnya perlu dilakukan pengaturan untuk mengawasi aksi korporasi berkaitan dengan penggabungan, peleburan dan akuisisi, baik aksi korporasi tersebut dilakukan secara vertikal (mulai dari pengolahan bahan bakunya, atau dari pengolahan produk sampai produk tersebut selesai diproduksi, dan sampai kepada tangan konsumen akhir) maupun secara horizontal (antara pelaku usaha

³ James C. Van Horne and John M. Wachowicz, *Fundamentals of Financial Management*, 13th ed (England: Prentice Hall, 2008), 604.

⁴ Ni Nyoman Indah Ratnasari, "Wajib Tahu! Tindakan Merger Perusahaan Bisa Mengakibatkan Monopoli Usaha," *Smartlegal.id*, April 15, 2021, <https://smartlegal.id/perubahan-anggaran-dasar/2021/04/15/wajib-tahu-tindakan-merger-perusahaan-bisa-mengakibatkan-monopoli-usaha/>.

yang sama dan sebelumnya bersaing). Pengaturan tersebut tertuang dalam Pasal 28 dan 29 UU No. 5 Tahun 1999 yang kemudian diatur lebih lanjut oleh PP No. 57 Tahun 2010 dan Peraturan KPPU No. 3 Tahun 2019.

Secara umum, peraturan perundang-undangan tidak melarang adanya aksi korporasi penggabungan, peleburan dan akuisisi oleh perusahaan sebagai pelaku usaha. Hal ini dapat dilihat dengan adanya kata-kata “dapat mengakibatkan” pada Pasal 28 ayat (1) dan (2) UU No. 5 Tahun 1999, sehingga untuk aturan dalam pasal ini pendekatan yang digunakan adalah pendekatan *rule of reason*. Pendekatan *rule of reason* adalah pendekatan yang menggunakan analisis ekonomi guna mencapai efisiensi agar dapat mengetahui dengan pasti apakah suatu tindakan yang dilakukan oleh pelaku usaha berimplikasi pada persaingan.⁵ Dalam hal ini, aksi korporasi tersebut dilarang apabila mengakibatkan terjadinya praktik monopoli dan persaingan usaha tidak sehat yang kemudian dijelaskan lebih lanjut oleh Pasal 2 ayat (2) PP No. 57 Tahun 2010 bahwa praktik monopoli dan persaingan usaha tidak sehat yang dimaksud adalah apabila disertai dengan perjanjian terlarang, kegiatan yang dilarang dan/atau penyalahgunaan posisi dominan. Sesuai dengan pendekatan yang digunakan yaitu *rule of reason* maka KPPU harus melakukan pembuktian/penilaian apakah aksi korporasi yang dilakukan dapat menyebabkan praktik monopoli dan persaingan usaha tidak sehat. Pembuktian/penilaian terhadap penggabungan, peleburan dan pengambilalihan yang telah berlaku efektif secara yuridif berdasarkan Pasal 3 ayat (1), (2) dan (3) PP No. 57 Tahun 2010 *jo*. Pasal 13 ayat (5) Peraturan KPPU No. 3 Tahun 2019 dilakukan dengan menggunakan berbagai analisis, antara lain:

- a. konsentrasi pasar;
- b. hambatan masuk pasar;
- c. potensi perilaku anti persaingan;
- d. efisiensi;
- e. kepailitan serta analisis-analisis lain yang mungkin digunakan;
- f. kebijakan peningkatan daya saing dan penguatan industri nasional;
- g. pengembangan teknologi dan inovasi;
- h. perlindungan usaha mikro, kecil dan menengah;
- i. dampak terhadap tenaga kerja; dan/atau
- j. pelaksanaan peraturan perundang-undangan.

Penilaian yang dilakukan oleh KPPU dilaksanakan paling lama dalam jangka waktu 90 hari dan melalui 2 tahapan, yaitu:

- a. Penilaian Awal. Analisis yang dilakukan untuk melihat ada tidaknya dampak terhadap persaingan usaha di industri dan/atau pasar. Jika terdapat dampak, maka barulah penilaian dilanjutkan ke tahapan penilaian keseluruhan.
- b. Penilaian Keseluruhan. Penilaian ini dilakukan oleh komisi penilai dibantu oleh unit kerja terhadap notifikasi yang memiliki dampak terhadap persaingan usaha di industri dan/atau pasar.

Berdasarkan hasil penilaian pada tahap penilaian keseluruhan yang dinyatakan dalam bentuk Penetapan Notifikasi, KPPU dapat berpendapat apakah aksi korporasi yang dimaksud dalam hal ini ada dugaan praktik monopoli atau persaingan usaha tidak sehat atau tidak. Jika dalam Penetapan Notifikasi KPPU berpendapat bahwa ada dampak negatif terhadap persaingan usaha, maka masih ada kesempatan bagi pelaku usaha yaitu berupa persetujuan bersyarat. Persetujuan bersyarat yang dimaksud adalah bahwa pelaku usaha

⁵ Andi Fahmi Lubis, *Op. Cit.*, 76.

harus melakukan tindakan penyesuaian secara struktural dan/atau penyesuaian atas perilaku pelaku usaha.

Menyambung ke ketentuan dalam Pasal 29 UU No. 5 Tahun 1999, bahwa terdapat kewajiban bagi perusahaan sebagai pelaku usaha untuk memberitahukan aksi korporasi penggabungan, peleburan dan pengambilalihan kepada KPPU dalam jangka waktu 30 hari. Tetapi kewajiban pemberitahuan tersebut tidak diberlakukan kepada semua pelaku usaha yang melakukan penggabungan, peleburan dan pengambilalihan, melainkan hanya untuk aksi korporasi yang dilakukan bukan antar perusahaan yang terafiliasi dan mengakibatkan nilai aset dan/atau nilai penjualannya melebihi jumlah tertentu. Angka pasti dari nilai aset dan/atau nilai penjualan yang dijadikan *threshold* tersebut diundangkan dalam Pasal 5 ayat (2) dan (3) PP No. 57 Tahun 2010 dengan besaran sebagai berikut:

- a. Nilai aset sebesar 2,5 triliun rupiah (20 triliun rupiah untuk usaha di bidang perbankan); dan/atau
- b. Nilai penjualan sebesar 5 triliun rupiah.

Pemberitahuan yang dimaksud dalam Pasal 29 UU No. 5 Tahun 1999 tersebut, harus dilakukan secara tertulis dengan formulir yang ditetapkan oleh KPPU. Dalam formulir tersebut, hal-hal yang harus dicantumkan antara lain:

- a. nama, alamat, nama pimpinan atau pengurus Badan Usaha yang melakukan penggabungan, peleburan, atau pengambilalihan;
- b. ringkasan rencana penggabungan, peleburan, atau pengambilalihan; dan
- c. nilai aset atau nilai hasil penjualan badan usaha
- d. tanda tangan pimpinan atau pengurus Badan Usaha yang melakukan penggabungan, peleburan, atau pengambilalihan; dan
- e. dokumen pendukung yang berkaitan dengan penggabungan, peleburan, atau pengambilalihan.

Apabila pemberitahuan tersebut tidak atau terlambat disampaikan ke KPPU, maka sesuai Pasal 6 PP No. 57 Tahun 2010 pelaku usaha dikenakan denda sebesar 1 miliar rupiah/hari keterlambatan dengan batas maksimal sebesar 25 miliar rupiah.

3.2 Kewajiban Pemberitahuan Aksi Korporasi

Menurut Alexander, aksi korporasi (*corporate action*) merupakan istilah di pasar modal yang menunjukkan aktivitas strategi emiten atau Perusahaan tercatat (*listed company*) yang berpengaruh terhadap kepentingan saham.⁶ Beberapa bentuk aksi korporasi yang umumnya dilakukan oleh emiten, antara lain: Pembagian deviden, baik dalam bentuk tunai atau kas maupun saham; pemecahan saham (*stock split*); penyatuan saham (*reverse split*); saham bonus; penawaran umum terbatas (*right issue*); pembelian kembali saham (*stock buy back*); merger dan akuisisi; dan *additional listing*, seperti *private placement* dan konversi saham, baik dari *warrant*, *rights*, maupun obligasi.

Aksi korporasi ini merupakan aktivitas emiten yang menarik perhatian pelaku pasar modal, seperti saham, penasihat investasi, manajer investasi, investor, atau pemegang saham. Pihak-pihak yang berkepentingan umumnya akan mencermati dengan seksama setiap langkah yang diambil oleh manajemen emiten dalam proses aksi korporasi, baik mulai dari rencana hingga proses pelaksanaannya.

Pihak-pihak yang berkepentingan akan mencermati dengan saksama setiap langkah yang dilakukan manajemen emiten dalam proses aksi korporasi baik sejak rencana hingga

⁶ Alexander Thian, *Hukum Bisnis* (Yogyakarta: Andi Offset, 2022), 148.

proses pelaksanaannya. Pemegang saham berkepentingan dengan aksi korporasi karena beberapa hal seperti:⁷

1. Perubahan komposisi kepemilikan dan dilusi saham. Sebuah aksi korporasi dapat mengakibatkan berubahnya komposisi pemegang saham serta dapat berakibat menurunnya persentase kepemilikan (dilusi saham);
2. Dana tambahan. Pemegang saham tidak selalu memiliki dana tambahan untuk turut serta dalam sebuah aksi korporasi;
3. Perubahan permodalan Perusahaan. Aksi korporasi yang menyangkut perubahan saham dapat berakibat pada perubahan pada sisi modal sendiri (ekuitas), dan dapat berdampak pada perubahan pada indikator-indikator yang berkaitan dengan permodalan;
4. Jumlah saham beredar. Jumlah saham yang beredar dapat berubah (bertambah atau berkurang) di pasar. Hal tersebut tentu saja dapat berpengaruh terhadap kinerja saham atau likuiditas perdagangan saham.
5. Harga Saham. Aksi korporasi dapat berpengaruh terhadap harga saham, di mana harga saham merupakan perhatian utama bagi pemegang saham khususnya investor yang aktif;
6. Dividen. Bagi pemegang saham, aksi korporasi dapat berakibat pada meningkatnya kinerja perusahaan yang berujung pada peningkatan profitabilitas yang berarti peluang dividen yang lebih besar;
7. Likuiditas. Hal ini mencerminkan laju perdagangan saham atau sejauh mana suatu saham aktif atau tidaknya diperdagangkan;
8. Strategi Investasi. Setiap investor baik institusi maupun perorangan memiliki preferensi berbeda baik terhadap peluang keuntungan (*return*) maupun potensi kerugian atau resiko (*risk*); dan
9. Portofolio Investasi. Manajer investasi suatu portofolio atau reksa dana berkepentingan meningkatkan nilai portofolio investasi yang dikelolanya.

Jika melihat dari banyaknya kasus keterlambatan pemberitahuan oleh pelaku usaha sepanjang tahun 2022 ini, maka perlu dilihat lagi efisiensi tujuan dari pemberitahuan penggabungan, peleburan dan pengambilalihan yang diatur tersebut. Berdasarkan Pasal 8 PP No. 57 Tahun 2010, di mana pemberitahuan yang dimaksud hanya mencakup hal-hal yang cenderung umum dan tidak memiliki urgensi, melainkan hanya berupa notifikasi kepada KPPU. Keberadaan kewajiban pemberitahuan tersebut dapat dikatakan sangat merugikan pelaku usaha dan hanya mempermudah tugas yang seharusnya menjadi tanggung jawab KPPU untuk melakukan pengawasan dan penilaian.

Kerugian yang dimaksud adalah kerugian secara riil tentunya dalam hal sanksi denda yang diberikan oleh KPPU karena keterlambatan pemberitahuan. Mengingat besaran denda yang dikenakan adalah sebesar 1 miliar rupiah per hari dengan maksimal 25 miliar rupiah dapat dikatakan tidak masuk akal untuk kewajiban yang secara fungsi tidak memiliki urgensi terutama bagi KPPU sendiri. Ketidakadaan urgensi tersebut dapat dilihat dari keputusan-keputusan yang telah ada, di mana keterlambatan pemberitahuan yang diwajibkan tersebut baru diketahui dalam kurun waktu hingga 1 tahun. Dalam hal aksi korporasi penggabungan, peleburan dan pengambilalihan sudah ditujukan oleh pelaku usaha untuk melakukan praktik monopoli dan persaingan usaha tidak sehat, tentu selama kurun waktu yang sangat lama tersebut sudah terlanjur menimbulkan kerugian

⁷ Saleh Basir and Hendy M. Fakhruddin. *Aksi Korporasi: Strategi Untuk Meningkatkan Nilai Saham Melalui Aksi Korporasi* (Jakarta: Salemba Empat, 2005), 47.

yang besar bagi pelaku usaha lain di bidang yang sama dan juga masyarakat selaku konsumen.

Selain kerugian secara riil dalam bentuk sanksi denda, terdapat kerugian lain yang sangat memberatkan pelaku usaha yang melakukan aksi korporasi penggabungan, peleburan dan pengambilalihan. Kerugian tersebut dalam hal berdasarkan hasil penilaian KPPU sebagaimana yang diatur dalam Pasal 3 PP No. 57 Tahun 2010 *jo.* Pasal 18 Peraturan KPPU No. 3 Tahun 2019 menyatakan bahwa pelaku usaha terbukti melakukan praktek monopoli dan/atau persaingan usaha tidak sehat, maka berdasarkan Pasal 47 ayat (2) huruf e UU No. 5 Tahun 1999 bahwa KPPU berhak untuk menetapkan pembatalan atas penggabungan atau peleburan badan usaha dan pengambilalihan. Pengaturan ini bertentangan dengan yang secara umum dilakukan yaitu pengaturan secara preventif. Dengan pengaturan seperti ini, pelaksanaan pengawasan dilakukan secara *post control* karena penilaian oleh KPPU baru dilaksanakan setelah suatu aksi korporasi penggabungan, peleburan dan pengambilalihan telah berlaku efektif secara yuridis. Pelaksanaan aksi korporasi penggabungan, peleburan dan pengambilalihan tentu bukanlah hal yang mudah, melainkan banyak persyaratan yang perlu dipenuhi hingga disetujui oleh Menteri, ditambah lagi pengurusan untuk pembatalan sebagaimana yang dimaksud dalam Pasal 47 ayat (2) huruf e UU 5/1999.

Jika dilihat lagi dalam 3 kasus terakhir yang diputus oleh KPPU sebagaimana yang terdapat pada Tabel 1, keterlambatan pemberitahuan adanya aksi korporasi pengambilalihan didasarkan atas ketidaktahuan dari pelaku usaha bahwa adanya kewajiban pelaporan tersebut. Hal ini menurut hemat penulis adalah hal yang cukup wajar karena seharusnya, kewajiban dari pelaku usaha dalam tindakannya melakukan sebuah aksi korporasi penggabungan, peleburan dan pengambilalihan seharusnya sudah selesai dengan telah disetujuinya pengajuan permohonan aksi korporasi tersebut kepada Menteri Hukum dan HAM.

Menanggapi permasalahan tersebut, dimungkinkan proses pemberitahuan serta penilaian dipindahkan menjadi sebelum disetujuinya permohonan oleh Menteri Hukum dan HAM yang artinya sebelum penggabungan, peleburan dan pengambilalihan berlaku secara efektif secara yuridis (*preventive control*). Tetapi langkah tersebut tetap bukanlah suatu upaya yang efektif. Hal itu dikarenakan, jika merujuk pada Pasal 129, 130 dan 131 UU PT, bahwa setelah dilakukan pembuatan akta penggabungan/peleburan/pengambilalihan, maka salinan akta tersebut harus dilampirkan kepada Menteri sebagai pengajuan pengesahan berikut anggaran dasar. Seharusnya salinan akta dan anggaran dasar yang diajukan ke Menteri dalam hal ini Menteri Hukum dan HAM sudah mencakup semua hal-hal yang dimintakan dalam formulir pemberitahuan ke KPPU. Sehingga pemindahan tersebut hanya menimbulkan suatu kegiatan yang *redundant* bagi pelaku usaha.

4. KESIMPULAN

Kesimpulan dari penelitian ini adalah pertama, bahwa pengaturan mengenai aksi korporasi penggabungan, peleburan dan pengambilalihan dilarang apabila mengakibatkan terjadinya praktek monopoli dan/atau persaingan usaha tidak sehat. Praktek monopoli dan/atau persaingan usaha tidak sehat yang dimaksud adalah apabila aksi korporasi tersebut disertai dengan adanya perjanjian yang dilarang, kegiatan yang dilarang, dan/atau penyalahgunaan posisi dominan. Pengaturan ini menggunakan pendekatan *rule of reason*, di mana perlu dilakukannya pembuktian/penilaian terlebih dahulu mengenai dampaknya

terhadap persaingan usaha yang dilakukan oleh KPPU dengan menggunakan berbagai analisis. Selain itu, terdapat pengaturan yang mewajibkan pelaku usaha yang melakukan aksi korporasi penggabungan, peleburan dan pengambilalihan untuk memberitahukannya kepada KPPU maksimal 30 hari sejak tanggal berlaku efektifnya. Kewajiban pemberitahuan tersebut hanya diwajibkan untuk transaksi yang menyebabkan nilai aset melebihi 2 triliun rupiah (20 triliun untuk bidang usaha perbankan) dan/atau nilai transaksi 5 triliun rupiah.

Kedua, bahwa adanya ketidakefektifan dari pengaturan kewajiban pemberitahuan bagi pelaku usaha karena pemberitahuan tersebut sangat merugikan pelaku usaha dan hanya mempermudah tugas yang seharusnya menjadi tanggung jawab KPPU. Kewajiban pemberitahuan tersebut tidak memiliki urgensi sama sekali, karena hanya sebuah tindakan *redundant* yang dibebankan kepada pelaku usaha dengan sanksi administratif berupa denda harian yang tinggi dan potensi pembatalan penggabungan, peleburan dan pengambilalihan yang telah disetujui.

Saran yang dapat dirumuskan dalam penelitian ini adalah kewajiban pemberitahuan mengenai penggabungan, peleburan dan pengambilalihan seharusnya sudah tidak diperlukan lagi dengan telah disetujuinya permohonan yang diajukan oleh pelaku usaha kepada Menteri sesuai dengan Pasal 129–131 UUP karena pada dasarnya informasi-informasi yang dimintakan dalam pemberitahuan sudah terakomodir oleh salinan akta beserta anggaran dasar perusahaan dari pelaku usaha. KPPU dalam hal ini dapat bekerja sama dengan Kementerian Hukum dan HAM untuk terlibat sebagai penilai yang menentukan apakah permohonan penggabungan, peleburan dan pengambilalihan disetujui atau tidak dengan telah mempertimbangkan ada atau tidaknya praktik monopoli atau persaingan usaha tidak sehat.

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